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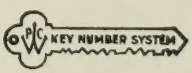

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REPORTS OF CASES

ARGUED AND DETERMINED IN THE

COURT OF CHANCERY OF THE STATE OF SOUTH CAROLINA

FROM THE REVOLUTION TO DECEMBER, 1813, INCLUSIVE

IN THREE VOLUMES

BY

HENRY WILLIAM DESAUSSURE

SENIOR JUDGE OF THE COURT OF EQUITY, AND PRESIDING JUDGE OF THE COURT OF APPEALS IN EQUITY IN THE SAID STATE

VOLUME I

Justitia est velle omnibus quod æquum est.
The duties of life are more than life.—Bacon's Works, Vol. VI.

COLUMBIA, S. C.
PRINTED BY CLINE & HINES
1817

ANNOTATED EDITION

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1917

District of South-Carolina.

Be it remembered, That on the twenty-fifth day of April Anno Domini one thousand eight hundred and seventeen, and in the forty-first year of the Independence of the United States of America, the Honorable Henry William Desaussure deposited in this Office the title of a Book, the right whereof he claims as author and proprietor, in the words following, to wit:

"Reports of Cases, argued and determined in the Court of Chancery of the State of South-Carolina, from the Revolution to December, 1813, inclusive, in three volumes, by Henry William Desaussure, senior Judge of the Court of Equity, and presiding Judge of the Court of Appeals in Equity in the said State."

"Justitia est velle omnibus quod æquum est."

"The duties of life are more than life."—*Bacon's works, vol. 6.*

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JAMES JERVEY, Clerk of South-Carolina District.

DEDICATION

TO THE HONOURABLE

JAMES R. PRINGLE, PRESIDENT,

AND THE OTHER MEMBERS OF THE SENATE;

THE HONOURABLE

THOMAS BENNETT, SPEAKER,

AND THE OTHER MEMBERS OF THE HOUSE OF REPRESENTATIVES, OF THE STATE OF SOUTH CAROLINA.

THE FOLLOWING WORK OWES ITS PUBLICATION TO YOUR LIBERAL PATRONAGE: TO YOU THEREFORE, IT IS PROPERLY AND RESPECTFULLY DEDICATED, BY THE AUTHOR.

LIST OF JUDGES IN EQUITY

SINCE THE REVOLUTION

Upon the erection and establishment of the Court of Chancery after the revolution, by the act of the Legislature of the 21st March, 1784, John Rutledge, Richard Hutson, and John Mathews, were elected Judges of that Court. They continued in office until the new organization of the Courts of Law and Equity, in the month of February, 1791; at which time John Rutledge was elected Chief Justice of the Court of Common Pleas and Sessions, and thereby vacated his seat on the Equity Bench.

Hugh Rutledge was then elected a Judge of the Court of Equity.

Richard Hutson resigned his office; and his place was filled up by the election of James Green Hunt, in the month of May, 1794. He died in the course of the summer of that year. The vacancy occasioned by his death not being filled up, the Judges Mathews and Hugh Rutledge continued to hold the Court, until the month of November, 1797, when Judge Mathews resigned his office.

In 1799, Ædanus Burke, (then a Judge of the Common Pleas and Sessions) and William Marshall, were elected Judges in Equity.

Judge Burke dying in the year 1802, William Dobein James was elected to fill his place in December, 1802.

Judge Marshall dying in the year 1805, the vacancy was filled up by the election of Waddy Thompson, in December, 1805.

At the Session of the Legislature in December, 1808, the Court of Equity was again re-organized, new districts were created, and two additional Judges were added to the former numbers: whereupon Henry William Desaussure and Theodore Gaillard were elected and commissioned in December, 1808.

By the same act the salaries were raised to six hundred pounds per annum. But the old Judges could not receive the new salary, as the Constitution prohibited any increase or decease of salary during their continuance in office.

Judge Hugh Rutledge dying in January, 1811, Thomas Waties, (then a Judge in the Court of Common Pleas and Sessions) was elected in his place in December, 1811.

In December, 1813, Judges James and Thompson resigned their commissions; and were afterwards re-elected and took new commissions, which entitled them to the increased salary, under the act of 1808.

The Court is now composed of

Henry William Desaussure,
Theodore Gaillard, } *Elected in December, 1808.*

Thomas Waties,—*Elected in December, 1811.*

William Dobein James,
Waddy Thompson, } *Elected in December, 1813.*

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PREFACE

JUSTICE has been properly called the standing policy of civil society; and as that policy is well understood and steadily pursued in any country, it may be concluded, that the government is wise and paternal, or weak, vicious, and tyrannical. For beyond all doubt, as the pure and enlightened administration of justice is one of the greatest blessings which a nation can enjoy, so the possession of that blessing is an evidence, either of a high degree of wisdom in the construction of the government, or of great virtue in the administration of it. Abuses may indeed occasionally take place under any form of government, whilst the rulers continue to have the passions and infirmities of men. But the regular course, the habit of the system, and its usual working, will furnish a safe guide in forming a correct opinion of its merit. History, which teaches by example, instructs us, that wherever despotism prevails, a sound administration of justice cannot generally be expected. Some brilliant instances have indeed occurred where monarchs, cloathed with despotic powers, have caused justice to be impartially and steadily administered in their dominions. And the long course of nearly a century of wise and humane administration, during which the happiness of the people seemed to be the great object of the Roman princes, from Nerva to the younger Antonine, though vested with absolute power, seems to put at defiance all human reasoning, as to forms of government. But this example has been rarely set, and more rarely followed; and it appears to belong to free governments alone to model their judiciary systems on such principles as almost to insure a faithful and beneficent administration of the laws, whatever may be the character of the functionaries.

The danger, however, under almost any form of government, is not so much of direct and palpable violations of acknowledged principles, as of perversions and sophistications. Even in Turkey, where an unmasked despotism disregards the very forms of justice, power finds it more safe and convenient to resort to the abuse of principles, than to open violations of them. Of this truth Dr. Clarke, the famous traveller, has given some curious examples.

It seems that by the Mohammedan law there is an offence called "Homicide by implication," or more strictly, "Homicide by an intermediate cause." A remarkable case was tried at the Greek island of Cos, while Dr. Clarke and his companions were at that island, a few years ago. It was as follows: A young man desparately in love with a girl of Stanchio, eagerly sought to marry her; but his proposals were rejected. In consequence of his disappointment he bought some poison, and destroyed himself. The Turkish police instantly arrested the father of the young woman, as the cause by implication, of the man's death. Under the fifth species of homicide, he became therefore amenable for this act of suicide. When the cause came before the magistrate, it was urged literally by the accusers, that "If he, the accused, had not had a daughter, the deceased would not have fallen in love; consequently he would not have been disappointed; consequently he would not have swallowed poison; consequently he would not have died: But he, the accused, had a daughter; and the deceased had fallen in love; and had been disappointed; and had swallowed poison; and had died. Upon all these accounts he was called upon to pay the price of the young man's life; and this being fixed at the sum of eighty piastres, was accordingly exacted.

Another instance was mentioned to Dr. Clarke, which occurred at the island of Samos, as a characteristic feature of Turkish justice; that is to say, a sophistical application of a principle, rigidly founded upon this fifth species of "Homicide by implication."—The Capudan Pasha reasoned with the people of Samos, on the propriety of their paying for a Turkish frigate, which was wrecked upon their territory, and the crew lost, "because the accident would not have happened unless their island had been in the way."

Perhaps the English doctrine of Deodand, by which, whatever personal chattel is the immediate cause of the death of a human being, is forfeited to the

king, comes strictly under this Turkish principle, though not carried to so absurd an extreme.

But cases of a much more atrocious and important kind have occurred in all governments tinctured with despotism. It is determined by the laws of China, that whosoever shows any disrespect to the emperor, is to be punished with death. As they do not mention in what this disrespect consists, any thing may furnish a pretext to take away a man's life, and to exterminate any family whatever. Two persons in that country, who were employed to write the Court Gazette, having inserted some circumstances relative to a certain fact, that were not true, it was pretended, that to tell a lie in the Court Gazette was a disrespect shown to the court; in consequence of which they were put to death. A prince of the blood having inadvertently made some mark on a memorial signed with the red pencil of the emperor, it was determined that he had behaved disrespectfully to that prince; which was the cause of one of the most terrible persecutions against that family that ever was recorded in history. Upon these facts Montesquieu makes the judicious remark, that if the crime of high treason be indeterminate, this alone is sufficient to make the government degenerate into arbitrary power.[1] Corruption keeps pace in such governments with the other abuses; and eagle-eyed despotism itself is deceived. In a case which occurred at Canton, some British seamen had killed a Chinese. The British agents acting for the East India company were extremely reluctant to give up the perpetrators, as the Chinese laws are generally strictly enforced in cases of homicide. The Chinese authorities demanded the seamen, and great difficulties arose; money was offered in profusion, and at length prevailed over all difficulties. The Chinese merchants, the hong, who were responsible for the ship, invented a story, that it was an accidental death; Chinese witnesses, who were bribed, attested it; Chinese Judges, who were corrupted, decided it; the relations of the man killed were bought to silence; and upon a false statement to the emperor, he confirmed the sentence by which the criminals escaped punishment. Thus corruption and imposition were carried to their highest pitch—But all this falsehood and concealment cost immense sums of money.[2]

The Roman story would furnish abundant examples of the abuses of power under judicial forms, by an enslaved senate, to satiate the cruelty or gratify the cupidity of a Tiberius, a Caligula, or a Nero. The first of these emperors seemed to take delight in making the senate the abject instrument of his butcheries and confiscations. No legal reports of these proceedings were ever published; but the indignant pen of the great historian Tacitus, has transmitted accounts of them, as everlasting memorials of the baneful nature of tyranny, and the fatal effects of a dependant judiciary.—Nor would the Grecian story fail to furnish innumerable examples of dreadful excesses committed by the popular governments of those small republics, where the people took upon themselves, in large bodies, to exercise the judicial power. The frequent judicial murders of the wisest and most virtuous citizens, by the majority of votes of a numerous court of citizens, is a stain upon the reputation of Athens which can never be wiped out.

In modern times the same scenes have been acted over in every country; and the innumerable judicial butcheries committed by the temporary tribunals erected by the triumphant party of the day, during the late revolutions in France, have only added new lessons to guard mankind against despotism, under every form it may assume. It is unjust, and cruel, and insatiable, whether it be exercised by a monarch, a leader of a faction, or a demagogue, who abuses his power over the people whom he misleads.

England has long boasted of the excellency of her judicial system, so well contrived, that whilst it guards the most exalted prerogative of the throne, and the privileges of the nobles, it shields the humblest subjects of the realm from the persecutions of the powerful, and the machinations of the cunning. Nor is this generally an idle boast—It is substantially true. But it is true only in modern times, and since the establishment of a real independence in the judiciary. Whilst

[1] Montesquieu's Spirit of Laws. 1st vol. p. 270.

[2] See Sir George Thomas Staunton's translation of the Penal Code of China, p. 515, 516. Appendix.

the Judges were dependant on the government for their continuance in office, or for the amount of their salaries, the grossest abuses prevailed, and the nation felt the miserable effects of their dependance. The courts of justice, like the parliament, ministered to the avarice of Henry VII. to the cruel caprices and rapacity of Henry VIII. and to the high claims of prerogative of Elizabeth. In the time of James I. the same claims of high prerogative were set up by the monarch; and the weakness of that vain king permitted even his favourites to interfere with the regular administration of justice—And the dependant courts were but too subservient to the will of the prince, as well as the dictates of his favourites. The lord chancellor Egerton presided in the court of chancery upwards of twenty years, "with unblemished reputation as a Judge in private causes: but his public conduct had been always framed to the directions of the court, with an obsequiousness of dangerous example in one who held so great and important a trust." [3]

In the famous case relative to Commendams, king James, and his attorney-general sir Francis Bacon, interfered directly in the administration of justice, and obliged the Judges to suspend proceedings in a private suit, (under pretence that it touched the royal prerogative,) until the king should be consulted, and his pleasure made known. The Judges were summoned before the privy council, and the following question was propounded to them: "Whether if at any time, in a case depending before the Judges, which his majesty conceived to concern him, either in power or profit, and thereupon required to consult with them, they ought not to stay accordingly?" They all (the lord Chief Justice Coke excepted) yielded that they would, and acknowledged it to be their duty to do so: only the lord Chief Justice of the king's bench said for answer, "that when that case should be, he would do that which would be fit for a Judge to do." [4] This was certainly a noble answer, and has been commended by sir William Blackstone, and goes far to redeem the character of sir Edward Coke for his virulent prosecution and abuse of sir Walter Raleigh and other state criminals on their trials.

Villiers, duke of Buckingham, the all-powerful favourite, was in the constant practice of writing letters to the Judges, soliciting favourable judgments for the party litigating, whose cause he espoused. Of this numerous examples are to be found in the memorials of those times, and particularly in the collection of lord Verulam's letters. Nor were these letters missive intended as mere matters of form, obtained by the importunity of suitors. They were written by the mighty master of the king and the state with an express view to influence the courts of justice in favour of his dependants and supporters; and they had but too great effect on the yielding mind of the unhappy lord Verulam. Nor did it stop there. His probity once shaken, he glided down the stream of corruption, receiving at first presents at the conclusion of causes, and finally, as might be expected, accepting bribes, pendente lite. Mr. Egerton and others, who had been recommended by Buckingham, and had given him presents for decrees, became his accusers, and he was convicted of corruption, driven from his office, and from the house of lords, imprisoned and heavily fined. Thus fell, ever to be lamented, one of the wisest and greatest of the human race, acknowledging his corruption, and making humble submission.[5] The duke of Buckingham made the same kind of applications to lord Bacon's successor, the lord keeper Williams; in whose life by bishop Hacket, (part 1, p. 107,) it is stated, that there was not a cause of moment, but, as soon as it came to publication (preparatory to trial) one of the parties brought letters from this mighty peer, and the lord keeper's patron.[6]

Another signal example of the effects of a dependent judiciary occurred in the case of Peacham. This man had been accused of inserting in a sermon several treasonable passages; but in a sermon never preached, nor intended to be made public—It had been taken out of his study. King James I. ever jealous

[3] Mallet's Life of Bacon, p. 57.—4th vol. of the Works of Bacon, Letter 163.

[4] See tract relative to the case of Commendams.

[5] See 6th vol. Bacon's Works, London edition, 8vo. p. 142, 148, 177, 178, 179, 181, 186 (Mr. Egerton's case, in which he received seven hundred pounds;) 191, 192, 193 (Monk's case;) 195, 197, 198 (Hansbye's case, in which Bacon received five hundred pounds, pendente lite;) 199, 204, 211, 212, 213, 216, 217, 218, 225, 245, 247, 248, 251, 254, 280, 369.

[6] 6th vol. Bacon's Letters, p. 142.

on this point, ordered his attorney-general, sir Francis Bacon, to sound the Judges beforehand, and gather their opinions separate and apart. Lord Chief Justice Coke obstinately refused to declare his opinion before trial, looking on this auricular taking of opinions (for so he expressly called it) as not according to the customs and laws of the realm, but of new and pernicious tendency. The other Judges submitted, and gave their opinions. Peacham was then tried, and was found guilty of high treason: in the same manner, and on the same ground, as Algernon Sidney was afterwards tried and convicted for a like crime, and on like evidence, in the reign of Charles II.

It is lamentable to learn from his own letters, that that great man, Bacon, the boast and the ornament of the English nation, took an active part in this attempt upon the independence of the judiciary of his country, and applied with great dexterity the powers of his wonderful mind to beguile or overawe the Judges into a sacrifice of their duties and powers, at the shrine of oppression. The noble conduct of Lord Coke on this occasion, together with his firm resistance in the business of Commendams, cost him his office—So true it is, that the independence of the judiciary is hated and dreaded by despotic power, under every form of government.[7]

In the time of Charles I. the Judges still remaining dependant on the crown, the same servility was practised. The king having imposed a tax by his own authority, under the name of ship money, Charles, in order to discourage all opposition, proposed this question to the Judges: "Whether, in a case of necessity, for the defence of the kingdom, he might not impose this taxation; and whether he were not sole judge of the necessity?" The Judges answered "that in a case of necessity he might impose that taxation, and that he was the sole judge of the necessity."[8] And this was not an empty compliment; the taxation was universally enforced, and the liberty of the nation put in the greatest jeopardy; for if the king had finally prevailed in this contest, he would soon have enjoyed absolute power. He was already in possession of the sword by virtue of his prerogative as the executive of the nation; and the power over the purses of the people, would have made him complete master, and he might have trampled equally over the parliament and the people. Mr. Hampden nobly resisted this stretch of arbitrary power, and though he was rated only twenty shillings on account of this tax, he refused to pay it,—and resolved to stand a legal prosecution, notwithstanding the declared opinions of the Judges, the great power of the crown, and the little prospect of relief in parliament. The cause was fully argued twelve days, in the exchequer chamber, before all the Judges. The issue was such as might have been expected from a dependant bench; the majority of the Judges gave sentence in favour of the crown.[9] It is true that four of the Judges did themselves honour by standing up against the assumed prerogative of the king, and thus showed that there are always some high minded men, who will do their duty, at all hazards and under any circumstances. But they were in the minority—Hampden lost his cause but he gained his object—the nation was roused by this and other oppressive measures of the government, to open resistance: the king was overthrown, and the monarchy subverted. And though unhappy events, produced by the folly of the mad enthusiasts of the time, and by the cunning and valour of Cromwell, defeated for a season the views of the enlightened men who aimed at the establishment of a free government, these efforts were not made in vain. On the restoration of the royal family, in the year 1660, though recalled without conditions, (contrary to the advice of the wise and virtuous Hale,[10] afterwards the great and admirable Chief Justice, whose motion to send over propositions to the king was negatived by acclamation,) the new government, taught by experience, and guided by the able and virtuous lord Clarendon, did not venture to set up the extravagant pretensions which had caused the civil war. But Charles II. was a profligate monarch, without religion or mor-

[7] See 5th vol. Bacon's Letters, 8vo. London edition of 1803. Letters 112, 114; p. 338, 339, 340, 343, 344, &c.—Also, Mallet's Life of Bacon, p. 63.

[8] 6th vol. Hume's History of England, p. 313, 314, &c.

[9] 6th vol. Hume's History of England, p. 314 to 316—State trials—Article, "Ship Money;" which contains the speeches of the four Judges in favour of Hampden.

[10] 1st vol. Burnet's History of his own times, p. 142.

als; and after the prosecution and retreat of that great minister lord Clarendon, he was supported by ministers as unprincipled as himself. The utmost pains were taken to make the judiciary subservient to the purposes of the crown. To effect this Judges were selected, not for their learning, talents and probity, but for their zeal to serve the government at all hazards, and upon any terms. The Judges were made to feel their dependance by frequent removals, whenever they discovered any symptoms of a refractory spirit; and pliant tools, without probity or character, were appointed to fill their places.

These are grave charges, but they are supported by the historians of the times, some of whom were intimately acquainted with the facts which they relate, and all of them agree in the substance of the story. The following instances are given by them:—On the question relative to the charter of the city of London, which was declared to be forfeited, in order to new mould it, and reduce the city to subjection to the court, Judge Dolben not being favourable to the government, was turned out of office.[11]

Wyld, a worthy Judge, indignant at the horrible perjuries of Bedloe, one of the infamous witnesses against men tried for their lives, on account of the popish plot, said to Bedloe, that he was a perjured man, and ought no more to come into courts of justice, but go home and repent. The Judge was turned out of office for his plain freedom.

During the trials which took place under pretence of the popish plot, in the year 1678, sir William Scroggs was Chief Justice, who is thus characterized: "Sir William Scroggs was a man more valued for a good readiness in speaking well, than either for learning in his profession, or for any moral virtue. His life had been indecently scandalous, and his fortunes were very low. He was raised by the earl of Danby's favour, first to be a Judge, and then to be Chief Justice —And it was a melancholy thing to see so bad, so ignorant, and so poor a man, raised up to that great post. Yet he now seeing how the stream run, went into it with such zeal and heartiness, that he was become the favourite of the people. But when he saw that the king had an ill opinion of it, (the plot,) he grew colder in the pursuit of it: upon which they who behaved themselves as if they had been tribunes of the people, began to rail at him. Yet in all the trials he set himself, even with indecent earnestness, to get the prisoners to be always cast." [12]

Another example may be given: "Fitzharris's trial (for a malicious and treasonable libel against the king) came on in Easter term, in the year 1681. Scroggs was turned out, and Pemberton was made Chief Justice. His rise was so particular, that it is worth being remembered. In his youth he mixed with such lewd company, that he quickly spent all he had; and ran so deep in debt that he was cast into a jail, where he lay many years. But he followed his studies so close in the jail, that he became one of the ablest men of his profession. He was not wholly for the court: He had been a Judge before, and was turned out by Scrogg's means; and now he was raised again, and was afterwards made Chief Justice of the other bench. But not being compliant enough, he was turned out a second time, when the court would be served by none but by men of a thorough paced obsequiousness." [13]

Nor is this the whole.—The same historian from whom we have made these extracts, states, "that all people were apprehensive of very black designs when they saw (in 1683) Jefferies made lord Chief Justice, who was scandalously vicious, and was drunk every day, besides a drunkenness of fury in his temper, that looked like enthusiasm. He did not consider the decencies of his post: nor did he affect to seem impartial as became a Judge."—"And Jefferies had three Judges joined with him in the king's bench, fit to sit by him." [14]

These apprehensions were soon verified, for in the following year (1684) Sidney was brought to trial, and convicted on proofs entirely insufficient, and which would not at this day be listened to in any tribunal in England or America. During Sidney's defence, which he conducted, himself, with admirable judgment and

[11] 2d vol. Burnet's History of his own times, p. 925.

[12] 2d vol. Burnet's History, p. 776.

[13] 2d vol. Burnet's History p. 870.—I quote from the London edition of 1725, in five volumes.

[14] 2d vol. Burnet's History, p. 979, 980.

temper, "Jefferies interrupted him often very rudely," and endeavoured to overawe or trepan him—Judge Wilkens interrupted him, "and by a strange indecency gave him the lie in open court." And upon Sidney's laying a statement of his case before the king, "Jefferies, in his furious way, said, either Sidney must die or he must die." [15] Sidney was executed, a martyr to public liberty.

On the accession of James II. to the throne, the same practices were resorted to by the government against the integrity and independence of the Judges, who were secretly asked their opinions on important cases then pending, in which the court took an interest: "and such as were not clear to judge, as the court did direct, were turned out; and upon two or three canvassings, the half of them were dismissed, and others of more pliable and obedient understandings were put in their places. Some of these were weak and ignorant to a scandal." In these hands the nation was in the utmost peril of losing its liberties.[16] In the year 1685 Chief Justice Jefferies was sent, after the suppression of Monmouth's rebellion, to the western counties, to try the prisoners. His behaviour was beyond any thing that ever was heard of in a civilized nation. He was perpetually either drunk, or in a rage, liker a fury than the zeal of a Judge. He required the prisoners to plead guilty: and in that case he gave them some hope of favour, if they gave him no trouble—otherwise he told them, he would execute the letter of the law on them in its utmost severity. This made many plead guilty, who had a good defence in law. But he showed no mercy: He ordered a great many to be hanged up immediately—Upwards of six hundred were executed. Nor can it be said that this happened in a barbarous age. It was in the age of Hale, of Locke, of Dryden, and of many others who have done honour to the English nation and to human nature. Nor in those frightful times, when the laws, which should be the terror of evil-doers, and the protectors of the good, were so dreadfully perverted, by the base dependance of the Judges on the government, were the juries any safeguard to the subject. Burnet says, "they became the shame of the nation, as well as a reproach to religion; for they were packed, and brought in verdicts as they were directed, and not according to evidence."—"On Sidney's trial there was a packed jury, abusive Judges, and a resolution to convict him."

All these evils were terminated by the expulsion of James from the throne, and by the introduction of a new family, the choice of the nation, who brought in new and better principles of government. Yet it is strange that the convention parliament, which called the prince of Orange to the throne, did not then secure the establishment of the independence of the judiciary, the want of which had been so severely felt by the nation.

It was not until the year 1700, the last year of the life and reign of William III. that an act of parliament was passed (13th William III.) by which it was enacted, that the commissions of the Judges should be made (not as formerly, durante placito, but) quamdiu bene se gesserit, and their salaries ascertained and established. A wonderful change was immediately perceived in the conduct and tone of the Judges, after the passing this statute. We hear no more of potent peers, and favourites of the monarch, sending letters of recommendation to the Judges in favour of particular suitors. There was no longer a subservient temper in the Judges, calculated to secure their continuance in office. The stream of justice flowed in an even, unbroken course, and the English courts attained and have supported a character, for learning, impartiality, dignity, and purity in the administration of justice, unexampled, or at least unsurpassed, in any other age or nation. The Judges feeling their independence to be real and solid, disdained to lend themselves to the sinister purposes of ministers, and spurned at the interference of any power in the performance of their duties. A few years after the statute of William, abovementioned, was enacted, a singular case arose, which furnished occasion to the Judges to manifest the independence which they now felt. Some freemen of the borough of Aylesbury were refused permission to vote at an election for members of parliament. They insisted on their right, and instituted suits against the returning officers, who managed the election and had refused their votes. A question was made, whether a freeman had such a

[15] 2d vol. Burnet's History, p. 984 to 987—See the state trials.

[16] Burnet's History, book 4th, transactions of the year 1686.

legal interest in the right of voting, as would support an action against the managers of the election who refused his vote. This was tried, and the jury found a verdict for the plaintiff against the returning officers—But three of the Judges decided that the action could not be supported. The lord Chief Justice Holt was of opinion, that the right to vote was an original right, founded on freehold, or charter, or prescription, or burgage tenure; all which are legal titles, and triable at law. On appeal to the house of lords, the judgment was reversed, and the action sustained. This bred great disputes between the house of commons and the lords. The commons committed all who were concerned in the suits.[17]

In the course of this cause, the house of commons had made an order that it should be penal for any Judge, counsel or attorney to be concerned in the trial. However the Chief Justice Holt, and several lawyers, brought the cause on. The house of commons, on this contempt of their orders, sent a serjeant at arms for the Chief Justice to appear before them—but he bade him begone: on which the commons sent a second message by their speaker, attended by as many members as espoused the measure. After the speaker had delivered his message, lord Chief Justice Holt replied to him in the following remarkable words: "Go back to your chair, Mr. Speaker, within these five minutes, or you may depend upon it I will send you to Newgate—You speak of your authority: but I tell you I sit here as the interpreter of the laws, and a distributor of justice: and were the whole house of commons in your belly, I would not stir one foot."

The speaker retired, and the house dropped the matter as far as respected the court. This was at a time when the house of commons was becoming the most important branch of the government; and resistance to its authority required more firmness than opposition to the executive power. Nor was this a solitary instance—In aftertimes the courts decided that general warrants, which had been long, if not immemorially used by the secretary of state, were illegal; and this inquisitorial branch of executive power fell to the ground.

Many of the emigrants who settled the English colonies in America, left Great Britain during the reigns of Charles I. Charles II. and James II. They brought with them a deep abhorrence of the intolerance and tyranny of those princes; and especially of the great abuses prevailing in the courts of justice: And they partook of the general joy in the prodigious securities obtained in the subsequent reigns, for civil and political liberty; among which, the establishment of the independence of the Judges formed a principal feature. Their attachment to these principles was further increased by the mischiefs resulting from the incautious appointments made by the British government, in many instances, of very inferior men, to preside in the courts of justice of the colonies, who did no honour to the mother country, and whose irregularities and improper conduct contributed in a considerable degree to weaken the attachment of the colonies to the government of Great Britain. Emphatically it may be said, that the appointments of men of worthless character and of very humble talents to the first offices in the government of the colonies, ruined the cause of the mother country, and contributed chiefly to the separation. Men of high talents and dignified character, could not brook to be ruled by such men as were sent over to govern in the name of the parent country. They felt their superiority, and the neglect of their talents. Hence the eminent men generally took part in the revolution, when the rashness of the ministry drove things to extremity between the two countries.

On the formation of the state constitutions, immediately after the revolution, care was taken by most of the states to secure the independence of the Judges of the superior courts of law and equity, on the firm grounds of holding their commissions during good behaviour, with fixed and immutable salaries. The provisions of the constitution of South Carolina on this subject, are in the following words:

"The judicial power shall be vested in such superior and inferior courts of law and equity, as the legislature shall from time to time direct and establish. The Judges of each shall hold their commissions during good behaviour; and the Judges of the superior courts shall, at stated times, receive a compensation

[17] See Ashby & Co. v. White, Lord Raymond's Reports; Salkeld, p. 19; 16 Viner, p. 194; and 1st Bro. Pl. 45, 5th vol.; Burnet's History, p. 724, 811.

for their services, which shall neither be increased or diminished during their continuance in office. But they shall receive no fees or perquisites of office, nor hold any other office of profit or trust, under this state, the United States, or any other power."

To guard against the evasion of these salutary regulations, the Judges are removable under any charges of misbehaviour, only by impeachment. And by another article it is declared, "that the house of representatives shall have the sole power of impeaching; but no impeachment shall be made unless with the concurrence of two-thirds of the house of representatives."—"All impeachments shall be tried by the senate. When sitting for that purpose, the senators shall be on oath or affirmation: and no person shall be convicted without the concurrence of two-thirds of the members present." By another article, a majority of each house is necessary to form a quorum.

The provisions of the constitution of the United States on this subject are similar to those of the constitution of the state of South Carolina, and nearly in the same words:

"The Judges, both of inferior and superior courts hold their commissions during good behaviour, with salaries which cannot be diminished during their continuance in office. They are removeable only by impeachment. The house of representatives has the sole power of impeachment. The senate has the sole power to try impeachments, sitting under the sanction of an oath: and two-thirds of the members present must concur in a conviction."

It seemed to be necessary to state distinctly the ground on which the judiciary of this country is placed, as great misconceptions have prevailed in some parts of Europe on this subject. The learned editors of a very interesting English periodical work, have asserted, that the Judges in America are not independent of the executive power. The passage is long, but it deserves quotation. After noticing the account, apparently with disapprobation, of lawyers making speeches of three days long, and being patiently heard by the Judges, the writer proceeds: "The pure administration of the laws is the true safeguard of the liberty of person, and security of property: the best criterion of a good government is justice flowing in an even, pure, and uncorrupt current; and the surest way of securing so invaluable a blessing to the community, is to make those to whom the administration of the laws is confided, independent of the executive power. The Judges in America are not thus independent. Being elected by the president and senate, and receiving only an uncertain 'compensation at stated periods for their services,' instead of adequate and permanent salaries, as contended for by Mr. Hamilton, they become in fact the creatures of the president and senate; and the test of their 'good behaviour,' is their acting in all political matters conformably with the views of the government. Their non-compliance would infallibly forfeit their seats. In the ordinary course of judicial proceedings such men will not always act with impartiality—in many cases they cannot. A Judge may be a candidate for the office of president, governor of a state, or member of congress, and may be an elector of any, or all of them, while he holds his seat. Disappointed in his object, and continuing on the bench, with what confidence can those who have opposed him submit their cause to his decision?"

In another passage from the same review, it is said, that "occasional obliquities in the administration of the law, may perhaps be accounted for by the circumstance, that even the office of Judge in the supreme and district courts, is conferred upon persons who have not gone through any previous discipline or practice to qualify themselves for discharging it."

It would appear, that the simple statement of the provisions of the constitution, would be a sufficient answer to most of these allegations. But it seems that the English writer understands, that a compensation at certain periods for the services of the Judges, which shall not be diminished during their continuance in office, means an uncertain provision, dependant on the pleasure of the president and senate; and that the test of their good behaviour, during which they are to hold their commissions, would be a conformity in political matters with the views of the government: otherwise the Judges would infallibly forfeit their seats. In America, the constitution is understood to mean that the Judges shall have fixed salaries provided by law, and immutable during their continuance in office: and that their commissions are secure against all attack whilst they per-

form their duties faithfully, and avoid the commission of any flagrant acts which would impeach their integrity. The practice has corresponded with this understanding. As soon as the courts of the United States were organized, salaries were fixed by law, which have remained unchanged under every change of political power. And several questions have occurred in which the Judges have felt themselves bound to decide contrary to the known wishes of the government. Upon the great change which took place in the year 1801, when power changed hands, the party which got possession of the government, found all the courts filled with Judges who had been appointed by their opponents. But it never entered into the head of any man that the salaries of the Judges could be diminished, or that their commissions, held under the constitution during good behaviour, could be taken away, whilst the courts themselves subsisted.

The Judges of this country have been called upon to exercise a power, which is a severer test of independence than any to which the English Judges are exposed. The constitution is the supreme law of the nation, and no act of congress opposed to, or inconsistent with it, can have any binding effect. In some cases the Judges have been obliged to pronounce that particular acts of congress were inconsistent with the constitution, and therefore void. No attempt has been made to shake their independence for the performance of these high acts of duty: nor could such an attempt succeed if made.

With respect to the possibility of a Judge's being a candidate for the presidency, or a governorship, and the want of confidence in his judicial character, which it is alleged might follow, it is not perceivable how a remedy can be applied, unless Judges were prohibited from being candidates for any other office—a regulation certainly unknown to the British constitution. But the evil apprehended has not been felt. Few Judges would ever be disposed, at an advanced period of life, to leave the grave and quiet duties of a permanent office, to which they were regularly bred, for the stormy controversies of political life. Few instances have yet occurred, of Judges in office having been candidates for the office of the presidency, or the government of a state. And if there had been, there would be no more reason to distrust their impartiality, whilst they remain in office, than there is in England to doubt the equity of the lord chancellor, who is appointed by the existing minister, and generally goes out of office with him, or is turned out by him if not sufficiently pliant—The eminent lord chancellor Camden was turned out by the duke of Grafton. Yet it is not understood that there has ever been any reasonable ground of complaint against the justice of the lord chancellor by any member of the opposition, who chanced to have causes depending in his court. If there be any difference between the two countries on this point, it is, that the lord chancellor in England, who exercises the highest judicial power in the kingdom except the house of lords, is not independent, but holds his commission during the pleasure of the crown: whilst all the states in America, which have chancellors, grant them commissions during good behaviour, with fixed salaries.

As to the charge that the Judges are appointed without any previous legal education or discipline to qualify them for office, there is not the smallest foundation for it—Not a single Judge has ever been appointed under the authority of the United States, who had not been regularly bred to the bar, and who had not considerable experience as a practitioner. Most of them have been men so highly gifted with eminent talents, matured by great experience, and chastened by high moral qualities, that they would bear a comparison with the greatest men who have adorned the courts of justice in England. The same careful selection of experienced lawyers has in general marked the appointment of the Judges of the superior courts in the several states.

A sneer has been thrown out at the patient hearing given by the Judges in America to the long speeches of the lawyers. It was not to have been expected that Englishmen, who justly boast of the patient investigation of truth in their courts of justice, would have brought this as a charge against the Judges of this country. In their own legal history it appears, that the trial on Mr. Hampden's resisting the payment of a tax of twenty shillings lasted twelve days. And in more modern times, the case of Fox and Mackreth, on a question of private

right, turning on a single point, occupied nearly twenty days, before the master of the rolls, the lord chancellor Thurlow, and the house of lords.[18]

The famous Dr. Johnson, whose opinion on such questions amounts to authority, was of a very different opinion from this writer on the point of the patient hearing of counsel. Upon some persons saying he paid no attention to the arguments of counsel at the bar, because they were paid for speaking, Johnson said, "Nay, you cannot help paying regard to their arguments if they are good—If it were testimony you might disregard it, if you knew it were purchased."

It should be remembered that the Romans never limited the pleading in the time of the republic, till it was tottering to its fall. Pompey began the practice, and the restriction was firmly established when the imperial power trampled on the ruins of liberty.[19] Of this restriction Pliny complains with proper indignation. He says, the custom of allowing two water-glasses, (i. e., two hour-glasses,) or only one, and sometimes half a one, prevailed, because the advocates grew tired before the business was explained, and the Judges were ready to decide before they understood the question. Pliny asks with indignation, are we wiser than our ancestors? are the laws more just at present? our ancestors allowed many hours, many days, and many adjournments in every cause: and for my part, when I sit in judgment, I allow as much time as the advocate requires—for would it not be rashness to guess what space of time is necessary in a cause which has not been opened! But some unnecessary things may be said: and is it not better that what is unnecessary should be spoken, than that which is necessary should be omitted? and who can tell what is necessary till he has heard? Patience in a Judge ought to be considered as one of the chief branches of his duty, as it certainly is of justice.[20]

That virtuous and great man sir William Jones, in his first charge to the grand jury at Calcutta, told them, "that he aspired to no popularity, and sought no praise, but that which might be given to a strict and conscientious discharge of duty, without predilection or prejudice of any kind, and with a fixed determination to pronounce on all occasions what he conceived to be the law, than which no man should suppose himself wiser." His conduct on the bench was strictly conformable to his professions—"On the bench he was patient, laborious and discriminating." [21]

Lord Hardwicke, who adorned the chancery bench upwards of twenty years, was remarkable for his patience; and he granted a rehearing of a cause, reversed his own decree, and said he rejoiced at an opportunity to rectify his error.[22]

Lord chancellor Eldon, after giving his opinion on a case before him of some difficulty, offered to hear it reargued, if the parties were dissatisfied with his opinion.[23] And it is noticed in the reports of P. Williams, (3d vol. p. 32,) that a case had been argued four times.

That eminent man, our own Chief Justice Marshall, said, (in the case of Little v. Barreme, 2d Cranch, p. 179,) that the first impression of his mind was, that though the instructions of the executive could not give a right, they might excuse from damages: "But I have been convinced that I was mistaken, and I have receded from this first opinion—I acquiesce in that of my brethren."

The advantages of a pure and regular administration of justice are well stated by the English writer; and by this test the United States would willingly be tried. It may be asserted with confidence, that the administration of the laws is impartial and enlightened. The business of the courts is conducted with regularity, and generally dispatched with as much speed as is consistent with an attention to those forms which are the outworks and the safeguards of liberty. And it is prodigiously less expensive than in England. An independent judiciary dispenses justice, without fear or favour: and can neither be terrified by power, nor seduced by affection, from the strait path of duty. This great

[18] See the case stated by Mr. Hargreave, in his juridical collection, and reported in 2d vol. Brown.

[19] Dialogue concerning Oratory, by Tacitus, § 38.—Pliny's Letters, 5th book, epistle 2d.

[20] Pliny's Letters, 6th book, epistle 2d.

[21] See lord Teignmouth's Life of Sir William Jones, p. 402, 403.

[22] See 2d vol. Atkens, p. 25.

[23] See 11th vol. Vezey, p. 395.

blessing is felt and appreciated by the citizens who have entire confidence in the integrity of their magistrates. These assertions are made after long experience, and a thorough knowledge of the subject; and there are certain criteria which may be considered very conclusive on the subject. The citizens of this country are certainly not of a temper to submit tamely, to oppression or injustice. Political parties also exist in every state, ever vigilant and ready to complain, where just and sometimes even imaginery causes exist; yet no serious complaints have been made of the want of purity or impartiality in the administration of justice. And it is not known that a single Judge of the courts of the United States, or of the individual states has been impeached, on the ground of corruption or partiality, since the revolution. If occasional instances of error and human infirmity are attributable to individual Judges, we have seen nothing in the administration of justice, of that barbarous and detestable temper which is ascribed by Doctor Johnson, to the English Judge who tried the unfortunate Savage. Nor can we produce any parallel to the three modern English Judges described by the learned Dr. Parr, in the following diatribe:—"With learning, taste and genius, which adorned the head, but improved not the heart, one of them was a sober, subtle, inexorable interpreter and enforcer of sanguinary statutes: with a ready penetration, keen discernment, barren fancy, vulgar manners, and infuriate passions, another indulged himself in the gibberish of a canting fanatic, and the ravings of an angry scold, before trembling criminals. With sagacity enough to make the worse appear the better cause, to superficial hearers, and with hardihood enough not to profess much concern for the bodies of men, or their souls, the third carried about him an air, sometimes of wanton dispatch, and sometimes of savage exultation, when he immolated hecatombs at the altar of public justice."

Next in consequence to the great business of securing an independent judiciary, is that of obtaining correct reports of the decisions of the courts of justice. It has the double value of fixing in an imperishable form the principles which govern the decisions of the courts, and of securing a reasonable degree of certainty and uniformity in the construction and administration of the laws. Reports of the cases decided by the courts have been made and published in all countries which could boast of public liberty; and where settled rules, not arbitrary caprice, govern the judgments of the courts.—Arbitrary princes have ever been jealous of such reports.—Whilst the Judges in England were dependant on the crown for their continuance in office, and for their salaries, their decisions, and their very language, were vigilantly watched. In one memorable instance, the reports of that great Judge, lord Chief Justice Coke, were examined, and censured and corrected by the lord chancellor Ellesmere, assisted by the attorney general sir Francis Bacon, acting under the express orders of king James I. The Chief Justice was required to attend the lord chancellor, and the attorney general, and others of the king's learned counsel, to answer for particular passages in his reports, wherein he was charged with having inserted novelties, and errors, and offensive conceits of his own, to the prejudice of the king's crown, his prerogative, his parliament, and his subjects—And he was required to answer to the charges, and to make a retraction of his errors. The Judge gave distinct answers to the instances particularly selected for animadversion, and endeavoured to explain and justify them. But so much offence was taken at the freedom of his reports, and his manly defence, that this was one of the causes of his disgrace. He was speedily dismissed from his office of Chief Justice, which was then held at the pleasure of the crown.[24]

There was no charge of corruption or misconduct of any kind on the part of the Chief Justice, whose great offence was, that he was not pliable enough to the views of the government, carried himself with too lofty an independence, and ventured to trench on the prerogatives of the king, when they bore hard on the liberty of the subject. These were the real grounds of his removal from office; and it speaks volumes for the establishment of the judiciary on the immoveable ground of independence, which will enable the Judges to resist oppression, from

[24] The whole transaction is so curious that it will repay the trouble of perusing the papers relating to it. They are to be found in the letters of lord Bacon, then attorney general, 6th vol. octavo edition, p. 121 to 133.—Also a paper in same volume, page 397 to 409.

whatever source it may arise, and to maintain firmly the cause of the country and the liberties of the citizen. Indeed, the conclusion from what we have seen, is irresistible: that the firm establishment of a judiciary truly independent, learned, wise and virtuous, is of infinite importance to society, under every form of government,—and that no government can be properly called a free one, and no people can long maintain their liberties, without a judiciary, independent, in the highest and best sense.

In a country where the citizens acknowledge no master but the laws, it is becoming that they should be well informed what the laws are. These are to be found, in the first place, in the statutes enacted by the legal representatives, duly elected. But as no legislator, however learned or sagacious, ever did, or can provide by statute for the infinite variety of cases perpetually growing out of the complex and ever varying relations and transactions of men, a much greater body of law is formed by the decisions of courts of justice, pronounced upon causes requiring some exposition or construction of the statutes when these are not sufficiently explicit, or founded on the great and immutable principles of justice, where the statutes are silent.[25] These decisions become binding precedents in the courts. Hence the necessity of the publication of the reports of cases decided by the courts, to enable the people to know what the law is, under this great branch of the legal system. And this knowledge is equally important to the Judges themselves: otherwise on any change, the new Judges might make constructions, and give decisions opposite to those of their predecessors: and the greatest uncertainty would prevail in the administration of justice, and in the knowledge of those rules which are to guide men in their contracts, as well as in the relations of life which are independent of contracts.

It is on this ground that the great lord chancellor Hardwicke and other eminent Judges have laid so much stress on the maxim "stare decisis," that the law may be known.[26]

The importance attached to uniformity of decision, and an adherence to precedents, is not the opinion of mere lawyers. Sir William Jones, who was not only a great law sage, but one of the most enlightened of men, and who took the largest views of human systems from the Thames to the Ganges, has recommended it in the strongest terms. In his beautiful essay on bailment he says, that "In practice, the law certainly employs two of the mental faculties,—reason, in the investigation of points entirely new, and memory, in transmitting the reason of sage and learned men, to which our own ought invariably to yield, if not from becoming modesty, at least from a just attention to that object for which all laws are formed, and all societies instituted, the good of mankind."—And the deep reflecting mind of Dr. Johnson took the same view of the subject. He said, "the advantage which humanity derived from law, is this, that the law gives every man a rule of action, and prescribes a mode of conduct which shall entitle him to the support and protection of society. That the law may be a rule of action it must be known—it is necessary that it be permanent and stable: this law is the measure of civil right, but if the measure be changeable, the extent of the thing measured never can be settled."—"To leave a law to be modified at discretion, is to leave the community without rule—It is to withdraw the protection of that public wisdom, by which the deficiencies of private understanding are to be supplied—It is to suffer the rash and the ignorant to act at discretion, and then to depend for the legality of that action on the sentence of the Judge."[27]

Nothing certainly can contribute so much to the desired stability and uniform-

[25] These judicial decisions, reviewed and confirmed by a succession of Judges, not only form the greater part of the rules, regulating property, and governing the acts and contracts of men, in every country,—but they have made the greatest improvements in the legal polity of every country. The unshackling real estates, from the perpetual and mischievous operation of entails, and the total abolition of torture in criminal prosecutions, in the reign of James I. (at its close), were brought about by judicial decisions alone, without statute; at a time when the legislature would not interfere to remedy those evils.

[26] Lord Bacon's maxim, "that not the decision, but the reason of it, should be regarded," does not oppugn this great maxim of stability—For this is only saying of the decisions of the courts, what is said by the soundest interpreters of statute law, that not the letter, but the meaning and intent shall prevail.

[27] See 2d vol. Johnson's Life by Boswell, p. 195.

ity of decisions by the courts, as the regular publication of the judgments rendered by the Judges. It is said that lord chancellor Hardwicke expressed a wish that the arguments used in decrees and judgments were published every year, and signed by the several Judges who pronounced them.

The legislature of this state seems to have been sensible of the wisdom of this course, for it has by statute required that the Judges sitting in the courts of appeal, should give their judgments and decrees in writing, and should sign the same; thereby forming a perpetual record of the judgment and of the grounds thereof. And in order to diffuse the knowledge of these judgments and decrees, the legislature has formerly encouraged and patronized the publication of the reports of cases decided in the courts of law of this state, and has recently encouraged with liberality the publication of the decrees of the courts of equity. Under the influence of this liberal patronage, the following reports have been prepared for the press, and it is proper that some statement should be given of the materials on which they are grounded.

The decrees of the court of equity, from the establishment of the court in 1784 to the month of December 1808, when a new and very important change took place in the constitution and arrangement of the court, have been preserved with care; and they furnish sufficient materials to enable a reporter to give correct statements of the points decided.—It were desirable that more could be done. But in general the bills and answers, and documents in the causes, have been so scattered, that it would be difficult if not impossible to collect them and make out full statements of the cases. The members of the bar who were concerned in those cases, have so generally retired from practice, and so many of them are dead, that it would be nearly impossible to obtain any correct statements of the arguments of the counsel. What could be done has been attempted; and applications have been made to such gentlemen as were within the reach of the reporter to obtain briefs of the arguments. Where they have been obtained they are made use of; but very little assistance has been derived from that source. With respect to the second volume, containing the decrees from December 1808, to the present time, the materials were more within the reach and control of the reporter. The Judges who decided them are all living, with the exception of the late chancellor, Mr. Hugh Rutledge; and application has been regularly made to them to furnish or indicate such decrees as they had severally pronounced on their respective circuits, and which they considered worthy of publication on account of the importance of the principles involved in them, or of the difficulty arising from the circumstances of the cases. All such as were furnished by the Judges from their notes, and many others not furnished by them, but collected from the records, have been inserted. Recourse has also been had to the commissioners and registers of the several courts for the records and documents in the cases decided in their respective courts; and the best use has been made of the papers furnished which was in the power of the reporter.

With respect to the decrees of the court of appeals the task was easier. The decrees were all within reach, and they have been used accordingly.—They are of two descriptions. Where the court is entirely satisfied with a decree, and the reasons given for it, it is the practice of the court to affirm the decree simply. In such cases the decree of the circuit court is given at length, to enable the reader to take a view of the whole case as affirmed. Where the court of appeals is satisfied with the decree below, but not with the reasons given; or where the court is dissatisfied with the decree and the reasons, that court gives its decision fully, with the reasons for it. And wherever the court is divided in opinion, the Judges severally deliver their opinions as they have formed them.—In all these cases full use has been made of the records of the court.

As no intention existed till lately to publish reports of the cases decided in equity, no very exact care was taken of the notes of the arguments of the counsel. And very little assistance has been furnished by the members of the bar, on application made to them for their notes. So that the public and the profession will not have the benefit, to any great extent, of the arguments of the learned counsel engaged in the several causes.

No reports of cases decided in chancery having ever been published in this state, or perhaps in any of the United States, many brief notices of decided cases

have been admitted into this work, which were not of very great importance in settling principles or doctrines: but as they were calculated to show the course of proceeding, and of transacting business in the court, and the nature of many of the causes brought before that tribunal, it was thought it might be useful to introduce them: more especially as the diffusion of the court, and its benefits, over the whole state, has not been of very long duration. Many such short cases, stating merely the point decided, occur in the earlier English reporters, and even down to the time of lord Hardwicke, since which it has been usual to give the statements of the cases, the arguments of the counsel, and the decrees of the court, at very great length; so that a volume of reports is filled up with comparatively few decisions. It is conceived, that it would have been improper, as well as impracticable, to have pursued this course, in a publication intended to comprize in a short compass all that has been done for many years past.

INTRODUCTION

In presenting to the public reports of cases decided in equity, the question naturally arises,—What is equity, and in what does it differ from strict law? This question has been frequently asked, and not always satisfactorily answered. It is not easy to define what equity is, but it may be described and illustrated, so as to be intelligible to every capacity. To equity, which is the refinement and perfection of law, may be ascribed in a higher degree what Hooker has sublimely said of law: "Her seat is the bosom of God; her voice the harmony of the world; all things in heaven and earth do her homage; the very least as feeling her care, and the greatest as not exempt from her power: angels and men, creatures of every condition, though each in different sort and manner, yet all with uniform consent, admiring her as the mother of their peace and joy."

"Equity," says an eminent English writer, "in its true and genuine meaning, is the soul and spirit of all law: positive law is construed, and rational law is made by it. In this, equity is synonimous to justice; in that, to the true sense and sound interpretation of the rule." [1] Another English writer says: "Equity is a judicial interpretation of the laws, which presupposing that the legislator intended what is just and right, pursues and effectuates such intention." [2]

Nor are these modern ideas. The ancients, so inferior to the moderns in experimental philosophy, and in many of the arts and sciences, had the finest conceptions where intellect alone was a sufficient guide. Their ideas of equity laid a solid foundation, on which modern jurisprudence has erected a beautiful superstructure of refined, but practical justice. Aristotle, whose great work on ethics and politics, chiefly sustains in modern times his mighty reputation, speaks thus of equity: "We proceed then to speak of equity, and to consider what relation it bears to justice. It is not precisely the same thing; nor yet is it different in kind; for it is a praise-worthy quality as well as justice, but is spoken of as something better than mere justice, and really is so; for it is the correction of strict, that is, of legal justice, which often needs to be modified by equity; because laws, being in their nature general, cannot decide rightly in the infinite variety of particular cases. The lawgiver is contented with making a rule which applies to the greater part of cases, well knowing that it will not include the whole; and the fault is neither in the law nor in the lawgiver, but in the nature of things. When an exception to the rule occurs, which the lawgiver did not foresee, this exception is admitted in equity, which thus supplies the defect of law, as the lawgiver would himself do were he present in court, and as he would have done by amending his law, had he been aware of the exception. Equity then is better than legal justice, being its amendment, and supplying that defect of laws which arises from their universality. It is therefore manifest that equity is a species of justice, and contrasted to another species, to which it is preferable." [3] We perceive in the preceding quotation, the principle of equity so clearly and fully developed and expressed by Aristotle, that the accumulated wisdom of twenty centuries has not added much to the explanation. Nor was this an impracticable chimera springing from the fertile mind of the great Stagirite: for we find that the Athenians, in whose schools Aristotle studied upwards of twenty years, entertained the notion of equity as supplemental to the written laws. Their Judges were sworn to administer relief according to the laws, where they were explicit; and in other cases to award the most equitable sentence.

At Rome the city prætor was entrusted with this delicate duty.—"The duties of the subject and the intentions of the government were proclaimed, and the civil jurisprudence was reformed, by the annual edicts of the supreme judge, the prætor of the city. As soon as he ascended his tribunal, he announced by

[1] Sir William Blackstone's Commentaries, 3d vol. p. 429.

[2] Woodeson's Lectures, 1st vol. p. 192, 193.

[3] Gillies' Aristotle, Ethics, book 5, chap. 10.

the voice of a crier, the rules which he proposed to follow in the decision of doubtful cases, and the relief which his equity would afford from the precise rigor of ancient statutes."—"A principle of discretion more congenial to a monarchy was introduced into the republic. The art of respecting the name and eluding the efficacy of the laws was improved by successive prætors; subleties and fictions were invented to defeat the plainest meaning of the decemvirs, (in the laws of the twelve tables,) and where the end was salutary, the means were frequently absurd."—"A jurisdiction thus vague and arbitrary was exposed to the most dangerous abuse: the substance as well as the forms of justice were often sacrificed to the prejudices of virtue, the bias of laudable affection, and the grosser seductions of interest or resentment. But the errors or vices of each prætor expired with his annual office; such maxims alone as had been approved by reason and practice were copied by succeeding Judges; the rule of proceeding was defined by the solution of new cases, and the temptations of injustice were removed by the Cornelian law, which compelled the prætor of the year to adhere to the letter and spirit of his first proclamation. It was reserved for the curiosity and learning of Hadrian to accomplish the design which had been conceived by the genius of Cæsar; and the prætorship of Salvius Julian, an eminent lawyer, was immortalized by the composition of the perpetual edict. This well digested code was ratified by the emperor and senate; the long divorce of law and equity was at length reconciled; and instead of the twelve tables, the perpetual edict was fixed as the invariable standard of civil jurisprudence." [4]

The powers attributed to the Roman prætor evidently exceeded Aristotle's idea of equity; and amounted to a species of inferior and temporary legislation. The prætor pronounced beforehand, on his entrance into office, a code of his own, to govern him in his judgment of the cases which might come before him; and which expired with the term of his office. But the compilation of all the most approved doctrines and principles, promulgated by the prætors, into the perpetual edict, would leave the subject of equity precisely where it stood before: for as no human sagacity, guided by the longest experience, can foresee all the combinations of circumstances in human affairs and transactions, nor legislate for them with exactness, the necessity of leaving something to equitable construction and decision, seems to be invincible. The perpetual edict was supposed to have provided for every case which could arise, and to have left no room for equity. But we find new codes, the Theodosian, the Justinian, the Basilian, arising in after ages, providing for the insufficiency or supplying the defects of the perpetual edict, or wholly supplanting it. And Justinian, who employed the ablest lawyers in his courts to compile his code, considered the first attempt so imperfect, that he speedily suppressed it, and substituted another which was supposed to be more complete.

The moderns have generally approved and adopted Aristotle's idea of equity. Grotius, one of the most learned, and Puffendorff, one of the most exact, of modern jurists, have concurred in it.—Mr. Woodeston, in his Vinerian lectures, says, the thought "that 'equity is the correction of the law, wherein it is defective, by reason of its universality,' is very sagacious, and worthy of its great author, but is capable of more elucidation than he has stopped to give it. By universality then is meant, that the law deals in general expressions, at least so far general, as to include some cases within the words which are not within the reason or spirit of its coercion, and to omit other cases which required the like provisional institutions. For it is impossible that any premeditation should discover, or ever so voluminous a code should express, that endless series of complicated occurrences which may vary the moral fitness of applying positive ordinances. In these instances the law is defective, and leaves out something which it is the province of equity to supply. Equity therefore, regarding the intent, and not scrupulously fettered by the letter of the law, has to this end a two-fold operation, sometimes abridging the comprehensiveness of the text, and sometimes extending the words so as to include other cases within parity of reason." [5]

[4] See the 8th volume of Gibbon's Decline and Fall of the Roman Empire, p. 13, 14, 15, 16, &c.—Mr. Gibbon has condensed with much precision the doctrines of the Roman or civil law into a single chapter.

[5] 1st vol. Woodeson's Lectures, p. 193, 194.

Mr. Justice Blackstone agrees with this general idea of equity. He says: "the most general and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it; or the cause which moved the legislator to enact it. For when this reason ceases, the law itself ought to cease with it. From this mode of interpreting laws by the reason of them, arises what we call equity, which is defined by Grotius, (nearly in the words of Aristotle,) 'the correction of that wherein the law is deficient, by reason of its universality.' For since in laws all cases cannot be foreseen, or expressed, it is necessary that when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested, of defining those circumstances, which had they been foreseen by the legislator himself, would have been expressed. And these are the cases, which, according to Grotius, 'lex non exacte definit, sed arbitrio boni viri permittit.' Equity thus depending essentially upon the particular circumstances of each individual case, there can be no established rules and fixed precepts of equity laid down, without destroying its very essence, and thus reducing it to positive law."

It ought however to be noticed, that the English jurists have agreed, and surely with good reason, though against the opinion of Grotius, that the operation and effect of penal laws may not be extended by equitable construction. "By the tenderness of our criminal code an offender may evade the punishment due to his offence, if his case does not come within the letter of the law; and he would also escape if his case came within the letter, and not within the spirit. The rigor of penal laws may be mollified, but not enlarged by equitable construction." If it were otherwise, the enjoyment of life and liberty would be rendered precarious and insecure, dependant on the passions and prejudices of the magistrate, and the citizen exposed to continued and painful apprehensions.

Lord Bacon illustrates the expedience of strict adherence to the doctrine that penal sanctions are not to be enhanced by equity, by a striking case. "If the law be, that a man should lose his right hand for a certain offence, (as was the case by the statute of 33d Henry VIII. chap. 12,) and the offender hath had his right hand cut off before, (perhaps in war,) he shall not lose his left hand, but the crime shall rather pass unpunished, than the letter of the law be extended."

Whilst the English jurists have so completely adopted the opinion of their great predecessor, Aristotle, in the general notion of equity, there is great diversity of opinion, and a good deal of jealousy, as to the manner and extent, in which equity serves for correction of the law. Thus sir William Blackstone, as if afraid of the extent of the doctrine he had been laying down, immediately subjoins, "that on the other hand the liberty of considering all cases in an equitable light, must not be indulged too far, lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the Judges; and law without equity, though hard and disagreeable, is much more desirable for the public good, than equity without law, which would make every judge a legislator, and introduce most infinite confusion, as there would then be almost as many different rules of action laid down in our courts, as there are differences of capacity and sentiment in the human mind." And the learned commentator takes great pains to explain the nature of equity, as understood and practised in the municipal courts of England; and to show that it is not an arbitrary, capricious system, depending on the crude notions of abstract equity, entertained by each succeeding Judge, but that it is as much an artificial system, founded on the principles of justice and positive law, as the common law. He insists that all the ideas of foreigners, such as Grotius and Puffendorff, on the subject of equity, as they relate to the English system, are founded in misapprehension, and tend only to mislead. And that even lord Kaims, and the English writers Coke, Selden, and lord Bacon, have not given correct views of the English system of equity. So too professor Woodeson, stating that sir John Trevor, a great Judge, after many years spent in his profession, as an advocate and a Judge, described equity as "qualifying, moderating and reforming the rigor, hardness, and edge of the law, as assisting it where it is weak and defective, and defending it from crafty evasions and new subleties against the justice of it," immediately guards against the too great latitude of this opinion, by adding, "we are not to suppose that all this is accomplished by the unrestrained arbitrament of the reigning Judges. The

use of precedents, and their binding authority, were understood soon after the practice of these jurisdictions became so extensive, and equal reverence was paid to them in courts of equity as of law. To which may be added, that the great number and variety of suits which have been determined in equity within the last century, have rendered its rules of decision proportionably less vague, and discretionary. The wisdom of the maxim, 'stare decisis,' became obvious and striking, when the business of the court of chancery became so extensively increased. Else the utmost uncertainty and even contradiction might take place in the rules of property; and no reliance could be placed on the stability of titles."

Mr. Woodeson in another passage of his lectures states, that "the correction of law, by equity, is not by way of control, but of exposition. It does not oppugn, but promote the meaning of the law. For if the law, understood according to the unquestionable intention of the legislator, has descended to particulars, and has described the very matter under consideration, it is not in such case defective by reason of its universality, nor is there any room for the interposition of equity, or any warrant or authority for that kind of juridical redress. Perquam durum est, sed ita lex scripta est, was the expression of the famous Ulpian, in a case where the terms were sufficiently explicit to exclude that equitable construction which reason would otherwise have dictated." And we find among the Judges themselves of great name and authority, a considerable difference of opinion in their estimate of the value of equity as a correction of law. Lord Chief Justice de Grey was accustomed to say he never liked equity so well as when it was like law: whilst lord Chief Justice Mansfield frequently said, he never liked law so well as when it was like equity.[6]

The necessity of the existence of the equity powers to the perfection of the administration of justice, is admitted and vindicated in the famous code civil, which has been matured by the wisdom of some of the ablest men in France. In a report made by the enlightened Portalis, he states, "that the tribunals would not fulfil the object of their establishment, if under the pretext of the silence or obscurity, or insufficiency of the laws, they should refuse to give judgment. There were Judges before there were laws, and the laws cannot foresee all the cases which may be offered for adjudication. The administration would then be perpetually interrupted, if the Judge should refrain from judging, whenever the point in contest submitted to him had not been foreseen by the law. The office of the law is to provide for the cases which most generally arise. Accidents, fortuitous cases, and extraordinary cases, do not form the subject of a law. Amongst those things which deserve the solicitude of the legislature, it is impossible to fix every thing by precise rules. It is a wise foresight to discern that every thing cannot be foreseen. There are then necessarily a multitude of circumstances in which a Judge finds himself without law. It is therefore proper to leave to the Judge the power of supplying the law by the natural lights of reason and good sense. Nothing would be more puerile than to endeavour to take such precautions, that a Judge should never be without a precise text to apply to the cases which come before him. To prevent arbitrary judgments, society would be exposed to a thousand iniquitous judgments; and what would be worse, to be deprived of the power of having justice administered. With the foolish idea of legislating on each case, it would make legislation itself an immense labyrinth, in which reason and the memory would be equally lost. When the law is silent, nature speaks; and if the foresight of the legislator is limited, nature is infinite. She applies to every thing interesting to man. Why then should he despise the resources she offers him. In all ages it has been said, that equity is the supplement to the law; and it may be defined to be, a return to the law of nature, in the silence, obscurity or insufficiency of the positive law. It is this equity which is the true supplement of legislation, and without which the ministry of the Judge, in a great number of cases, would become impracticable. For it is rare that any contest arises about the application of a precise text. It is always because the law is obscure, or imperfect, or silent, that litigation arises. It is necessary then that the Judge should never pause. No question of property should ever remain undecided. The power of judging is not always governed

[6] In the case of Dursley and Fitzhanding, reported in 6th vol. Vesey.

in its exercise by formal precepts: it is by maxims, usages, examples and doctrines. Thus the virtuous chancellor D'Aguesseau said, very properly, that the temple of Justice is not less consecrated to the sciences than to the laws; and that the true doctrine which consisted in the knowledge of the spirit of laws, was superior to a knowledge of the laws themselves." The legislative body to which this report was addressed, adopted its reasoning, and enacted, in the language of the reporter, "That the Judge who should refuse to decide, under the pretence of the silence, obscurity, or imperfection of the laws, should be subject to prosecution, as guilty of a denial of justice." [7]

The great chancellor lord Camden agrees substantially with this opinion of the French jurists, in the judgment which he rendered in the case of mutual wills. The case was as follows: A man and his wife, who was entitled to a separate estate, joined in a will expressed to be their mutual last will. By this will the residuary estate of both seems to have been made a common fund, and to have been so bequeathed as to go to the survivor for life, with a limitation over on the death of the survivor to certain relations. The husband died first: the wife then proved the will, acted as executrix, took possession of the husband's property, and enjoyed it equally with her own separate estate for many years. She afterwards died, leaving a will by which, disregarding the mutual will, she gave her own property to another relation, in exclusion of those entitled under the mutual will.

The case was considered so new and without precedent, that the counsel resorted in their arguments to the authors of foreign countries, where such wills are in use. Lord Camden said, "I am of opinion that this case must be decided by the laws of this country—The mutual will was made here, the testators were subjects of this kingdom, and the estate devised was lodged in our own funds: so that this disposition, notwithstanding the uncommon form of the testament, must be ruled by the law of this court. And I trust that the everlasting maxims of equity and conscience upon which the jurisdiction of this court is built, are capacious enough, not only to comprehend this, but every other case that may happen; and that the justice of this court is co-extensive with every possible variety of human transactions. He then proceeded to consider the case in two views—First, how far the mutual will shall operate as a binding engagement, independent of any confirmation by accepting a legacy under it: Secondly, whether the survivor can depart from this engagement, after she had accepted a benefit under it. He said that this court is never deceived by the form of instruments. The actions of men are here stripped of their legal cloathing, and appear in their first naked simplicity. Good faith and conscience are the rules by which every transaction is judged in this court; and there is not an instance to be found since the jurisdiction was established, where one man has ever been released from his engagement, after the other has performed his part. On these principles he decided in favour of the claimants under the mutual will, and made the devisee heir and executor under the wife's will, a trustee to perform the contract. He did not deny that the mutual will was, like other wills, a revocable act. He admitted that it might be revoked by joint consent clearly; and by one of the parties only, if he gave notice.[8]

There is a peculiarity in the English and American system of equity, which distinguishes it, at least in modern times, from the system of all other countries. It is that the branch of jurisprudence called equity is administered in a distinct tribunal from the law tribunals. Mr. justice Blackstone says this distinction is not at present known, and does not seem ever to have been known in any other country. And yet the difference of law from equity when administered by the same tribunal was perfectly familiar to the Romans; the jurisdiction of the prætor being very distinct from the leges or standing laws. But the power of both centered in the same magistrate, who was equally entrusted to pronounce the rule of law, and to apply it to particular cases by the principles of equity.

[7] See the 1st vol. of the Code Civil, p. 49, 4th section, octavo edition.—In the original it stands thus: "Le Juge qui refusera de Juger sous prétexte du silence, de l'obscurite, on de l'insuffisance de la loi, pourra etre poursuivi comme coupable de deni de Justice."

[8] See Lord Camden's argument stated in the 2d vol. of Hargreave's juridical arguments, p. 304–311.

Mr. Mitford, who has since presided with great ability as lord chancellor of Ireland, (under the title of lord Redesdale,) has briefly but powerfully touched this subject. He says, in his treatise on the pleadings in a suit in chancery, "that it is difficult to discover by what means the courts of justice in England, usually termed courts of equity, have obtained the jurisdiction they now exercise. Their authority, and the extent of it, have been subjects of much question; but time has given them full establishment; and the limits of their duty seem now to be in a great degree, though perhaps not completely, ascertained." [9] The exercise of this jurisdiction by courts distinct from those to which the ordinary administration of justice is entrusted, seems to be a peculiarity in the jurisprudence of this country. In the construction of every system of laws, the principles of natural justice have been first considered; and the great objects of municipal laws have been to enforce the observance of those principles, and to provide a positive rule where some rule has been deemed necessary or expedient, and natural justice has prescribed none. It has also been an object of municipal law to establish modes of administering justice. The wisdom of legislators in framing positive laws to answer all the purposes of justice, has ever been found unequal to the subject; and therefore, in all countries, those to whom the administration of the laws has been entrusted, have been compelled to have recourse to natural principles, to assist them in the interpretation and application of positive law, and to supply its defects; and this resort to natural principles has been termed judging according to equity. Hence a distinction has arisen in jurisprudence between positive law and equity. In prescribing forms of proceeding in courts of justice, human foresight has also been defective; and therefore it has been commonly submitted to the discretion of the courts themselves to vary or add to established forms, as occasion and the appearance of new cases have required. In England a policy somewhat different has prevailed. The courts established for the ordinary administration of justice have, as in other countries, recourse to principles of equity in the interpretation and application of the positive law. But they are bound to established forms of proceeding; and those usually stiled courts of common law, to which the ordinary administration of justice principally belongs, have been embarrassed by a rigid adherence to rules of decision, which though originally framed for wise purposes, have in their application been frequently incompatible with, or not equal to the principles of natural and universal justice: and the modes of proceeding in those courts, though admirably calculated for the ordinary purposes of justice, are not adapted to the full investigation of all the intricate and complicated subjects of litigation which are the result of the increase of commerce, of riches, and of luxury, and the consequent variety in the necessities, the ingenuity, and the craft of mankind. Early therefore in the history of our jurisprudence, the administration of justice by the ordinary courts, appears to have been incomplete. To supply the defect, the courts of equity have gained an establishment; assuming the power of enforcing the principles upon which the ordinary courts also decide when the powers of those courts, or their modes of proceeding, are insufficient for the purpose; of preventing those principles, when enforced by the ordinary courts, from becoming (contrary to the original purpose of their establishment) instruments of injustice; and of deciding on principles of universal justice where the interference of a court of judicature is necessary to prevent a wrong, and the positive law is silent.[10]

The courts of equity also administer to the ends of justice, by removing impediments to the fair decision of a question in other courts; by providing for the safety of property in dispute, pending a litigation; by restraining the assertion of doubtful rights in a manner productive of irreparable damage; by preventing injury to a third person from the doubtful title of others; and by putting a

[9] The liberality with which of late years the courts of common law have noticed and adopted the principles of decision established in the courts of equity, though it may have been conducive to the great ends of justice, has tended to prevent the bounds between the two jurisdictions from being completely ascertained.

[10] Principles of decision thus adopted by the courts of equity, when fully established and made the grounds of successive decisions, are considered by those courts as rules to be observed with as much strictness as positive law.

bound to vexatious and oppressive litigation, and preventing unnecessary multiplicity of suits: and without pronouncing any judgment on the subject, by compelling a discovery which may enable other courts to give their judgment; and by preserving testimony when in danger of being lost before the matter to which it relates can be made the subject of judicial investigation." [11]

"This establishment has obtained throughout the whole system of our judicial polity: most of the inferior branches of that system having their peculiar courts of equity: and the court of chancery assuming a general jurisdiction in cases not within the bounds, or beyond the powers of other jurisdictions. The power thus exercised by the court of chancery is commonly termed the extraordinary jurisdiction of the court, to distinguish it from the several other jurisdictions attributed to the chancery as part of the general establishment for the administration of justice according to the course of the common law. The existence of this extraordinary jurisdiction, entirely distinct from the ordinary courts, though frequently considered as an enormity requiring redress, has perhaps produced a purity in the administration of justice, which could not have been effected by other means: and it is in truth a consequence of that jealous anxiety with which the principles and forms established by the common law have been preserved in the ordinary courts; as the bulwarks of freedom, and of the absolute necessity of preventing the strict adherence to those principles and forms, from becoming intolerable."

The opinion of that pre-eminent man Bacon, lord Verulam, is entitled to great weight in considering the question, which is to be preferred, the blended jurisdiction of law and equity, in the same tribunal, or the separation, in different tribunals. And his opinion was in favour of a separation of the jurisdictions. His words are, "apud nonullos receptum est ut jurisdictio quæ decernit secundum æquum et bonum, atque, illa altera, quæ procedit secundum jus strictum, iisdem curiis deputentur: apud alios autem ut diversis: omnino placet curiarum separatio. Neque enim servabitur distinctio casuum, si fiat commixtio jurisdictionum, sed arbitrium legem tandem trahet."

Lord Kaims, an eminent Scotch Judge, in the introduction to his principles of equity, notices this peculiarity of the English system, and examines the propriety of it. He professes the highest reverence for the judgment of Bacon, and he admits the weight of the argument that the mixture of the law and equity jurisdictions in the same tribunal would be apt to confound the distinction between cases of a legal and of an equitable nature; and thus arbitrary discretion be substituted in all cases for law. And he himself (lord Kaims) reinforces the argument by the following remarks: "In the science of jurisprudence, it is undoubtedly of great importance that the boundary between equity and common law be clearly ascertained, without which we shall vainly hope for just decisions. A Judge who is uncertain whether the case belongs to equity or to common law, cannot have a clear conception what judgment ought to be pronounced. But a court that judges of both, being relieved from determining this preliminary point, (whether the case belongs to the law or equity jurisdiction,) will be apt to lose sight altogether of the distinction between common law and equity."—Lord Kaims then proceeds to urge some reasons on the other side of the question, and in favour of the united jurisdiction, and concludes with giving a preference to that system: But with his accustomed modesty he suggests those reasons and his opinion with great diffidence, acknowledging that he felt the bias that naturally is produced by custom and established practice, as it was in his own country.

The English have not only scrupulously separated the jurisdictions of law and equity, but they have been remarkably jealous of any attempt in practice to blend them. Lord Mansfield, the Chief Justice of the court of king's bench, than whom a greater magistrate never presided in a court of justice, was reproached with a disposition to introduce the rules and principles of equity into his court of law; and the reproach brought much obloquy on him. It was said, that being "more

[11] It is not a very easy task accurately to describe the jurisdiction of our courts of equity: those who have attempted it have generally failed: and the apparent necessity of making the attempt for the purpose of elucidating the subject, must be the apology for what is here offered.

versant in the Roman than in the English jurisprudence, he was guided more by general rules of equity than by principles of law. That he was apt to assume an unpardonable latitude in the construction of statutes, and to decide upon them, not as they are, but as he conceives they ought to be: he would submit the acts of the legislature to the discretion of a Judge." He was charged with "attempting to change the king's bench, a court of common law, into a court of equity; and that instead of those positive rules by which the judgment of a court of law should be invariably determined, he has introduced his own notions of equity and substantial justice."

In opposition to lord Mansfield's plan of administering justice in a court of common law according to the principles of equity, it was observed, that "written law establishes the rights both of prince and people. Its certainty, and the determinate and invariable discriminations with which it is replete, not only mark the boundaries between right and wrong, but preserves them inviolate, and diffuses general tranquillity by enabling us to judge with certainty, when we stand within the limits of security. However therefore we may admire the wisdom which established courts of equity to remedy those evils which the forms of common law could not reach; yet the utility of this precaution will not only be lost, when the modes of decision practised in the courts of equity are adopted in courts of law, but that this extension, to the general system of our jurisprudence, of those principles which were only admitted for the remedy of particular defects, will eventually, by violating the settled rules of justice, instead of removing partial exceptions, annihilate the grand distinction between law and despotism, and leave us exposed, if not to the oppression, at least to the insecurity of arbitrary dominion."

"The advantages to the subject (of transplanting equity principles of decision into the courts of law) have been even hitherto problematical, the future consequences are extremely to be dreaded. When the court of king's bench assumes legislation, the learned world may continue to witness and admire the wisdom and beauty of its decisions, but the palladium of the British constitution is removed, and liberty exists no longer."

That eminent Judge, lord Eldon, said, (in a case under consideration before him,) "he thought that the character of the law of England suffered more by the circumstance of the courts of law acting upon what they conceive to be the rules of equity, than by any other circumstance. He thought it impossible a court of law could exercise the equity jurisdiction at all." And that, "he was seriously apprehensive that courts of law, supposing they are administering the rules of this court, (chancery,) have totally misunderstood them." [12]

An able foreign writer, who has given an excellent account of the British constitution, has noticed this anomaly of a court of equity exercising distinct powers from the courts of law, and he appears to have understood the subject better than any other foreigner. De Lolme remarks, on the false notions of the office and powers of the English courts of equity entertained by many who suppose that the Judges are to pursue the rules of natural equity alone, following the dictates of their own private feelings, and grounding their decisions on the peculiar circumstances of the case before them. He judiciously observes, that certainly the power of the Judges in equity cannot be to alter by their own private judgment the written law, that is, acts of parliament, and thus to control the legislature. Their office, he insists, consists in producing remedies for those cases, for which the public good requires that remedies should be provided, and in regard to which the courts of law, shackled by their original forms and institutions, cannot procure any. He also remarks with judgment on the causes which have prevented the courts of law and equity from encroaching on each other, and thus dangerously uniting in themselves the powers of Judges of equity and Judges of the common law. De Lolme's own conclusion as to the real character of the court of equity in England, is too curious to be omitted. "From all the above observations," he says, "it follows, that of the courts of equity, as established in England, the following definition may be given, which is, that they are a kind of experimental legislature, continually employed in finding out and pro-

[12] See 6th vol. Vesey, p. 12 to 41.

viding law remedies for those new species of cases, for which neither the courts (of law) nor the legislature, have as yet found it convenient or practicable to establish any: in doing which they are to forbear to interfere with such cases as they find already provided for. A Judge of equity is also to adhere in his decisions to the system of decrees in his own court, of which regular records are kept for that purpose. From this latter circumstance it again follows that a Judge of equity, by the very exercise he makes of his power, is continually abridging the arbitrary part of it; as every new case he determines, every precedent he establishes becomes a land-mark or boundary, which both he and his successors in office are afterwards expected to regard." And he adds, that the appeals carried up to the house of lords, shews that the Judges in equity are subjected to certain positive rules, besides those of nature and conscience only: an appeal being naturally grounded on a supposition of some rules of that kind which were neglected or violated.

It is proper however to remark, that De Lolme's idea of the court of equity being a kind of experimental legislature, is fanciful, and not founded in fact. In the famous case of Chesterfield v. Janssen, reported in 1st volume of Atkins, lord chancellor Hardwicke expressly says, "whatever may be called legislative authority in this court, I utterly disclaim. But so far as the court has already gone in cases; so far as lord Nottingham, lord Cowper, lord King and lord Talbot have gone in the cases before them, I think myself under an indispensable obligation of following."

An additional reason of great importance, for the separation of the equity from the law jurisdiction, in England and America, is founded on their peculiar institution of trial by jury. As juries are essentially a component part of the law tribunals, it would be dangerous to allow the exercise of equity powers to those tribunals. Juries are apt enough already to feel themselves exempt from the authority of fixed rules of law, and to adjudicate in all cases according to their own crude undisciplined notions of mere natural equity. And the salutary check of the court, over the verdicts of juries, would be in a great measure, if not wholly, lost, if they were sanctioned in considering themselves endued with equity powers.

Nor could the narrow forms of the pleadings in the courts of law, which necessarily bring the question in controversy to a single and precise point, admit of that latitude which would embrace the great variety and extent of matter which is generally included in the proceedings in equity. And a simple judgment rendered in the forms of law could not provide for that variety of points, which are amply regulated and settled by a plenary decree in equity. Those who are in favour of blending the law and equity jurisdictions, would soon feel in practice the imperfections and incapacity of the legal forms, to reach all the cases of equitable cognizance; and would be obliged to alter the forms of law proceedings, and enlarge them according to the equity model. This would speedily supercede all the legal forms, and every thing would soon become of equitable cognizance, and be decided by equity principles alone, and positive law would be overwhelmed and lost.

In all those countries where the jurisdictions of law and equity are united, there exists no trial by jury: and the forms of proceeding are altogether upon the civil law plan, which is adopted and followed in the court of equity. So that the example of those nations does not seem fit to be followed by those who reverence and desire to preserve the trial by jury in mixed questions of law and fact. The trial by jury, and the pleadings according to the civil law forms, seem to be incompatible with each other. If it be alledged that the jurisdiction both of law and equity cases may be given to the same Judges, with power to hold the courts separately, and to follow in each the forms peculiar to each, that would in effect be giving up the question—for that would admit the propriety of separating the jurisdictions themselves, though entrusted to the same hands. Nor would it be easy to find men competent to sit and to decide correctly, as Judges in equity to-day, and as Judges at law to-morrow; and carefully to separate in their minds, and in their practice, the proper objects of the jurisdiction of each. The danger would be, that gradually every thing would slide into the equity jurisdiction, to the utter subversion of mere law. The experience in the courts of

the United States is quite insufficient to enable us to pronounce that this danger is imaginary. Besides, the business of the law courts already fills up all the time, and employs all the learning and talents of the Judges at law. The superaddition of the duties of the courts of equity would leave no time for the persevering course of study necessary for the enlightened discharge of their duties. It is only in the tribunal of the last resort, the highest court of appeals in civil cases, without any original jurisdiction, that it would be proper to blend the law and equity powers, in order by its supreme controlling power to keep the decisions of all the courts uniform and consistent.

There is a reason of a higher order in favour of the separation of the jurisdictions of law and equity, founded on the nature of free governments. It is a part of the wise jealousy of republics to divide power into many branches, so that too much power should not be accumulated in the same hands. As a result of this principle, the legal and equitable powers should be placed in different hands —and perhaps the criminal jurisdiction ought to be separated from the civil. The union of all three in the same persons would be hazardous in the extreme. It has produced great mischiefs and oppression where it has been tried. Aristotle informs us, that the constitution of the judiciary power, in the Carthaginian government, was highly oligarchical; the whole of that power being vested in one court, which tried all kinds of causes, and decided all of them without appeal.[13] And the Roman historian Livy observed, long after Aristotle's time, "judicum ordo Carthagine ea tempestate dominabatur; eo maxime quod iidem perpetui judices erant. Res, fama, vitaque omnium, in illorum potestate erat. Qui unum ejus ordinis, idem omnes adversos habet."[14]

The Greeks and Romans, jealous of the accumulation of power in the same hands, divided the jurisdiction of the courts, and placed the cognizance of some causes in one tribunal, and others in other tribunals.

The chief magistrates of Athens were nine in number, and were called archontes, or rulers.[15] To each of them was assigned a particular portion of jurisdiction and duty. The chief of the nine archons had jurisdiction in many cases of an ecclesiastical as well as civil nature. He also determined all causes between men and their wives; concerning wills and testaments, dowries and legacies, and some other subjects.—The other archons had other subjects appropriated to them.[16] When Solon new modelled the Athenian republic, he respected and preserved the venerable tribunal of the areopagus, and the election of the archons; but he invented and established the popular constitution of the judiciary power. Pericles abridged the power of the areopagus, and by debasing the composition, he increased the tyranny of the Athenian tribunals. The people, once masters of the courts of justice, and consequently of the lives and fortunes of all ranks of men, soon drained and exhausted every source of authority in the state, not flowing from themselves.[17] And exercising the judicial powers themselves, the most monstrous tyranny and injustice followed. Socrates and others, the wisest and best men of the republic, were condemned by the tumultuous assemblies of several hundred Judges.

The Romans also divided the jurisdiction over various branches of causes, among different bodies of Judges: but they committed the error of composing their courts of too great a number of persons. In such multitudes it could not be expected that many individuals could be learned in the laws, or enlightened in the application of them. The great advantage of deliberation and mutual interchange of ideas, could not exist among such numbers; and all responsibility was lost; for the Judges voted in such a manner that the public neither knew the opinions of the individual Judges, or the reasons of these opinions.

The modern have a great superiority in this respect over the ancient systems. The courts are composed generally of a few Judges, with a divided jurisdiction. These are, or ought to be, selected, at least for the superior courts, for their

[13] Aristotle's Politics, book ii. p. 116, 117.

[14] Livy, lib. 33, chap. 46.

[15] Potter's Greek Antiquities, 1st vol.

[16] Potter's Greek Antiquities, 1st vol. p. 76, 77.

[17] Aristotle's Politics, 2d vol. book ii. p. 120.

learning, experience and probity. And possessing high character, with great responsibility, they hear patiently, deliberate maturely, and decide impartially, giving their reasons publicly. These are essential and inestimable advantages in the administration of justice.

It is not intended to go into a full statement of the peculiar objects of the equity jurisdiction, as established in England and in the United States of America. The subject is treated luminously by sir John Mitford, in his treatise of equity pleadings, enlarged subsequently by Mr. Cooper, and by some of the elementary writers. The jurisdiction grew to its present extent by degrees, according to the exigencies of the times, and the changes of circumstances and manners. Nor was its growth permitted to take place without some struggles on the part of the courts of law; particularly on the subject of injunctions, granted by the courts of chancery to interfere with judgments at law. As early as the time of sir Thomas More, doubts were entertained of the propriety of these injunctions;[18] and the subject produced open hostility between the courts in the time of lord chancellor Ellesmere, in the reign of James I. As this was the last struggle to restrain the court of chancery in the exercise of this, or indeed any other branch of its jurisdiction, it may be worth while to state the case more fully:—It will show more forcibly the necessity of the equity jurisdiction, in a separate court.

One Glanvill sold to a young man named Courtney a jewel, which he pretended to be of the value of three hundred and sixty pounds, (whereas it was in truth worth but twenty,) and three other jewels of the value of a hundred pounds: and for his security he took a bond of six hundred pounds, in the name of one Hampton; and procured an action to be brought in Hampton's name, and the action to be confessed, in the vacation. Glanvill paid all the costs of both parties. Afterwards Courtney finding the deceit, exhibited his bill in chancery for relief; and also brought a writ of error to reverse the judgment, but the judgment was affirmed. Upon the hearing in chancery it was decreed, that Glanvill should take back his jewel and an hundred pounds, and that he should procure the said Hampton to release and acknowledge satisfaction of the judgment. Glanvill not complying with the decree, was imprisoned by the court of chancery. He then applied to the court of law, by a habeas corpus, to be discharged. Lord Coke, the Chief Justice, said that this decree in chancery and imprisonment, being after a judgment at the common law, was unlawful: and that this court ought to relieve him. And he cited for proof a judgment in the 5th of Edward IV. between Cobb and Moore, when Cobb procured an action of debt to be brought against Moore, and the action to be confessed by attorney; and a writ of error to be brought thereon, and the judgment to be affirmed: all this was done in the absence of Moore, who being beyond sea, upon his return exhibited his bill in chancery to be relieved concerning this practice, there being no debt due. And it was resolved, that after a judgment at common law he could not be relieved, but was enforced to exhibit his bill in parliament, and there was a special act made for his relief. Lord Coke also cited another case of a judgment at law, in 39th of Elizabeth, between Finch and Throgmorton, to the same point. In that case all the Judges were assembled, and the matter debated before them; and it was resolved by them all, that although the said bill contained much matter of equity, and there was very good cause the complainant should have been relieved, if he had complained before the judgment obtained at the common law, yet now, having suffered a judgment at the common law, he comes too late to be relieved in a court of equity; and cannot now examine any pretence of equity, after a judgment at the common law. Wherefore lord Coke and all the court held, in Glanvill's and Courtney's case, that Glanvill ought to be bailed; and they let him go on bail till the next term, and he was then discharged.[19]

[18] Sir Thomas More being lord chancellor, was informed that the Judges had expressed their disapprobation of the injunctions he had granted. He caused a docket to be made of every injunction, and the reasons of it, which he had granted: and inviting all the Judges to dine with him, he introduced the subject after dinner: when upon full discussion of every one of them, the Judges confessed that he could not have acted otherwise than he had done.—Roper's Life of Sir T. More, p. 58.

[19] The case of Glanvill and Courtney is reported in Moor, p. 838. 1st Roll. iii. and Cro. Jac. p. 343.

This decision of lord Coke and his court being questioned, the subject was brought before the king in council, in the year 1616, and the matter debated; and upon the opinions and certificate of the king's council, judgment was finally given in favour of the chancery jurisdiction, in cases of injunction after judgments at law. And the lord chancellor was commanded in future not to desist to give to the subject, on complaint thereafter to be made, such relief in equity, (notwithstanding any proceedings of the common law against them,) as shall stand with the justice or merit of their cause, and with the former ancient and continued practise and presidency of the court of chancery. And this judgment was ordered to be enrolled in the chancery, there to remain on record, for the better extinguishing of the like differences and questions that may arise in future times. All which proceedings were enrolled in chancery.

Lord Coke is said by sir William Blackstone to have been clearly in the wrong, and to have submitted, with dignity. He never questioned that judgment, though he lived many years afterwards, and was in four parliaments, where he had both opportunity and power to have done it, if he had not known that judgment to have been given according to justice, and the laws of the realm: but he desisted, and openly professed before the privy council that he would not maintain a difference between the two courts, nor bring it into question,—whereof entry was made in the council book.[20]

Since that time the subject has been considered to be settled, and no controversy has arisen as to this branch of equity jurisdiction. And surely it was highly proper that this jurisdiction should exist somewhere. The case of Glanvill and Courtney, upon which the question arose and the point of jurisdiction was settled, shews the importance and even necessity of it. A great fraud had been committed, and so dexterously managed and fenced in by a judgment at law, that the court of law could not or would not give relief. If the court of equity was prohibited from interfering by its injunction, as the court of law attempted to do, frauds must prevail. This would be a reproach to the justice of a nation, and a libel on the wisdom of its judiciary arrangements. The attempt failed, and the court of equity was supported in its jurisdiction, to give relief where all remedy at law was at an end. The court of equity carries this principle to the utmost extent, not only against judgments at law, founded in fraud or imposition, but against its own decrees, obtained by fraud, or by imposition on the court. It has been repeatedly decided that such decrees may be opened by a new bill charging the fraud or imposition: and that the defendant should not protect himself by pleading the former decree.[21] And this is founded on a great principle, that it is the duty of courts of justice to relieve parties from any injustice which is occasioned by their own acts or oversights, which took place at the instance of the party against whom the relief is sought.—It is their duty to act with decision, and without scruple on this point.[22]

Whatever may have been the origin of the equity jurisdiction, it has been firmly established for two centuries; and it extends over a great variety of the most important branches of jurisprudence: and justice has been so wisely and beneficently administered, by a succession of wise and great men, who filled the chancery bench from the time of lord chancellor Nottingham down to lord Camden, and even later, that a finer body of doctrine, of the most refined principles of justice, lies scattered through the reports of decisions in the court of chancery, than is any where else to be found; and would furnish abundant as well as excellent materials to a scientific legal mind, to digest a most beautiful system of practical justice. It is greatly to be lamented that such a work has never been executed. It is a desideratum in legal science. Mr. Fonblanque has given great assistance to the student, and even the practising lawyer, by his learned notes and collections of cases appended to a text of uncommon brevity, learning, and obscurity. Mr. Roberts, Mr. Sugden and others have undertaken to state systematically the doctrines of the court of equity, on particular subjects; and have

[20] See a small treatise on the jurisdiction of the court of chancery, where this whole controversy and its result is stated.

[21] See 2d P. Wms. p. 73, 74. Lloyd v. Mansell.—1st P. Wms. 737. Richmond v. Tayleur.—3d P. Wms. iii. Sheldon v. Fortesque: cases Temp. Talbot 201, Gally v. Baker.

[22] See 6th Vesey, p. 92, 93, Pultney v. Warren.

illustrated their works by a selection of the cases decided, which support those doctrines. But no great work has yet appeared, embracing the entire range of the equity principles, and reducing them to a clear, connected system. Whoever may undertake this task, and execute it with learning and skill, will render a great service to the public, as well as to the profession. And it would be easy to shew in such a work that the chancery doctrines are wise expositions of the law, with happy and just applications of its best principles, to the extraordinary cases constantly arising in the transactions of men; and that they are founded on the eternal principles of justice applied to a refined and complicated state of society:—That the court borrows light, and learning, and wisdom, from every source, but above all from the civil law, that great fountain of the jurisprudence of the modern nations of Europe. This fact is generally admitted by the jurists on the continent of Europe; but the English writers do not so willingly make the concession. Sir William Jones however, whose great mind disdained all concealment, makes the acknowledgment in the amplest form. He says, "the great work of which Justinian has the credit, consists of texts collected from law books of approved authority, which in his time were extant at Rome; and those texts are digested according to a scientific analysis; the names of the original authors, and the titles of their several books being constantly cited. But although it comprehends the whole system of jurisprudence, public, private and criminal, yet that vast compilation was finished, we are told, in three years. It bears marks indeed of great precipitation and of a desire to gratify the emperor, by quickness of dispatch: But with all its imperfections, it is a most valuable mine of judicial knowledge; it gives law at this time to the greatest part of Europe; and though few English lawyers dare make such an acknowledgment, it is the true source of nearly all our English laws, that are not of a feudal origin." [23]

The United States of America generally having borrowed their judicial system, the organization of their courts, the principles of decision, the rules of evidence, and the very forms of proceeding in suits, from England, the equity branch of jurisprudence forms an essential and interesting part of our legal polity. And so far as the principles derived from the civil law have weight or authority in the court of chancery, a proper knowledge of the civil law doctrines, becomes more interesting to us, than they are even in England; since the universal abolition of most of the feudal doctrines, and particularly those which relate to the tenure and descent of landed property; and the introduction of a more equal division of estates among the wife and children, or other relations of a person dying intestate, have brought our systems of jurisprudence nearer to the civil law than the English laws have yet approached.

In a few of the United States, the equity system, operating in a distinct tribunal, has not been adopted: nor have the general equity powers been entrusted to the courts of law. Hence it is said that there is a sensible defect in the administration of justice in those states: the courts of law, from the narrowness of their organization, and their modes of proceeding, not being able to give that relief in many important cases where equity would furnish full remedies. And where the law Judges in their zeal to do justice have had recourse to the equity principles of decision, they have been applied in an imperfect and halting manner: and the evils of a mixed jurisdiction foreseen by the sagacious mind of Bacon, must be produced. In one of the states at least, the attempt has been made to blend the jurisdictions by investing Judges of the courts of law with the equity powers, to be exercised separate and apart from the law court, on what is called the equity side, with power to refer all disputed facts to a jury. If the information received is to be credited, this plan has not succeeded in practice. The law court having a preference in the order of transacting business, on account of the attendance of a multitude of jurors, the greater part of the time of the Judge is occupied therewith, and little leisure or opportunity is left for the dispatch of business on the equity side: and the multiplied issues made up to try the facts of the causes, have increased the delay and expense of suits to an intolerable degree.

[23] Life of sir William Jones, by Lord Teignmouth, Philadelphia edition, p. 315, 316.

The legislature of the United States have placed the civil and criminal, the legal, equitable and admiralty powers, in the same courts; rather it is presumable from the desire to avoid the multiplication of expensive courts, to administer justice in a very limited extent of causes, than from a conviction of its propriety.

In this state, the court of equity is distinct from the courts of law.[24] The question of the propriety of blending the jurisdictions, has been repeatedly discussed with great ability in our state legislature; and the result has been a clear conviction that the separation of the common law and equity systems, in distinct tribunals, was the safest plan for a free country, whose policy requires a division of power, as well as the best adapted to ensure justice effectually and speedily to the suitors. The powers of the court of chancery as they exist in England, are exercised in this state by the Judges in equity, in a distinct court a little modified by statutary provisions. And the want of regular ecclesiastical courts has necessarily thrown some branches of that jurisdiction into the court of equity.[25] Alimony is allowed to wives on making out proper cases to entitle them to relief, without the necessity of a divorce a mensa et thoro; not a single instance of divorce of either kind having ever occurred in this state, since the revolution; either by the sentence of a court of justice, or by act of the legislature.

The court of equity is composed of five Judges, holding their commissions during good behaviour, with salaries fixed by law and immutable whilst they remain in office. They have no fees of any kind.

For the convenience of the citizens the state is divided into eleven equity districts, in each of which the court of equity is held twice every year at stated periods, by a single Judge, for the trial of causes. From his decrees, the parties dissatisfied, may appeal to the full bench of the Judges in equity, who are convened twice in each year, in order to hear and determine on all appeals. The decision of this court is final and conclusive. The reports of cases decided in the court of chancery in England, are received as authority in the court of equity in this state, to the commencement of the American revolution. Those of a subsequent period are read, as illustrating the doctrines of the court; but they are not of authority, further than their reason warrants, no more than the adjudications of any other foreign tribunals.

A commissioner is appointed for each of the equity districts, with the powers of the register, and of the master in chancery, somewhat enlarged by statute, in order to prepare the business of the court by the necessary interlocutory orders, and by reports on cases of account referred to him by a Judge.

The forms of proceeding in the court are upon the English model, by bill and answer, pruned of some redundancies, and moulded to suit the circumstances and habits of the country.

Witnesses are examined viva voce, in open court, which method has been supposed to possess great advantages over the course formerly pursued of examination in private on interrogatories. Exceptions are made to this rule, with respect to witnesses living out of the jurisdiction of the court, and also in favour

[24] A court of chancery appears to have existed in this state, very early after the settlement of the colony. There are distinct traces of it under the proprietary government—and soon after the royal government superceded the proprietary, the court of chancery was regularly established, and endued with the powers of the court of chancery in England. The court was composed of the governor and council, who dispensed this branch of justice. It could not be expected that a court so constituted could have been celebrated for its learning or legal judgment. Governors appointed for their military skill, or their parliamentary connections, and a council composed generally of private and unlearned men, could not be expected to be eminent Judges. The effect was natural. Little confidence was reposed in their judgment, and no valuable decrees are recorded which illustrate the science, or furnish lights to guide succeeding times.

[25] As we have nothing of an ecclesiastical establishment in this country, but the clergy of all denominations depend on the voluntary contributions of their people, for support, we have very little of the ecclesiastical jurisdiction. An ordinary is appointed for each district, with power to receive the probate of wills, and to register them; but he has little original power, and all his acts are subject to revision by the courts. We have nothing of that vast system of ecclesiastical jurisdiction which exists in England, as stated by Mr. Richard Washington, in his book on that subject, published in 1688.

of aged and infirm persons unable to travel, who are examined by commissions and interrogatories.

The decrees of the court are enforced by execution against the estate of the defendant, as well as by process against his person. This system has succeeded in practice. Justice is administered with as much speed as in the courts of law, and as is consistent with mature deliberation.

Many of the causes are heard and determined within one year, and most of them within two years, from their commencement—the few which are of longer duration, owe their procrastination to the necessity of collecting testimony from abroad, or to other peculiar circumstances, which make some delay necessary, that substantial justice may not be sacrificed to speed. Scarcely a single case in the court of appeals remains undecided one year after the appeal is made, and a great majority of the cases are decided within six months.

It hath repeatedly happened that on the rising of the court of appeals, not one case has been left undecided—a circumstance which certainly is rare in any country, and it is probable, has never occurred in the court of chancery in England, since the time of sir Francis Bacon, who once boasted when lord keeper, that he had determined all the business of his court.[26]

The expenses of a suit in equity are very moderate; not amounting in any case to a tenth part of the expenses of a suit in chancery in England; and in general not to a twentieth part of those expenses.

[26] See his letter of the 8th June, 1617; 6 vol. of his works, p. 149. in which he says "this day I have made even with the business of the kingdom for common justice: not one cause unheard; the lawyers drawn dry of all the motions they were to make; not one petition unanswered, and this I think could not be said in our age before. This I speak not out of ostentation, but out of gladness when I have done my duty. I know men think I cannot continue, if I thus oppress myself with business: but that account is made; the duties of life are more than life."

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RULES OF THE COURT OF EQUITY

ESTABLISHED BY ORDER OF THE JUDGES,

1 Desaus. *57

*Rule 1st. No subpœna or other process for appearance shall issue (except in cases to stay waste) till after the bill is filed.

2d. All subpœnas ad respondendum shall be served personally, or where the defendant cannot be found, but is within the state, by leaving a true copy of the writ at the dwelling house, or most usual and notorious place of residence or habitation, of the person to whom directed.

3d. In case the defendant do appear, he shall constitute a solicitor to appear and act for him, so far as a solicitor can or may lawfully act, during the continuance of the suit, and file the warrant or order to appear for him in the register's office.

4th. In case the complainant reside out of the state, the defendant may, at any time after the service of the subpœna, obtain an order for the complainant to put in security for costs, before the master or commissioner; and if such security be not put in within thirty days after the service of such order on the complainant's solicitor, the bill shall stand dismissed, unless the master or commissioner, on cause shewn, shall grant further time.

5th. Every demurrer shall express the several causes of demurrer, and shall be determined in open court.

6th. Upon any slip or mistake in the bill, the plaintiff on motion before the master or commissioner may, (within thirty days after demurrer put in, and notice thereof,) amend on payment of costs.

7th. If the demurrer be admitted by the plaintiff to be good within thirty days after filing it, and he doth pay the defendant, or his solicitor, the costs, then the bill shall be dismissed of course, without motion; unless both sides agree to the amendment of the same: But such dismission is no bar to a new bill to be exhibited by the plaintiff.

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*8th. In case the plea or demurrer be allowed, the complainant's bill shall be dismissed with costs; and if the defendant's plea or demurrer be overruled, the defendant shall pay costs.

9th. If the defendant plead that there is another suit depending for that very cause, or that the cause had been formerly dismissed, and the dismission signed and enrolled in the court of equity, if the plaintiff be not satisfied therewith, the same shall be referred to the master or commissioner in equity; and if it be determined against the plaintiff, he shall pay costs to the defendant; but such reference must be procured by the plaintiff, and a report thereon, within thirty days after filing such plea, otherwise the bill to be dismissed of course.

10th. Pleas to the jurisdiction, and pleas of any matter of record, or of matters recorded in this court, need not be upon oath: but pleas in bar, founded on matters in pais, are to be on oath.

11th. Upon demurrer being overruled, the defendant shall pay costs, and put in plea or answer, within thirty days thereafter; in like manner if a plea be overruled, the defendant shall pay costs, and put in an answer within the same time; and in like manner if a defendant on exception taken, be ordered to make a better answer, he shall pay costs, and put in his amended answer within the same time: otherwise in such cases, an attachment shall be granted, or the bill be taken pro confesso, at the election of the complainant; unless in either case further time be obtained according to the 13th section of the act of assembly passed in December, 1808.

12th. If the defendant appears by solicitor, upon affidavit made that such defendant is absent from the state, then a commission shall be granted by the register or commissioner, directed to two or more persons of credit to take and certify the answer; and the form of the oath shall be endorsed on the answer, be subscribed by the defendant, and be certified by the commissioner, as having been subscribed and sworn; and where the defendant shall reside within the state, and shall have appeared as aforesaid, he shall be at liberty to swear to his plea or answer, before any judge or justice of the

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peace of this state, and the form of *the oath shall be endorsed on the answer or plea, be subscribed by the defendant, and be certified as aforesaid, by such judge or justice of the peace; and where it may be necessary that any bill or petition be sworn to, the same may be sworn to, certified in the same manner.

13th. An answer, charged as a defendant's own act, must be without saying to his remembrance or as he believeth, if laid to be done five years before, unless the court upon exception taken shall find special cause

to dispense with so positive an answer: and if he deny the fact, he must traverse or deny it directly, and not by way of negative pregnant.

14th. In case the answer is imperfect, the complainant in thirty days after he can procure a copy of the answer, shall put in his exceptions: otherwise none to be admitted without a particular order of the court, if sitting, or the master or commissioner in equity in case the court is not sitting—But in cases of injunction or ne exeat, the court on cause shewn, may require exceptions to be filed within a shorter period.

15th. If the defendant shall fail to amend his answer, the exceptions within fifteen days after filing thereof, and notice to the defendant, shall be heard before the master or commissioner, in equity.

16th. The exceptions taken and specified to be alone insisted on, and no new exceptions put in.

17th. If the answer be certified insufficient, the defendant is to pay costs; but the defendant may have liberty to appeal from the report of the master to the court.

18th. If the answer be reported good, the plaintiff shall pay the defendant costs.

19th. The complainant upon bill filed, and thirty days after subpœna served, and defendant on plea or answer filed, may obtain a commission to examine witnesses resident out of the state on application to the register or commissioner, giving ten days notice thereof to the opposite party, and serving him at the same time with a copy of the interrogatories to be annexed; and if he does not put in cross interrogatories before the expiration of that time, a commission shall

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be granted to the party applicant ex *parte: There shall be four commissioners, two to be named by each party, unless the opposite party shall not join in the commission, in which case they shall be named exparte by the applicant, and the commission may be executed by any two or more of them.

20th. Witnesses unable to travel from age, sickness or infirmity, may be examined by commission if ordered by a judge or commissioner on motion and affidavit; the applicant giving the same notice, and taking out his commission in other respects, as prescribed by the preceding rule.

21st. Commissions when executed shall be sealed up by the commissioners, who shall execute the same, and directed to the register or commissioner of the court from whence they issue, and shall not be opened but on motion in open court, or by consent of parties in writing.

22d. If the plaintiff shall fail to appear and prosecute his suit, the bill shall be dismissed, unless the court on cause shewn shall allow him further time; such dismissal however shall not be a plea in bar to a new bill, but a second shall.

23d. If the defendant shall not appear and defend the suit, the bill and answer shall be read; if the court upon hearing shall find cause to decree for the plaintiff, yet a day shall be given for the defendant to shew cause against the same; but before he be admitted thereunto, he shall submit to such conditions as the court shall see fit to impose.

24th. Decrees may be enrolled at any time, not exceeding twelve months, after they shall be pronounced; unless by special order of the court.

25th. No execution or attachment for the enforcement of a decree shall issue, until thirty days after the rising of the court during which such decree was pronounced: and if there be an appeal, then such execution or attachment shall not issue until thirty days after the adjournment of the court of appeals at which the cause shall be determined, and all executions shall be returnable on the first day of the term next after the same shall issue: unless otherwise ordered by the court.

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*26th—(For Charleston.) The master or commissioner in all cases of reference having prepared his report shall issue a summons for the parties to attend him and peruse the same. And if either party is dissatisfied therewith, he shall within ten days after the time fixed for attendance, state his exceptions in writing, and take out a summons to be heard thereon; a copy of which he shall serve on the adverse party, or his solicitor, at least three days before such hearing: and the master or commissioner shall thereon finally determine and report.

27th—(For the Country.) On the circuit, notice of all reports made in vacation shall be served on the parties, or their solicitors, on or before the first day of the next term; and the party dissatisfied therewith, shall file his exceptions and give notice thereof on or before the second day of the same term: Notices of all reports in term time shall be immediately served on the parties or their solicitors: and the party dissatisfied therewith, shall within one day after such notice file his exceptions; that in all cases where such exceptions are filed and notice given, the commissioners shall immediately proceed to hear, and thereon finally determine, unless he shall allow further time.

28th. The injunction to stay proceedings at law must be served either on the party himself, his counsel or solicitor, as the cause requires, and afterwards filed in the office of the clerk of the court of common pleas.

29th. All causes shall be docketted ten days before the meeting of the court; and no cause shall be docketted until the pleadings are complete and filed.

30th—(For Charleston.) Briefs shall be served with the registers of the respective circuit courts and courts of appeal, three

days before the meeting of the courts; and no cause will be heard, unless briefs are so delivered.

31st—(For the Country.) On the circuit all briefs shall be served, on or before the meeting of the court.

32d. A decree being fully performed, the party satisfied shall, on application made to him, enter satisfaction in a book to be kept for that purpose by the register or commissioner, and on the enrolled decree, (if the

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same be enrolled,) and the register or *commissioner shall grant certificates of satisfaction on application therefor.

33d. When the bill or petition is dismissed, the costs shall be paid by the complainant; when sustained, by the defendant, unless otherwise ordered by the court: the party in either case entitled thereto, may have an attachment or execution for enforcing payment thereof.

34th. Sundays are to be included in all the calculations of time under the preceding rules.

35th—(For Charleston.) The bill being taken pro confesso, the order therefor can only be set aside where the defendant shall give ten days written notice in Charleston, prior to the ensuing term, of his intention to apply for the same on the first day of such term, and shall have previously filed, or on making the application shall produce a full and explicit answer or plea, with a brief for the court, and shall docket the cause for hearing at the said term, and submit to any further conditions the court may impose. If complainant be dissatisfied with the answer, he may within ten days tender exceptions, and if on reference thereof the answer shall be adjudged insufficient, the bill shall be absolutely ordered to be taken pro confesso. But in making a final decree, where a bill has been taken pro confesso, the court will require such proofs as shall satisfy it of the justice of the complainant's demand; and the defendant may be heard touching the merits so disclosed, and may take advantage of any matter which would have been good cause of demurrer, but not of such as ought to have been presented by plea or answer.

36th—(For the Country.) The bill being taken pro confesso the order therefor can be set aside only where the defendant shall apply for the same on the first day of the meeting of the court, and shall have previously filed, or, on making such application shall produce a full and explicit answer or plea, with a brief for the court, and shall docket the cause for hearing at such court, and submit to any further conditions the court may impose.—If the complainant be dissatisfied with such answer, he shall forthwith file exceptions, and if on reference thereof the answer shall be adjudged insuffi-

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cient, the bill shall be absolutely *ordered to be taken pro confesso, as to the points not satisfactorily answered, unless otherwise ordered by the court; but in making a final decree where a bill has been taken pro confesso, the court will require such proofs as shall satisfy it of the justice of the complainant's demand, and the defendant may be heard touching the merits so disclosed, and may take advantage of any matter which would have been good cause of demurrer, but not of such as ought to have been presented by plea or answer.

37th. The register and commissioners of the respective courts shall keep books in which they shall cause to be transcribed all reports made to the court, as soon as the same shall be confirmed.

38th. No cause shall be continued on the docket for a longer time, or on other terms than those prescribed by law.

39th. Gowns and black coats shall be the habit of the bar, and no member thereof shall be permitted to address the court unless in such habit.[1]

20th March, 1810.

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[1] See various rules and regulations for the proceedings in the court of equity, in different acts of the legislature respecting that court; and particularly the 12th, 13th, 14th, 15th, 16th and 17th sections of the act of December, 1808.

The rule of the court of chancery, as to supplementary bills, and bills in nature of bills of review, made by lord chancellor Hardwicke, is to be found in 2d vol. Atkins, p. 139, in a note.

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1 Desaus. 63

RULES OF COURT CONTINUED.

South Carolina. In the Court of Appeals.
Fall Term, 1810.

In all cases brought up to the court of appeals, costs may be directed to be paid by either the complainants or defendants, as the court shall see fit, notwithstanding the decree or order of the circuit judge respecting them should not be made a ground of appeal.—(A copy from the minutes.)

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*Ordered that the master and the commissioners in the equity circuit courts of this state, shall at the first sitting of their respective courts in every year, severally make report to the court of the different estates in their hands severally, under and by virtue of any decree or order of the court, with a full and particular account of the monies received and paid relating to said estates: And the said masters and commissioners shall also at the time abovementioned severally report what executors, administrators, guardians or trustees have been ordered by any decree of the court, to account annually before them respectively, and which of them have complied therewith: and it shall be the duty of the said master and commissioner respectively to take out rules against those

who may be in default, so as to enforce the due execution of the orders and decrees of the court on that subject.

April 23d, 1811.

When the defendant is out of the limits of the state, and an order is taken out for him to plead, answer or demur, or that the bill be taken pro confesso, the defendant appearing in person or by his attorney before the expiration of the time contained in the said order, shall be at liberty to move at chambers, before any one of the judges, and giving four days notice thereof to the complainant or his attorney, for a dissolution of the said order.

Henry Wm. Desaussure,
Theodore Gaillard,
Thomas Waties,
William D. James,
Waddy Thompson.

March 26th, 1814.

ACTS OF THE LEGISLATURE,

ESTABLISHING, ORGANIZING, REGULATING, OR GIVING AUTHORITY TO THE COURT OF CHANCERY

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1 Desaus. *65

*An act to establish a Court of Chancery in the province of South Carolina.—Passed the 9th September, 1721.

The first section authorizes and empowers the governor and the majority of the council, for the time being, "to hold a court of chancery, and to have, exercise, and use the same jurisdiction, power and authority, in granting and issuing forth all original and remedial writs, and other process whatsoever, and in hearing, adjudging and determining all causes and suits in equity, in as full and ample a manner as any chancellor, or court or courts of chancery, in America, can, may or ought to do."[1]

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*II. And be it further enacted, That all writs and process issuing out of the said courts of chancery, (except such writs as are herein after excepted,) shall be signed by the register of the same court, and shall be granted of course by the said register to any person or persons whatsoever, who shall apply for the same, such persons paying the fees allowed by law for such writs and process.

III. And be it further enacted, That no injunction for staying suits at law, or for staying execution, shall at any time hereafter be granted out of the court of chancery of course, or by surprise, but upon the bill of complaint being first filed in the said court, and two days notice at least given by the party complainant, to the adverse party, his or her counsel or solicitor, in writing, that he intends to move the said court for such injunction, expressing in the said notice in writing, the place where and the time when he intends to move for the same, to the intent that the adverse party may have due notice, and attend to oppose the granting such injunction, if he shall see fit.

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*IV. And whereas the parties do often obtain injunctions upon notorious, false, and

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[1] It is not clear from this act what power was intended to be vested in this court, in relation to the issuing of original writs and other process. It was probably intended that the powers and duties of the court should correspond to the high court of chancery in England. But in that court there are two distinct tribunals: the one ordinary, being a court of common law; and the other extraordinary, being a court of equity. The jurisdiction of the ordinary legal court extends (among other things) to the fabrication and emission of original writs. This is the officina justitiæ, always open for any one who may have occasion for a writ of any description that may suit his case, and which is demandable ex debito justitiæ, as a matter of right. These writs were, in ancient times, kept in a hamper; hence it was called the hanaper office.—See 3 Bl. Com. ch. 4.

If the practice of issuing writs out of chancery, whereon to ground proceedings at law, ever existed in this country, it appears not to have continued long; and the circuit court act of 1769, and other subsequent acts, have totally abolished it.

With respect to the hearing and determining of causes, the power of the court does not appear to be very certain or determinate. It is not easy to ascertain in what manner, or in what cases the chancellors, or courts of chancery in America, exercised, or might, or ought to have exercised equitable and other powers, in the year 1721.

It has never been determined in this state, whether the courts of equity have jurisdiction to repeal letters patent, or original grants, by scire facias. This is a branch of the royal

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prerogative which belonged *formerly to the grand justiciar. The scire facias was returnable to the officina brevium et cartarum regiarum, because the patents of the crown were there registered.—See Forum Romanum of Ch. Baron Gilbert, 21.

The chancellor, who was anciently the king's chaplain, and keeper of his conscience, as well as a keeper of the records of all grants, was well acquainted (as he is still supposed to be) with the reasons and suggestions on which all grants issued: and if there was any deception practised, or false suggestion made, he was competent to inquire into it, and to cancel the grant if he thought proper.

The scire facias is sometimes returnable to the king's bench, when the question depends on an issue of fact to be tried by a jury.—See 3 Bl. Com. 261. 5 Com. Dig. 282. Dyer 197. 4 Inst. 72.

In the case of Mounce v. Ingram and others, decided in the constitutional court of appeals at Columbia, in April, 1802, the plaintiff in an action to try the titles to a tract of land, claimed under an original grant, which by mistake, and through the fraud of a third person, had been post dated. The grant ought to have issued and borne date in 1785, but the person, who had fraudulently obtained a copy of the plat annexed to the grant, and had procured the same to be certified, &c. interposed a caveat, by which the issuing of the grant was delayed; and in the mean time, he surreptitiously obtained another grant for the same land, dated prior to the date of the plaintiff's, which afterwards issued in 1786. The caveat was never prosecuted: and when the plaintiff's grant was issued, instead of dating it at the time when it would

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have been dated, *had no caveat been interposed, (which was the usual and correct practice,) it was dated at the time it issued, or was delivered to the grantee, in consequence of the caveator's failing to follow up and support his caveat. All this could have been established by satisfactory evidence; but the court, at the trial of the cause, refused to admit any proof

groundless suggestions in the bill of complaint set forth; for the prevention of such abuses, be it enacted, that the party complainant, or his or her solicitor, shall make oath (if required) that he or she believes the allegations in his or her bill of complaint, for obtaining injunctions, to be true.

V. (The first part of this section repealed by act of assembly of 1784.)—"No injunction whatsoever shall continue in force any longer than till the sitting of the next court, after the party defendant shall have put in his answer to the bill of complaint, unless the court shall see cause to continue the same. Provided, That nothing in this act be construed or deemed to extend to injunctions for staying of waste, but that all injunctions for staying of waste be granted of course, on affidavit made before the master of the same court, that the party praying such injunction hath been three years in the quiet and peaceable possession of the lands, where such waste shall be said to be committed."

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*VI. (The first part of this section altered by the 7th section of the act of assembly of 1784. The remainder not now applicable.)

VII. VIII & IX. (Obsolete, and new provisions made by subsequent acts.)

X. And be it further enacted, That the said court shall proceed, adjudge and determine in all causes brought into the said court, as near as may be according to the known and established rules of his majesty's high court of chancery in South Britain.

XI. (Repeals all former acts of the legislature relative to the court of chancery in the province of South Carolina.)

Extract from an act of 17th February, 1746.

"Be it enacted, That the master of the said court, (chancery) for the time being, shall have power to hear all motions of course, and make orders thereon."

An act for establishing a Court of Chancery. —Passed 21st March, 1784.

Whereas by the constitution or form of government, it is declared, that the lieutenant-governor of the state, and a majority of the privy council, for the time being, shall, until otherwise altered by the Legislature, exercise the powers of a court of chancery: And whereas many inconveniences arise from so frequent a rotation of the members who compose the said court, as is required by the constitution in the office of privy counsellors:

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*I. Be it therefore enacted, That from and immediately after passing this act, the power and authority of the court of chancery, as established by the constitution or form of government of this state, on the 19th day of March, A. D. 1778, shall cease and determine.

II. The court of chancery shall in future consist of three judges, to be chosen by joint ballot of the senate and house of representatives, and commissioned by his excellency the governor, during good behaviour, removeable nevertheless on the address of both houses of assembly.

III. Every person elected and commissioned as aforesaid, before he shall enter upon the duties of his office, shall take and subscribe the oath of fidelity to the state; and shall also take the following oath of office, which the governor or commander in chief is hereby directed to administer, to wit:

I A. B. do swear that I will well and truly serve the people of this state, in the office of judge of the court of chancery, and that I will do equal right to all manner of people, great and small, high and low, rich and poor, according to equity and good conscience, and the laws and usages of South Carolina, without respect of persons, according to the best of my knowledge, skill and abilities.—So help me God.

And if any person shall presume to execute the said office without being qualified as this act directs, he shall forfeit and pay the sum of 10,000*l.* sterling, to be applied to the use of the state, and which shall be sued for and recovered by the governor or commander in chief for the time, ex officio.

IV. All the powers and authorities which

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to impeach the validity or sufficiency of the grant under which the defendants claimed, or for the purpose of giving a priority to that under which the plaintiff claimed. On appeal to the judges at their sittings at Columbia after the conclusion of the circuit courts, it was contended on the part of the plaintiff, 1st, That the courts of equity had no power to examine the matter in question, and decide thereon by way of scire facias, as the lord chancellor in England may: and, 2d, That the courts of common pleas were competent to examine and try the validity of patents, or original grants, in all cases where the matter comes fairly in issue before them in the ordinary course of justice, in suits between party and party, according to the established rules of evidence, and the principles of the common law. And it was attempted to be shewn that this had been frequently done in the law courts of England and the United States; and for this purpose the following cases and authorities were quoted: 10 Co. 109, Legat's case. 1 Co. 41, the case of Alton Woods. Barwick's case, 5 Co. 94. The king v. Pasmore, 3 Durnf. and East's Rep. 212. White v. Jones, 1 Wash. 117. Haywood's Rep. 135, 375, 129, and Tarrant v. Terry, 1 Bay 238.

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*But the whole court refused the application for a new trial: and although no opinion was expressed with respect to the propriety of an application to a court of equity for relief, yet it was understood it was the opinion of a majority of the judges that that was the proper tribunal to grant it. The court decided on the ground that parole evidence was inadmissible, to impeach the validity of a grant under the great seal.

have been at any time vested in, or exercised by a court of chancery in this state, for the purpose of making such rules and orders as may be thought expedient and necessary for carrying on the proceedings in the said court, either before or since the revolution, shall be, and they are hereby vested in, or they may be exercised by the said judges, or any two of them. And the said judges, or any two of them, are hereby fully authorized and empowered to hear and finally to determine, all such matters and causes, as shall from time to time be brought before the said court.

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*V. The said judges, or any two of them, shall have full power and authority to establish such standing rules and orders, (not repugnant to this act,) for regulating the practice of the said court, as they shall deem most consistent with justice and equity, and as may effectually tend to the dispatch of business, without unnecessary delay to suitors.

VI. [2]No suit or petition in chancery, on which a decree or dismission has not been yet obtained, shall be considered as dismissed, or discontinued, for any past delay of prosecution; but that all suits and petitions shall be deemed to be pending in the court hereby established, and to be, now, in the same state as they were in when the last proceeding was had thereon; and every such suit or petition shall be finally determined, within one year from and after the passing of this act; and every petition or suit which shall be hereafter preferred to, or instituted in the said court, shall be finally decided within one year after the same shall have been preferred or commenced, unless upon application, in full and open court, in termtime, and for special reasons, to be assigned on account of the absence of material witnesses, or of some of the parties, or any other equitable cause, the court shall think proper to extend the time (not exceeding [3]twelve months longer) for the determination of the suit.

VII. The said court shall be considered as always open for administering justice to suitors, and in the vacation, any one of the said judges may make such rules and orders preparatory to hearing in any suit or cause depending in the said court, as may be necessary.

VIII. The stated terms for holding the said court, and for the full and solemn hearing of causes, shall be on every second Monday in March, June, September, and on every third Monday in December; and the said court shall sit at the said terms, de die in diem, (Sundays excepted,) at the place where the courts of common pleas are usually held in Charleston, until all the causes ready for

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hearing, *(and which shall be set down, or entered for hearing, with the register of the said court, ten days previous to the first day of each term,) shall be heard.

IX. And whereas the obliging a complainant seeking relief from a verdict or judgment at law, to deposit the sum for which such verdict or judgment was obtained, before an injunction can issue to stay execution, although his prayer is manifestly founded in equity, hath been, and would be attended with much inconvenience to suitors, and, in many instances, may amount to a denial of justice.

Be it therefore enacted, That a party applying for an injunction to stay proceedings in an action at law, or judgment, or execution, or the levying of execution, shall be entitled to such injunction, on making oath, or giving his affirmation, (according to the form of his profession,) to the truth of his bill, and giving bond to the plaintiff at law, with security to be approved by the master in chancery, for such sum, and with such condition as the court shall direct, if upon the merits of the motion for such injunction (of which motion due notice shall always be given to the adverse party) the complainant shall appear from the equity stated in his bill, to be entitled to an injunction.

X. And there shall be a register of the said court, to be appointed by the governor, with the advice of the privy council, and commissioned during good behaviour.

XI. The sheriff of the district in which the party against whom any process of the said court issues resides, or the estate to be affected thereby lies, shall execute and make a proper return of all such process, writs of subpœna only excepted.

XII. If in any suit in the said court, a defendant, against whom a process shall issue, shall not cause an appearance to be entered thereupon, as it ought to have been, if such process had been duly served, and affidavit shall be made, to the satisfaction of the court, that such defendant is without the limits of this state, or that, on enquiry at his or her usual place of abode, he or she could not be found to be served with such process, the said court may make a rule, or order, di-

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recting and ap*pointing such defendant to appear at a certain day, therein to be mentioned; and a copy of such order shall, within ten days after making thereof, be inserted in the South Carolina Gazette, and continued for three months; and another copy thereof pasted up at a door of the statehouse in Charleston; and, if the defendant shall not appear within the time limited by such order, on proof made, to the satisfaction of the said court, of the publication thereof, as aforesaid, the court may order the complainant's bill to be taken pro confesso,

[2] See 2d section of act of assembly of 16th March, 1783.

[3] See last section of act of assembly of 7th March, 1789, to continue judicial proceedings.

and make such decree thereon, as to the said court shall appear just and equitable, and issue the process necessary to enforce the execution, or compel the performance of the said decree, the complainant first giving sufficient security, in such sum as the court shall think proper, to abide such order as may be made on the defendant's appearing to the suit, and paying such costs to the complainant as the court shall order.

Provided, That if any person against whom such decree shall be made, or his or her legal representative, shall within four years after passing the said decree, if without the limits of the United States, and within two years if absent from this and within the United States, appear in court, and petition to be heard, with respect to the matter of such decree, and shall pay down, or give security for payment of such costs as the court shall think proper, the person so petitioning shall be admitted to answer, plead, or demur to the bill, and such proceedings shall be thereupon had in the said suit, as there might have been in case the party had originally appeared, and as if no former order, or decree, had been made in the said cause.

XIII. If neither the person against whom such decree shall be made, or his legal representative, shall appear, and petition for a rehearing, and pay, or give security for payment of such costs, within the time abovementioned, such decree shall stand absolutely confirmed against the person against whom it was made, his legal representatives, and all claiming under him. But if such defendant shall be in custody at the time a decree shall be made, upon refusal or neglect to en-

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ter appearance, or to *appoint an attorney as aforesaid, or shall be forthcoming so as to be served with a copy of the decree before any process shall issue to compel the performance thereof; and if such defendant shall die in custody before such copy is served on him or her, then the heir at law, if any real estate be affected thereby, or if only personal estate, the executors or administrators shall be served with such copy within six months after such death; or if the heir, executor, or administrator, be out of the state, then the said decree to be published in the South Carolina Gazette, and also posted up at the front door of the state-house in Charleston, for three weeks previous to further proceedings.

XIV. If any person brought into the said court, on process issued therefrom, shall refuse or neglect to enter an appearance, according to the rules of the court, the court may appoint a solicitor to enter an appearance for such defendant, and thereupon such proceedings shall be had in the said cause, as if the party had actually appeared.

XV. Each of the said judges shall be allowed a salary of five hundred pounds sterling per annum, payable quarterly at the treasury of this state, in lieu of all fees and perquisites of office whatsoever.

An act for the more speedy and effectual enforcing the execution of decrees in the Court of Chancery.—Passed 12th March, 1785.

Whereas the present mode of enforcing obedience to decrees in the court of chancery is tedious and often defective: Be it therefore enacted, That in all cases where payment of money is decreed by the said court, it shall be lawful for the party to whom such payment is to be made, to sue forth (at his option) either the usual process for compelling performance of the said decree, or a writ, in nature of a fieri facias, to make the estate both real and personal of the party by whom such money is to be paid, liable to satisfaction thereof, in the same manner

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as it is on *such a writ from the court of common pleas, and that the sheriff of the district in which the estate levied upon lies, shall have the same power and authority to sell and convey the same, as he hath on a fieri facias from the court of common pleas, and be entitled to the like fees for the execution thereof.

Extract from an act of the legislature, passed on the 7th March, 1789.

Whereas, by an act for establishing a court of chancery, it is enacted, that every petition or suit, preferred to, or instituted in the said court, shall be finally decided within one year after the same shall have been preferred or commenced, unless upon application in full and open court, in term time, and for special reasons to be assigned on account of the absence of material witnesses, or of some of the parties, or any other equitable cause, the court shall think proper to extend the time (not exceeding twelve months longer) for the determination of the suit: and whereas, it has been found, that the time limited by the said act, for the duration of suits, is too short, and productive of inconvenience and expense, when one of the parties or witnesses are very remote from this state:—Be it therefore enacted, that the said court shall have full power on application in term time, and for special reasons to be assigned on account of the absence of material witnesses, or of some of the parties, or any other equitable cause, to extend the time, for the determination of such suit or petition (not exceeding twelve months longer) than the time allowed by the recited act.

An act to establish a Court of Equity within this state.—Ratified on 19th February, 1791.

Whereas by the constitution of this state it is declared, that the judicial power shall be vested in such superior and inferior courts of law and equity as the legislature shall, from time to time, direct and establish: and

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where*as it is expedient that a court of equity, with adequate powers, be established in this state:

I. Be it therefore enacted by the honourable the senate and house of representatives, now met and sitting in general assembly, and by the authority of the same, That the laws now of force for establishing and regulating the court of chancery within this state, be and they are hereby declared to be and continue of force in this state, until altered or repealed by the legislature thereof; subject, nevertheless, to such alterations, amendments and restrictions as are herein after directed.

And whereas great inconveniencies have been experienced in the remote parts of the state, on account of the court of chancery having been hitherto held in one part of the state only: in remedy thereof,

II. Be it enacted, That all future sittings of the court of equity, for the full and solemn hearing of causes, shall be held at the times and places herein after directed; that is to say, at Columbia for all causes wherein the defendant shall reside in Camden, Orangeburgh or Cheraw districts, on the fifteenth days of May and December; at Cambridge for all causes wherein the defendant shall reside in the district of Ninety-six, on the fifth days of May and December; and at Charleston for all causes wherein the defendant shall reside in either of the districts of Charleston, Beaufort or Georgetown, on the second Monday in March, on the second Monday in June, and the third Monday in September; and the same days in every succeeding year; and that the court shall continue to sit from day to day (Sundays excepted) at Columbia and Cambridge respectively, until all the causes which shall be brought before them shall be heard; provided the time of their sitting shall not exceed six days at each place; and at Charleston till all the business ready for the said court shall be heard.

And whereas it will be conducive to the more perfect investigation of the truth that the testimony of witnesses be taken in open court, in presence of the parties:

III. Be it therefore enacted by the authority aforesaid, That the examination of all

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witnesses who may be called *upon to give evidence in the said court, shall be taken by word of mouth, and in open court, subject to such regulations and exceptions as the said court may, from time to time, order and direct.

IV. And be it further enacted by the authority aforesaid, That the master of the court of equity for the district of Charleston, Georgetown and Beaufort, shall give good and sufficient security, to be approved of by the governor or commander in chief for the time being, for the faithful discharge of his duty, in the sum of five thousand pounds sterling; which said bond, and any other bond, to be given by the commissioners to be appointed by virtue of this act, shall be deposited in the office of the secretary of the state, and be liable to be sued on by any party aggrieved by the misfeasance or default of the said master or any of the said commissioners respectively.

V. And be it enacted by the authority aforesaid, That there shall be, in each and every of the districts aforesaid, one commissioner, who shall be commissioned and appointed by the governor or commander in chief for the time being, during good behaviour, and who shall give security, to be approved by the governor, in the sum of one thousand pounds, well and faithfully to administer his office; whose business it shall be to file and keep all bills, answers and papers whatever, relating to any cause depending in any of the said districts respectively; swear and examine all witnesses, where necessary or ordered by the court, upon interrogatories and cross interrogatories, who may be brought before any of them, touching any matter or thing depending, or to be commenced in any of the said several and respective districts; swear defendants to answers; take recognizances and affidavits, and to do and perform all other matters and things, which are usually done either by the master or register of the said court, previous to the hearing of any cause. Provided always, That where it may be necessary to examine aged, sick, or infirm persons: or witnesses out of the state, then and in every such case it shall and may be lawful for the said court to issue out one or more commission or commissions to examine the said wit-

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nesses *upon interrogatories, whose depositions, when taken, shall be read in evidence in any of the districts within this state.

VI. And be it further enacted by the authority aforesaid, That the said commissioners in their said several and respective districts, shall attend at the sitting of every court to be held in and for the said several districts, and shall there take and enter down the decrees, orders and minutes thereof, and make up and report upon all matters and things referred to them in the said court; and shall also make all sales under the decree of said court.

VII. And be it further enacted by the authority aforesaid, That the said commissioners respectively shall be entitled to receive

for their services aforesaid, the same fees, perquisites and emoluments as are or may be fixed and established by law for the master or register of said court for similar services.

And whereas, in cases under the value of one hundred pounds, and in cases which may not be litigated, it may be unnecessary to proceed by bill and answer in the said court:

VIII. Be it therefore enacted by the authority aforesaid, That in all such cases it shall and may be lawful for the parties complaining to present his or their petition to the said court, on oath, setting forth the true nature of the case, or sum really due; a copy of which said petition shall be served on the opposite party, at least thirty days before the sitting of the court, with notice thereon to appear on a certain day in court, in order to answer, if necessary, the contents of said petition: and if the party so served with a copy of said petition, shall not appear at the time and place in the said notice mentioned, or if appearing, shall not offer some substantial defence, then the said court shall proceed to make such order or decree therein as to justice and equity shall appertain. Provided always, That if the defendant or defendants should appear at the return of said petition, and shew sufficient reasons to the said court, on oath, for going into a more ample investigation of the case, then and in every such case, the said parties

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shall and may be at liberty to go *into the examination of witnesses to prove and substantiate their respective allegations, as in other cases.

IX. And be it further enacted by the authority aforesaid, That the judges of the said court are hereby authorized and required to make and establish all such rules, orders and regulations as may be necessary for the better and more effectually carrying into execution the terms of this act, for the benefit of the citizens of this state.

X. And be it further enacted by the authority aforesaid, That it shall and may be lawful for any one of the judges of the said court to hear all motions, and to make all orders necessary in any cause previous to the hearing and making the final decree.

XI. And be it further enacted by the authority aforesaid, That the judges shall cause the principal facts and reasons on which they found their decree in each cause to appear upon record.

XII. And be it further enacted by the authority aforesaid, That suits in equity shall not be sustained in any case where plain and adequate remedy can be had at common law.

XIII. And be it further enacted by the authority aforesaid, That all suitors and defendants in the court of equity may do their own business without application to any counsellor or solicitor of the court.

XIV. And be it further enacted by the authority aforesaid, That each and every of the judges of the court of equity shall ride the circuit, unless prevented by sickness or unavoidable accident.

Extract from an act for establishing the annual Salaries of the Public Officers of Government, and for ascertaining and regulating the fees to be taken by those who by law may be entitled to them, throughout the state.—Ratified 19th February, 1791.

Whereas it is expedient and necessary that the salaries of the public officers of government should be fixed upon a regular and permanent footing, during their continuance in office; and that the fees to be received and

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ta*ken in the public offices and by those who by law shall be entitled to the same, may be regulated and ascertained, to the end the citizens thereof may know with certainty the sums they are to pay, and the services to be performed for such payment:

I. Be it therefore enacted by the honourable the senate and house of representatives, now met and sitting in general assembly, and by the authority of the same, That from and after the fifth day of April next, the annual salaries herein after specified and enumerated, and no others, shall be paid, taken and received by the public officers of government herein after mentioned, in lieu of all other sum and sums of money whatever; any law, usage or custom to the contrary thereof in any manner notwithstanding.—(The salaries are then enumerated.)

II. And be it further enacted by the authority aforesaid, That the several and respective fees herein after mentioned, and no others, shall be paid, received and taken in the respective public offices in this state, and by those entitled to fees throughout the same, for the different services in the respective suits in this act specified and contained, in lieu of all other demands whatever for said services; any law, usage or custom to the contrary thereof in any wise notwithstanding.

FEES IN EQUITY.

Master and Commissioners in Equity.

	l.	*s.*	*d.*
For every summons		1	9
For every copy of a charge or discharge		1	
Taking every affidavit in writing		1	6
For every oath administered			6
Taking every recognizance		2	
For every day's attendance in court on any cause		3	6
Taking the oaths for every defendant, to answer out of office, and attendance		5	
Every attendance in office, on summons of either party, or their solicitors		3	6
Hearing and determining any contested matter, and order thereon		5	

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	l.	s.	d.
*Making up and returning every report into court, but only one report to be charged in each suit		14	
Commissions on sales under decrees of the court, three per cent. for the first hundred, and one per cent. on all sums above.			
Drawing each set of conveyances	1	5	

REGISTER, AND COMMISSIONERS IN EQUITY.

For affixing the seal of the court to subpœna, or other writ, and signing the same		2	6
For affidavit of service of subpœna, or other writ		2	6
For examining every witness, drawing depositions, exemplifications of proceedings in any cause, if required, containing minutes of a decree, all orders of court, or for copies thereof, per copy sheet of ninety words			5
For every search			8
For entering every cause for hearing		1	
For attending court in each cause		3	6
Reading all papers in a suit		2	
Examining decree, affixing seal thereto, and attending the judges in court to sign certificates of examination		4	
Notification to insert in gazette, by order of court, and attendance on printer		1	6
For affixing every seal, and signing every commission to take answers and examine witnesses, or for other purposes		2	6

SOLICITOR IN EQUITY.

Complainant's Solicitor.

Preparing and filing a bill in equity, with all necessary exhibits	7		
Drawing interrogatories in chief for complainant's witnesses, and cross interrogatories, drawing and engrossing commissions, and attending to strike commissioners, where necessary, with proper instructions	3	10	
Arguing exceptions on points of law before the master or judge at chambers when necessary, *and attending thereon, including all charges incidental thereto	2		
For all other services in the cause, including briefs served on judges, except the decree	3		
Drawing and engrossing decree, per copy sheet			5

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Defendant's Solicitor.

For preparing and filing defendant's answer, and all necessary exhibits	7		
Drawing interrogatories in chief for defendant's witnesses, drawing and engrossing cross interrogatories, commissions, attending to strike commissioners where necessary, with instructions	3	10	
Arguing exceptions on points of law before the master or judges at chambers, when necessary, including notices, attendance, and all incidental charges relative thereto	2		
For all other services in the cause, including serving judges with briefs, and except the decree	3		
Drawing and engrossing decree, per copy sheet			5

III. And be it further enacted by the authority aforesaid, That if any of the public officers of this state, or other person or persons entitled to fees by this act, and in the foregoing lists particularly mentioned, shall take or receive any further, other or greater fee or reward for any of the services in the said foregoing lists respectively mentioned, or shall invent or contrive any other or further fee or reward for any of the said services, then, and in every such case, the person or persons so offending, upon due proof and conviction, shall forfeit for the first offence, four times the amount of the sum so taken, paid or received, to be recovered in any court of record in this state; one half to be paid to the person who shall sue for the same, and the other moiety to be paid into the public treasury for the use of the state, except in such counties where county courts are established, in which cases the said last mentioned moiety shall be paid for

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the use of the county; *and for the second offence, shall stand divested of his office, and be rendered incapable of re-appointment to the same; and on information from the court, under hand and seal, the governor shall fill up the vacancy, if the legislature should not be sitting; and if in the county courts, the vacancies shall be filled up by the justices of the said county.

IV. And be it further enacted by the authority aforesaid, That the following officers, to wit, the secretary of state, register and commissioners in equity, register of mesne conveyances, ordinaries and surveyor-general, shall, and they are hereby directed to keep their several offices open from nine o'clock in the morning until three o'clock in the afternoon, each and every day throughout the year, (Sundays, Christmas day, and the anniversary of the independence of America excepted;) and the sheriffs, and the clerks of all courts, are hereby obliged to give constant attendance at their offices, either by themselves or deputies, in their several and respective offices; which said offices shall be kept in the city, town or village, where the respective court-houses are established. And no person shall be compellable to pay any of the aforesaid fees, unless at the time of demand, or before distress of goods is made, an account thereof shall be delivered, signed by the officer to whom the same is due, specifying distinctly every article in words at length, with the particular fee charged for it, and shall give a receipt for the same, if required.

V. And be it further enacted by the authority aforesaid, That the several clerks and registers of the courts of justice, and sheriffs, throughout the state, shall collect in and receive their own fees from the different suitors or persons who are liable to pay the same in the said courts of justice respectively; except where the plaintiffs or complainants in any suit shall reside in foreign countries, or without the limits of this state; in which

case the agents or attornies of the said plaintiffs or complainants shall be answerable for the payment of said fees; except the clerks of county courts, whose fees shall be collected as heretofore.

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*VI. And be it further enacted by the authority aforesaid, That all former and other acts for regulating or establishing salaries and fees throughout this state, or in the districts or counties thereof, and every of them, shall be, and the same are hereby repealed. And this act shall be held, deemed and taken as and for a public act, and taken notice of as such without pleading the same, by all judges, justices, magistrates and courts of justice, within this state.

VII. And be it further enacted by the authority aforesaid, That this act shall be and continue in force for the term of four years, and from thence to the end of the next meeting and sitting of the legislature.—(Since extended.)

Extract from an act for the abolition of the rights of primogeniture, and for the giving an equitable distribution of the real estate of intestates, and for other purposes therein mentioned.—Passed 19th February, 1791.

Be it enacted by the honourable the senate and house of representatives, now met and sitting in general assembly, and by the authority of the same, That from and after the first day of May next, it shall and may be lawful to and for any person who may be entitled to a distributive share of any estate, real or personal, and shall have arrived to the age of twenty-one years, or be married, to apply by petition to the court of equity or common pleas, (at the option of the party) for a writ of partition, to be directed to certain commissioners, authorizing and requiring them to divide the said estate; and the court shall thereupon issue a writ of partition in the same manner as is directed for the admeasurement of dower, by an act, entitled, "An act for the more easy and expeditious obtaining the admeasurement of dower to widows, of the lands of which their deceased husbands were seized in fee at any time during their marriage." And the commissioners so to be appointed, being first duly sworn, fairly and impartially to discharge their duty, shall proceed to execute the said writ, and return the same to the court. And

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when the *said estate cannot, in the opinion of the commissioners, be fairly and equally divided between the parties interested therein, without manifest injury to them, or some or one of them, then they shall make a special return of the whole property, and the value thereof truly appraised, and certify their opinion to the court whether it will be most for the benefit of all parties, to deliver over to one or more of the parties interested therein the property which cannot be fairly divided, upon the payment of a sum of money, to be assessed by the said commissioners, or to sell the same at public auction; and the court shall proceed to consider and determine the same: And if it shall appear to the court that it will be for the benefit of all parties interested in the said estate, that the same should be vested in one or more persons entitled to a portion of the same, on the payment of a sum of money, they shall determine accordingly; and the said person or persons, on the payment of the consideration money, shall be vested with the estate so adjudged to them as fully and absolutely as the ancestor was vested. But if it shall appear to the court that it would be more for the interest of the parties that the same should be sold, then they shall direct a sale to be made on such a credit and on such terms as to them shall seem right, and the property so sold, shall stand pledged for the payment of the purchase money.

And be it further enacted by the authority aforesaid, That the judges of the respective courts shall be, and they are hereby authorized from time to time to make such rules and orders as may be necessary for the purpose of carrying the foregoing clause into effect.

And be it further enacted by the authority aforesaid, That this act shall commence its operation on the first day of May next, but not sooner.

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*Extract from an act for establishing an easier and cheaper mode of recovering money secured by mortgage on real estates, and barring the equity of redemption, and for other purposes.—Ratified 19th February, 1791.

Whereas mortgages are generally meant merely as securities for debts, and no actual estate is intended to be conveyed by the mortgagor to the mortgagee; but the mortgaged estate is intended, and ought to be considered only as a pledge for the payment of the principal and interest due on the debt meant to be secured. And whereas, the present mode of foreclosing mortgages of real estates is tedious and expensive, and the right of the mortgagor to his equity of redemption is, in the present mode of exercising that right, attended with inconvenience: Now for the easier and speedier advancement of justice, in obtaining the payment of debts secured by mortgage, and for ascertaining when the equity of redemption of the mortgagor shall be barred:

I. Be it enacted by the honourable the

senate and house of representatives, now met and sitting in general assembly, and by the authority of the same, That on judgment being obtained in the court of common pleas on any bond, note or debt, secured by mortgage of real estate, it shall and may be lawful for the judges of the court of common pleas, in case of any judgment having been obtained subsequent to the property's being mortgaged, and prior to the obtaining judgment in the action hereby allowed to be commenced, to order the sale of the mortgaged property for the satisfaction of the monies secured by the said mortgage, and to give a reasonable extension of the time when the sale is to take place, not exceeding the term of six months from the judgment; and also to give a reasonable credit on the sale of the mortgaged premises, not exceeding the term of twelve months from the sale; and the mortgagor shall be forever barred and foreclosed by such sale from his equity of redemption in as complete a manner as if the same had been foreclosed in a court of chancery; any law, usage or custom to the contrary thereof in any wise notwithstanding:

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Provided always, That if at any *time before such sale, the mortgagor shall tender to, or pay into the hands of the plaintiff, or his agent or attorney, or to the sheriff, all the principal money and interest meant to be secured by such mortgage, and also all the costs of the suit, the sale shall not take place, but the mortgagee shall enter satisfaction on the said mortgage, and the mortgaged premises shall be for ever exempt from the said mortgage.

II. And be it further enacted by the authority aforesaid, That no mortgagee shall be entitled to maintain any possessory action for the real estate mortgaged, even after the time allotted for the payment of the money secured by mortgage is elapsed, but the mortgagor shall be still deemed owner of the land, and the mortgagee as owner of the money lent or due, and shall be entitled to recover satisfaction for the same out of the land in the manner above set forth. Provided always, That nothing herein contained shall extend to any suit or action now pending, or when the mortgagor shall be out of possession, nor to contravene in any way, the ordinance, entitled, "An ordinance to encourage subjects of foreign states to lend money at interest on real estates within this state, nor to deprive any person or persons of any right which he, she or they may have at the time of passing this act.

III. And be it further enacted by the authority aforesaid, That where the same lands are mortgaged at divers times, the debts meant to be secured by such mortgages shall be paid in the order the same are recorded agreeably to law, and in no other order; any law, usage or custom to the contrary thereof in any wise notwithstanding.

Extract from an additional act to the act entitled "An act to establish a Court of Equity within this state," passed the 19th February, 1791.—Ratified 20th December, 1791.

(The first section alters the regulations for the times of the sitting of the court of equity, which have been since changed.)

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*II. Be it enacted by the honourable the senate and house of representatives, now met and sitting in general assembly, and by the authority of the same, That whenever any person shall be dissatisfied with a judgment at law, and shall think himself relievable in equity, he may, at any time within forty days after the adjournment of the court at which such judgment was obtained, give notice by himself or his attorney, in writing, to the sheriff of the district with whom execution may be lodged, that he means to file his bill in the court of equity, praying for a writ of injunction, and shall annex thereto an affidavit of such intent; and such sheriff, on being served with such notice and affidavit within the said time, whereof he shall make true entry in his books, shall be bound, on receiving security as herein after prescribed, to stay further proceedings on such execution. Provided the said notice and affidavit be served on him before actual sale of the property; and in cases where levies shall have been made on any movable property, the complainant, on giving bond to the sheriff, with two good sureties to be approved by him, subject to the future approbation of the court, in a sum equal to double the real value of the property so levied on, and conditioned to return in good order to such sheriff, the whole of the said property, if the complainant does not procure from the court of equity, and cause to be served on him, a writ of injunction within thirty days from the date of such bond, shall be entitled to receive back and retain all such moveable property; and the said complainant shall be bound to proceed to file his bill and apply for an injunction, according to the rules and practice of the court of equity, within twenty days after giving such bond to said sheriff; and if no writ of injunction issuing out of the court of equity be served on said sheriff within thirty days after his taking said bond, commanding him to stay proceeding in said suit at law, he shall then proceed to seize and again take into his possession said property; and sell the same under the said execution, after giving the legal notice; and if the said complainant shall not forthwith surrender and deliver up such property, the said sheriff shall assign the said bond to the

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plain*tiff in the suit at law, who may commence suit thereon and proceed to recover from the said defendant at law and his securities, the amount of the penalty of the

said bond with costs of suit, in which suits no imparlance shall be allowed.

Extract from an act entitled "An act to enable the circuit court of Georgetown to meet," &c. and for the better advancement of justice in the courts of law and equity, &c.—Ratified 21st December, 1793.

V. Whereas the act entitled, "An act to establish a court of equity within this state," directs that the said court shall sit at Columbia for all causes where the defendant shall reside in Camden, Orangeburgh and Cheraw districts; at Cambridge, for all causes where the defendant shall reside in the district of Ninety-six; and at Charleston, where the defendant shall reside in either of the districts of Charleston, Beaufort or Georgetown; but the said act makes no provision for the trial of causes where there are two or more defendants, some residing in districts ranged under one of said courts, and some in districts ranged under another:

Be it enacted by the honourable the senate and house of representatives, now met and sitting in general assembly, and by the authority of the same, That where there are several defendants, residing in different districts, ranged under different courts, the complainant shall commence and pursue his proceedings in that court which takes cognizance over the districts in which the greatest number of defendants shall reside; but where an equal number of the defendants reside in districts ranged under different courts, the complainant may elect in which of such courts he will commence his proceedings; and the judges of the said court of equity shall and may make all proper and necessary rules for carrying the intention of this clause into effect.

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*An act to enable trustees to surrender their trusts in the manner therein mentioned. —Ratified the 19th December, 1796.

Whereas doubts exist whether the court of equity have power to permit trustees to resign their trusts, with the consent of the parties entitled to the use of the trust estate, and to substitute other persons to support the trusts:

Be it therefore enacted by the honourable the senate and house of representatives, now met and sitting in general assembly, and by the authority of the same, That in every case of a trust estate, where the person or persons entitled to the use of any property or estate, vested in trust, being of age, or his, her or their guardian, if under age, may be willing to have other trustees substituted, in the room of those in whom the legal estate is vested, or to have any one or more trustees substituted in the room of any one or more of the first or former trustees, the court of equity shall be, and they are hereby authorized to permit such one or more of the first or former trustees, to surrender his, her or their trust, and to appoint such one or more trustees, in his, her or their room, as to the court of equity may appear fit, proper and advisable; and the trustee or trustees so appointed and substituted, shall then be considered to all intents and purposes, as vested completely and absolutely with all the estate, right, title, interest, powers, privileges and authority, and as liable to all the conditions, terms and restrictions as that trustee or those trustees were vested with or liable to, in whose stead, room or place, he, she or they may be so appointed or substituted: and the first or former trustee or trustees, shall be therefrom completely exonerated and discharged. Provided always, That a certificate of such appointment and substitution shall be endorsed by the register or commissioner in equity, upon the original trust deed, if the trust be created by deed, and the deed can be found, and that such a certificate shall be annexed to the original will, if the trust be created by will, and be lodged therewith, in the office where the will may be lodged, and that such a certificate shall also be re-

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corded in the secretary's *office, or other office wherever the deed or will may be recorded or lodged, or ought to be recorded or lodged.

Extracts from an act, entitled "An act supplementary to an act, entitled an act to establish an uniform and more convenient system of judicature."—Ratified the 21st December, 1799.

(The first twenty-three sections have no relation to the court of equity.)

XXIV. Be it enacted by the honourable the senate and house of representatives, now met and sitting in general assembly, and by authority of the same, That so much of an act passed the twentieth December, in the year of our Lord one thousand seven hundred and ninety-one, as relates to the times and places of holding the courts of equity for Charleston, Columbia and Cambridge, be, and the same is hereby repealed.

(The twenty-fifth section regulates the times of the sittings of the court of equity, which are since altered.)

XXVI. And be it further enacted by the authority aforesaid, That the sheriffs of the districts within the respective limits of which said courts shall be held, are enjoined and required to execute, or cause to be executed by his lawful deputies, all process from the court of equity in the several districts belonging to its jurisdiction as aforesaid; and that he shall attend, or cause his lawful deputy so to do, the said court of equity during the time of its sitting; that two of the said

chancellors shall attend at each court of equity hereby established.

XXVII. And be it enacted by the authority aforesaid, That all causes of equitable cognizance, arising within any of the districts of this state, shall be tried and determined in the jurisdiction or circuits herein before described and marked out, and that commissioners in equity and registers shall be appointed for each of the said equity circuits or districts, in the manner prescribed by an act passed on the nineteenth day of February, one thousand seven hundred and ninety-one, entitled, "An act to establish a court of equity in this state."

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*(The subsequent clauses of this act not applicable to the court of equity.)

An act for the better arrangement of the sittings of the Courts of Equity; for the establishment of a Court of Appeals for the same, and for other purposes therein mentioned.—Passed the 15th December, 1808.

Be it enacted by the honourable the senate and house of representatives, now met and sitting in general assembly, and by the authority of the same, That the state shall be divided into three circuits for the court of equity, to wit: the southern, the northern and the western; that the present common pleas districts of Charleston, Colleton, and Beaufort, united, shall form the southern circuit of the court of equity; that the present common pleas districts of Georgetown, Horry, Marion, Williamsburgh, Darlington, Marlborough, Chesterfield, Lancaster, Kershaw, Sumter, Fairfield, Richland and Lexington, united, shall form the northern circuit of the court of equity; and the present common pleas districts of Orangeburgh, Barnwell, Edgefield, Abbeville, Pendleton, Greenville, Spartanburgh, Union, York, Chester, Laurens, and Newberry, united, shall form the western circuit of the court of equity.

And be it further enacted by the authority aforesaid, That the districts of Charleston, Colleton, and Beaufort, united shall form one equity district, to be called Charleston district, the courts for which shall sit at Charleston court-house on the third Monday of February and the first Monday of November in every year; that the districts of Georgetown, Horry, Marion, and Williamsburgh, united, shall form one other equity district, to be called Georgetown district; and the districts of Orangeburgh and Barnwell, united, shall form one other equity district, to be called Orangeburgh district; the courts of Georgetown and Orangeburgh districts shall be held at Georgetown and Orangeburgh court-houses on the first Mondays of February and June in every year; that the districts of Darlington, Marlborough and Chesterfield, united,

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shall *form one other equity district, to be called Cheraw district; and the districts of Edgefield, Abbeville and Pendleton, united, shall form one other equity district, to be called Ninety-six district: the courts of Cheraw and Ninety-six shall be held at Cheraw and Abbeville court-houses on the second Mondays of February and June in every year; that the districts of Lancaster, Kershaw, and Sumter, united, shall form one other equity district, to be called Camden district; and the districts of Greenville, Laurens and Newberry, united, shall form one other equity district, to be called Washington district: the courts for the districts of Camden and Washington shall be held at Kershaw and Laurens court-houses on the third Mondays of February and June in every year; that the districts of Fairfield, Richland and Lexington, united, shall form one other equity district, to be called Columbia district; and the districts of Spartanburgh, Union, York, and Chester, shall form one other equity district, to be called Pinckney district: the courts for Columbia and Pinckney districts shall be held at Richland and Union court-houses on the fourth Mondays of February and June in every year.

And be it further enacted by the authority aforesaid, That one of the judges of the court of equity is hereby authorized and required to attend at the several times and places above mentioned, and to hold the courts of equity for the several districts hereby established; and that the orders and decrees of the said judges, in all cases wherein appeals shall not be made to the courts of appeals hereinafter established, shall have the same effect with decrees sanctioned by the courts of appeal.

And be it further enacted by the authority aforesaid, That a court of appeal for the court of equity, shall be, and the same is hereby established; which said court shall exercise appellate jurisdiction in all cases brought up from the circuit, and shall be holden at Charleston court-house for the southern circuit, on the first Monday in January, and on the second Monday in March in every year, and at Richland court-house for the northern and western circuits, on the first Tuesday next after the ending of the common pleas circuits in every spring and

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fall of the *year; and it shall be the duty of all of the judges of the court of equity to attend at the said courts of appeal, and to hear and try all appeals that may be brought up from the circuits hereby annexed to the said courts respectively.

And be it further enacted by the authority aforesaid, That any person who wishes to appeal from any order or decree of any judge presiding on the circuit, shall, before the rising of the court at which such order or decree is made, state in writing, the grounds upon

which he intends to appeal, and deliver the same to the said judge, and serve the opposite party, or his solicitor, with a notice thereto annexed, that he intends to appeal from the said order or decree at the next court of appeals for the said circuit, and that the said appellant shall thereafter be at liberty to move to have copies of all the necessary papers sent up to the court of appeals, and to place his cause upon the docket of the same at any time before the sitting of the court, without being subject to any other rules or forms heretofore adopted.

And be it further enacted by the authority aforesaid, That it shall hereafter be in the power of any one judge in equity, in chambers, to make orders of reference to the master or commissioner, in any cause depending in the court of equity, which is ready for a reference, before the final hearing of the same: Provided the party applying for such reference, shall have given ten days notice to the opposite party, of the time and place, and judge, before whom he means to make a motion for such reference.

And be it further enacted by the authority aforesaid, That it shall be the duty of the judges in equity to make all further rules and regulations which may be necessary to carry this act and all former acts respecting the said court more fully into effect.

And be it further enacted by the authority aforesaid, That all papers appertaining or relating to causes in the court of equity, which have heretofore arisen in those districts by this act comprehended in Columbia district, shall be transferred to the office of the commissioner of the said district; and

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that a commissioner in equity shall *be appointed as heretofore by the governor, for the said district, who shall exercise all the powers of master and register in equity, both for the circuit court and the court of appeals to be holden at Richland court-house, as by this act is directed.

And be it further enacted by the authority aforesaid, That the sheriff of Richland, for the time being, is hereby authorized and required to exercise all the duties of a sheriff in the court of equity, both for the district of Columbia and the court of appeals hereby established at Richland court-house.

And be it further enacted by the authority aforesaid, That in addition to the present number of judges of that court, there shall be elected two judges, who shall be commissioned in the same manner, and perform the same services as the present judges of the said court.

And be it further enacted by the authority aforesaid, That all the judges of the court of equity, who shall be hereafter appointed, shall receive the same salaries as the judges of the courts of common pleas and sessions are at present entitled to receive by law.

And be it further enacted by the authority aforesaid, That all writs of subpœna ad respondendum, issuing out of the said court of equity, shall require the defendant or defendants to appear in the said court on a day certain, and shall also require the defendant or defendants to file his, her or their plea, answer or demurrer, within thirty days next after the day so appointed and expressed in the said writ for his, her or their appearance as aforesaid, and that the said writ shall be served at least ten days before the appearance day therein expressed.

And be it further enacted by the authority aforesaid, That the master or commissioner of the said court, or one of the judges in chambers, shall have power, on good cause shewn on oath, to extend the said time to plead, answer or demur, for such period as shall be deemed necessary: Provided the same does not extend beyond the time appointed for docketing the causes for the next court in the district where the cause may be depending in which such order for extension is made.

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*And be it further enacted by the authority aforesaid, That in case the said defendant or defendants shall not file his, her or their plea, answer or demurrer, within the time limited as aforesaid, for the same to be filed, that the register or commissioner of the court where the cause may be depending, shall, at the expiration of the said time, grant an order that the bill shall be taken pro confesso; and unless the said order shall be set aside as hereinafter directed, the court shall make such decree therein as to the said court shall appear just and equitable, and issue the process necessary to enforce the extenuation or compel the performance of the said decree.

And be it further enacted by the authority aforesaid, That whenever an order shall be granted as aforesaid, that the bill shall be taken pro confesso, the court shall have power, on application of the defendant or defendants, to set aside the same on such terms as the said court may prescribe.

And be it further enacted by the authority aforesaid, That whenever there shall be granted as aforesaid, an order that the bill shall be taken pro confesso, on application of the complainant or his solicitor, stating that the answer of the defendant or defendants is necessary to enable the court to pronounce their final decree, the commissioner or register shall issue an attachment against the said defendant or defendants, to compel such answer in the usual form; and that no previous rule, requiring the said defendant or defendants to shew cause why such attachment should not issue, shall be necessary.

And be it further enacted by the authority aforesaid, That the master of the court of equity shall, in all cases arising or pending within the equity district of Charleston aforesaid, have the same power and authority

as a judge at chambers, to grant order for writs of ne exeat and attachment, in all cases of practice, and that the commissioners in equity, in the several other districts, shall, in all cases arising or pending within their respective districts, have power to issue writs of ne exeat and attachments, in all like cases, without any previous order, upon such evidence and under such circumstances

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as *would authorize a judge at chambers to make orders therefor.

And be it further enacted by the authority aforesaid, That all acts or parts of acts, usages and customs repugnant to this act, be, and the same are hereby repealed.

And be it further enacted by the authority aforesaid, That from and immediately after the passing of this act, there shall be no other or higher fees taken in any suit in the court of equity than the following, viz.

Master and commissioner in equity's fees.—For every summons, thirty-seven and a half cents; taking every affidavit in writing, twenty-five cents; for every oath administered, six and a quarter cents; taking every recognizance, forty cents; taking the oaths for every defendant to answer, out of office, and attendance, one dollar; for every attendance in office on a reference by order of court, on the summons of either party, or their solicitors, seventy-five cents; hearing and determining any contested matter, or order thereon, other than by order of reference, one dollar; making up and returning every report into court, but only one report to be charged in each suit, three dollars; commissions on sales under decrees of the court, two and a half per cent. for the first hundred, and one per cent. on all sums above; for drawing each set of conveyances, five dollars.

Register and commissioner in equity's fees.—For affixing the seal of the court to subpœna or other writ, and signing the same, twenty-five cents; for affidavit of service of subpœna or other writ, twenty-five cents; for examining witnesses and taking down their depositions, nine cents per copy sheet; exemplifications of proceedings in any cause, if required, nine cents per copy sheet; for all other office copies, if required, nine cents per copy sheet; a copy sheet to consist of ninety words; for every search, twelve and a half cents; but not more than one dollar for all searches which may be necessary in any cause; for entering every cause for hearing, twelve and a half cents; examining decree, affixing seal thereto, and attending the judges in court to sign certificates of exami-

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nation, one dollar; notifications to *insert in gazette by order of court, and attendance on printer, thirty-one and one quarter cents; for affixing every seal, and signing every commission to take answers and examine witnesses, or for other purposes, fifty cents.

Solicitors' Fees in Equity,—Complainant's Solicitor.—Preparing and filing a bill in equity, with all necessary exhibits, twenty dollars; drawing interrogatories in chief for complainant's witnesses, and cross interrogatories, drawing and engrossing commissions, and attending to strike commissioners where necessary, with proper instructions, ten dollars; arguing exceptions on points of law, before the master, or judge at chambers, where necessary, and attending thereon, including all charges incidental thereto, five dollars; for making and serving the briefs on the circuit judge, five dollars; and on the judges of appeal, ten dollars; drawing and engrossing decree, per copy sheet of ninety words, nine cents.

Defendant's Solicitor.—For preparing and filing defendant's answer, and all necessary exhibits, twenty dollars; drawing interrogatories in chief for defendant's witnesses, drawing and engrossing cross interrogatories and commissions, attending to strike commissioners, attending where necessary with instructions, ten dollars; arguing exceptions on points of law, before the master, or judges at chambers, when necessary, including notices, attendance, and all incidental charges relative thereto, five dollars; for making and serving briefs on the circuit judge, five dollars; and on the judges of appeal, ten dollars; drawing and engrossing decree, per copy sheet of ninety words, nine cents; for drawing and presenting any petition, and all exhibits which may relate thereto, and briefs if necessary, ten dollars.

And be it enacted by the authority aforesaid, That the foregoing list of fees shall be, and the same is hereby established by law; and that if any of the officers therein mentioned, shall take or receive any or greater reward for the services therein mentioned, or shall invent or contrive any other or further fee or reward for any of the said services, with intent to evade this law, then and in every such case, the person or persons so offending,

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upon due *proof and conviction, shall forfeit and pay the sum of two hundred dollars for each and every such offence, one half to the informer, and the other half to the state.

And be it enacted, That no charge shall be allowed for copies not actually granted.

Extracts from an act to vest in the Court of Common Pleas, the powers appertaining to and exercised by the Courts of Equity, as to the appointment of guardians, so far as may relate to the rights of minors in any estate to be divided under the act passed in the year of our Lord 1791, and for other purposes.—Passed 17th December, 1808.

Whereas by an act entitled, an act for the abolition of the rights of primogeniture, for giving an equal distribution of the real estates of intestates, and for other purposes

therein mentioned, passed the nineteenth day of February, in the year of our Lord one thousand seven hundred and ninety one, the estate of intestates may be divided by an application to the court of common pleas: And whereas the rights of minors are often involved in such divisions, and no sufficient powers vested in the said courts of common pleas to protect the said rights of minors:

Be it therefore enacted by the honourable the senate and house of representatives, now met and sitting in general assembly, and by the authority of the same, That all the power and authority appertaining to and exercised by the court of equity, as to the appointment of guardians of the persons and estates of minors, be, and the same is hereby vested in the judges of the courts of common pleas, or either of them, holding such court, as far as the rights of minors may be concerned in any real or personal property, to be divided under the said act of assembly, passed on the nineteenth day of February, in the year of our Lord one thousand seven hundred and ninety one; as well as all other acts, relative to the partition of estates, real or personal, together with all other powers necessary for carrying into effect the above recited act; any law, usage or custom to the contrary notwithstanding.

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*II. And be it further enacted by the authority aforesaid, That whenever it shall be necessary to bring any prisoner into court, as a witness in any case, it shall be lawful for the presiding judge to order such prisoner to be brought into court, without the necessity of a writ of habeas corpus; and when the said prisoner shall have given his evidence, to cause him to be remanded to the custody of the officer to whose keeping he shall have been originally committed; any law, usage or custom to the contrary thereof in any wise notwithstanding.

III. And be it further enacted by the authority aforesaid, That the judges of the court of common pleas shall be, and they are hereby declared, in all cases of idiocy or lunacy which may hereafter occur, to be vested with jurisdiction concurrent with that exercised in like cases by the judges of the court of equity; and the judges of the several circuit courts of this state, be, and they are hereby declared to be vested with the like powers and authority which the judges of the court of equity, by law, or by the style, usage and practice of the court of equity, now have and exercise, either as to inquiring into the lunacy or idiocy of any lunatic or idiot, or as to the appointment of guardians of the person or property of such lunatic or idiot, according to the usage and practice of the court of equity in like cases.

V. And be it further enacted by the authority aforesaid, That in all cases which may hereafter arise, or be now depending, wherein the rights of the state may be involved, it shall be the duty of the persons claiming under the state, to call on the attorney-general or solicitors, in their respective districts, to defend the right of the state; on failure whereof, the record of such case shall not be adduced as evidence to substantiate any claim against the state.

VII. And be it enacted by the authority aforesaid, That it shall in future be the duty of the sheriff to serve all writs of subpœna which may be delivered to them for service, and that they shall be entitled to receive the same fees therefore as for the service of summary processes, and mileage on each ticket.

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*An act establishing a Court of Equity in and for the district of Beaufort, and for other purposes.—Passed the 19th December, 1810.

Whereas sundry inhabitants of Beaufort district have, by their petition to the legislature, represented the great inconveniences they suffer from their remote situation from the court of equity:

I. Be it enacted by the honourable the senate and house of representatives, now met and sitting in general assembly, and by the authority of the same, That from and after the passing of this act, the district of Beaufort shall constitute an equity district, in the southern equity circuit.

II. And be it further enacted by the authority aforesaid, That one of the judges of the court of equity is hereby authorized and required to attend and to hold a court of equity at Coosawhatchie court-house, on the last Monday of January and May in each year, for the trial of all causes of equitable cognizance arising within the district, subject to the same rules and regulations that the courts of equity in other districts in this state are by law subject to: Provided nevertheless, that the said court shall not continue its sittings longer than six days at any one time.

III. And be it further enacted by the authority aforesaid, That a commissioner in equity, having all the powers, and being liable to perform all the duties of a master and register in equity, be immediately appointed by the governor, who shall give bond with two sureties, to be approved of by the governor, in the sum of four hundred dollars, for the faithful performance of the duties of his office.

IV. And be it further enacted by the authority aforesaid, That the sheriff of Beaufort district for the time being, is hereby authorized and required, to attend upon the said court, and to exercise all the duties of a sheriff in the court of equity.

V. And be it further enacted by the authority aforesaid, That all suits which have arisen in Beaufort district, and been commenced in the court of equity in Charleston,

and all papers appertaining or relating there-

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to, shall be *transferred to the office of the commissioner in equity for Beaufort district.

VI. And be it further enacted by the authority aforesaid, That the first court to be holden under this act, shall be holden on the last Monday in May next.

And whereas doubts have been expressed whether the court of equity can continue any cause in the said court for a longer time than three years, even with the consent of the parties:

VIII. Be it therefore enacted, That the said court of equity may, and they are hereby authorized to continue any cause depending in the said court for a longer term than three years, by consent of the said parties; and without such consent, on good and sufficient cause shewn, in any case where there shall have been pronounced any decretal order within the term of three years from the time of filing the bill.

X. And be it further enacted by the authority aforesaid, That the courts of equity and appeals shall be holden in Charleston, at the times following, instead of the times now established by law, that is to say: the court of equity to sit on the third Monday in February, and the court of appeals on the second Monday in March; any law to the contrary hereof notwithstanding.

XI. And be it further enacted by the authority aforesaid, That all acts or parts of acts repugnant to this act, be, and the same are hereby repealed.

Extracts of an act for regulating the courts held by the associate judges of this state, at the conclusion of their respective circuits, and of the courts of appeals held by the judges of the court of equity within this state, and for other purposes therein mentioned.—Passed December, 1811.

Whereas, in and by an act of the general assembly of this state, passed on the fifteenth day of December, one thousand eight hundred and eight, entitled, "An act for the arrangement of the sitting of the courts of

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equity, *for the establishment of a court of appeals for the same," &c. such courts of appeals have been established, to be holden at Charleston court-house and at Richland court-house. And it is thereby declared to be the duty of all the judges of the court of equity, to attend at the said courts of appeal, and to hear and to try all appeals that may be brought up to the said courts respectively; but that the suitors of the said courts of equity, and others, may know the grounds and reasons whereon the decision of the said courts of appeals shall be made:

IV. Be it enacted by the honourable the senate and house of representatives, now met and sitting in general assembly, and by the authority of the same, That the grounds and reasons on which the decisions on those appeals respectively shall be made by the said judges, shall be given and subscribed by them in writing, and shall be recorded at Charleston, by the register of the court of equity there, who shall also be register of the court of appeals so as aforesaid directed to be held at Charleston court-house; and at Columbia, by the commissioner of the court of equity for Columbia district, who shall also be register of the court of appeals, so as aforesaid directed to be held at Richland court-house, and who shall respectively keep proper books for that purpose, which shall be indexed in such a manner that the decisions therein recorded, shall be promptly and readily come at; which books shall be furnished at the public expense, and belong to the public as the property thereof; and the registers of the said courts of appeal, shall be entitled to fees for their services therein, which shall be regulated as near as may be by the fees allowed for similar services to the register and commissioner of the courts of equity.

And whereas, by the act of the general assembly last aforesaid, the court of equity for Charleston district was directed to be held at Charleston court-house, on the third Monday in February, and the first Monday in November in every year; and the court of appeals was directed to be held there on the first Monday in January, and on the second Monday in March in every year. But by an act, entitled, "An act establishing a

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court of equity *for the district of Beaufort," &c. passed on the nineteenth day of December, one thousand eight hundred and ten, it is enacted, that the courts of equity and appeal shall be holden in Charleston, at the times following, instead of the times theretofore established by law, that is to say: the court of equity to sit on the third Monday in February, and the court of appeals on the second Monday in March; and as it is manifestly an error as to the last mentioned regulation:

V. Be it therefore enacted, That the said regulations, as far as respects the times of the sitting of the said courts, be hereby repealed, and that hereafter the court of equity for Charleston district shall be held at Charleston court-house aforesaid, on the third Monday in February, and on the second Monday in November in every year; and that the said court of appeals shall be held there on the first Monday in January, and on the second Monday in March in every year; the said law, or any other law, to the contrary thereof in any wise notwithstanding.

An act for appointing an additional commissioner in equity, for the court of equity in Charleston, and for other purposes therein mentioned.—Passed December, 1813.

Whereas much inconvenience has arisen to the suitors and others in the court of equity of Charleston district, by reason of the great increase of business in that court, and of there being but one master of the same; and whereas the business of the said court is greatly impeded thereby:

Be it enacted by the senate and house of representatives, now met in general assembly, That a commissioner in equity shall be appointed, who, as well as the present master, shall exercise all the powers and authorities of, and perform all the duties incident to the office of the said master, and be entitled to receive for his services the same fees and compensations as are allowed by law to the master of the said court: and the said commissioner in equity shall give

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the same security for the faithful dis*charge of his duty as is now required to be given by the master in equity for Charleston.

And be it further enacted by the authority aforesaid, That the judge presiding in the said court shall be, and he is hereby authorized to apportion the business of the said court now performed by the master, between the said master and commissioner, in such manner as shall appear to him most proper to expedite the same and best promote the interest of the said suitors and others, in the said court: Provided always, that when the parties interested shall agree to refer their business either to the master or commissioner aforesaid, as they may choose, on application being made to the judge aforesaid, he shall be and is hereby required to permit them so to do, unless he should for some substantial reason think it expedient to refuse such permission.

And be it further enacted by the authority aforesaid, That in case of any clashing or interference between the master and commissioner in equity in the exercise of the powers, and in the performance of the duties of their respective offices, the judges of the said court shall be, and they are hereby authorized to make such rules and regulations as shall prevent the same in future, and shall be necessary to carry into effect this act, and the purposes intended thereby.

And be it further enacted by the authority aforesaid, That all registers and commissioners in equity who are or shall hereafter be appointed, shall respectively execute a bond with good and sufficient securities to the state of South Carolina, in the sum of twenty thousand dollars, for the faithful performance of the duties of their respective offices of registers and commissioners in equity, and that such bonds shall be taken in the several districts throughout this state by the commissioners appointed to take bonds and securities from the sheriffs of the several districts of this state, which said bonds shall be transmitted and deposited as heretofore directed by law.

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*An act to establish a Court of Equity for Edgefield district. Passed 21st December, 1814.

Be it enacted by the honourable the senate and house of representatives, now met and sitting in general assembly, and by the authority of the same, That hereafter there shall be held by some one of the judges of the courts of equity, at Edgefield court-house, for Edgefield district, on the first Monday of February and June in each year, a court of equity, to hear and determine all causes and matters cognizable in a court of equity, and which may arise in said district; which said court of equity shall continue to sit one week, if necessary to finish the business of the same; and the said court of equity so established, shall exercise all the powers and jurisdiction now exercised by the courts of equity of this state.

And it be further enacted by the authority aforesaid, That a commissioner in equity for the said district of Edgefield, shall be appointed in the same manner as other commissioners in equity are by law appointed, and he shall be required to give the same security, perform the same duties, and exercise the same powers; and that immediately after said appointment, he shall receive from the commissioner in equity for Ninety-six district, all papers and records which may relate to any business or suits already commenced or determined, wherein the parties defendants are resident in the said district of Edgefield; and it shall be the duty of the said commissioner of Ninety-six district, to deliver all and every such paper or record accordingly.

And it be further enacted by the authority aforesaid, That the sheriff of Edgefield district, for the time being, shall attend the courts of equity in said district, and shall have the same powers, and perform the same duties, as the sheriffs of other districts wherein courts of equity are already established.

And be it further enacted by the authority aforesaid, That the commissioners in equity, except the commissioner in equity of Cheraw district, shall keep their respective offices at

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the town or village where such courts *shall be held, on Tuesday and Friday in each and every week. And should any commissioner in equity neglect to attend at their respective offices on the days aforementioned in each and every week, he shall forfeit and pay to the clerk of the board of commissioners of the poor, for the use of the poor

in the district in which he shall reside, the sum of five dollars; to be recovered by complaint and proof thereof made before any justice of the quorum, according to the rules of common law, which fines and forfeitures shall not be recovered if the commissioner shall make it appear to the satisfaction of the justice that such neglect was in consequence of indisposition or other unavoidable accident.

Extract from an act entitled an act to postpone the meeting of the Court of Appeals at Columbia, &c. &c.—Passed 15th December, 1815.

Be it enacted, That the fall meeting of the court of appeals in equity in Columbia, shall hereafter be held at Columbia on the second Tuesday next after the ending of the common pleas circuits in November, instead of the first Tuesday, as heretofore, so as to enable the judge who holds the circuit court of equity in Charleston to prolong the sitting of the said court in November, until the period hereby required by law for the meeting of the court of appeals in Columbia.

Extract of an act entitled, an act for the prevention of frivolous appeals.—Ratified 13th December, 1815.

Be it enacted, That on any appeal to be made from the decision of any circuit court of law or equity within this state, if the decision shall be against the appellant, or he shall withdraw his appeal, interest on the amount recovered shall be allowed, at the rate of seven per cent. from the day the verdict or decree was given, to the time when such appeal shall be dismissed or withdrawn.

And be it further enacted, That the amount of the interest hereby allowed, shall be endorsed on the back of the execution, and collected by the sheriff with the original debt.

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

COURT OF CHANCERY IN THE STATE OF SOUTH CAROLINA

FROM SEPTEMBER, 1784

1 Desaus. *107

*The first sitting of the court of chancery, erected by the act of the legislature, of the 21st day of March, 1784, was at Charleston, on the 14th day of June, 1784, and was continued for several days successively. There were present the three judges who had been then recently elected by the legislature—John Rutledge, Richard Hutson and John Mathews: Alexander Moultrie, attorney general; William Hasell Gibbes, master in equity; and William Fraser, register.

Many petitions were presented, and much business of course was transacted, but no causes were heard, and no decisions made, which involved any principle of importance.

Present—John Rutledge, Richard Hutson, and John Mathews.

Many petitions were presented, and much business of course transacted. Many important causes were brought on, in some of which orders of reference to the master were made, with instructions to guide him; and in others decretal orders were made establishing and deciding the rights of the parties litigating. But decretal orders were at that time made without stating in writing the reasons of the court or the grounds of the decision: so that little information can be drawn from a number of the earlier cases. But the various applications made to the justice of the court, and the orders made

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upon them, are well *calculated to shew the nature of the business brought into the court, as well as the mode of transacting it: and the knowledge of which will, it is supposed, be useful to young practitioners.

1 Desaus. 108

Case. I.

In the case of HUNTER and Others v. BOYKIN.

(September, 1784.)

[*Judgment* ⇦416.]

[Where a judgment was recovered upon a contract made during the Revolutionary War, chancery restrained the plaintiff from enforcing the judgment, in order to give the defendant the benefit of the act for the depreciation of the paper currency.]

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 787; Dec. Dig. ⇦416.]

This was a bill filed by the complainant to obtain an injunction against a judgment at law, which Boykin had recovered against the complainants, on a contract made during the revolutionary war, when the paper money, then in circulation, was greatly depreciated. The legislature had passed an act, on the 16th March, 1783, entitled, "An ordinance for settling a depreciation table."† By this act it was ordained, that the table of depreciation, annexed to the act, stating the progressive depreciation of the paper currency monthly, from the month of May 1777, to the month of May 1780, should "be the rule for the determination of all differences which may arise on any contracts which have been made in this state, by any private persons, and which still subsist." And that "in the settlement of the depreciation on such contracts, the value of the money shall be fixed at the time the contract was made, and not at the time the contract was to have been fulfilled."

To prevent the enforcement of the judgment at law, on the nominal amount of the debt, and to have the benefit of the depreciation act, was the object of the bill of the complainant.

Upon the hearing of the case, the court ordered, "that the debt in this case be liquidated by the master according to the table of depreciation, and that on payment of the balance of the debt and costs at law, and of this suit, the defendant Boykin acknowledge satisfaction on the judgment obtained by him against the complainants."††

† Public Laws, p. 325, 326.

†† Although the depreciation act speaks only of contracts, it was extended by construction, and upon the reason of the thing, to legacies, and all other transactions arising during the progress of the depreciation of the paper currency: and payments made during depreciation were also reduced by the scale established by

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law. In the case of Ro*berts v. the executors of

Cattell, the complainant sought by his bill the payment of a legacy bequeathed to him by the will of William Cattell. A large payment had been made to the complainant Roberts, on the legacy, during the time of depreciation. In the settlement, the court ordered that the sum so paid should be reduced by the scale of depreciation. The debts and credits in executors' accounts were also subjected to the scale of depreciation.—See the case of De Brahm & others v. the executors of Fenwicke. Register's book, No. 1, p. 20.

1 Desaus. *109

*Case II.

Present—Judges Rutledge, Hutson, and Mathews.

DINCKLE and Wife v. TIMROD and Others.

(December, 1784.)

[*Partition* ⇐=39.]

[Chancery has jurisdiction to decree a partition of land.]

[Ed. Note. For other cases, see Partition, Cent. Dig. § 93; Dec. Dig. ⇐=39.]

[*Partition* ⇐=77.]

[Cited in Pell v. Ball, 1 Rich. Eq. 387; Chalmers v. Jones, 23 S. C. 469; Holley v. Glover, 36 S. C. 419, 15 S. E. 605, 16 L. R. A. 776, 31 Am. St. Rep. 883, to the point that the court of chancery has power to order a sale of land in partition.]

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 211; Dec. Dig. ⇐=77.]

Bill and answers read with exhibits, whereupon ordered that the country lands be divided by commissioners, or any three of them, into five equal parts or shares, for the benefit of the children of Michael Muckenfuss, and the representatives of his son Andrew: and that the lands in Charleston be sold by the master after six weeks public notice on a credit of two years, (subject to the claim of Catharine Friend) on interest, and security to be approved by the master, for the benefit of the complainant, and the other children of the said Michael Muckenfuss. †

† It will be seen by this case, that the partition of real estates, is within the jurisdiction of the court of equity in South Carolina. And the power of ordering sales, where a division cannot be made advantageously, or where the land is unproductive to the children, is of very great importance in a country where landed property is held by almost every man, and is transferred from hand to hand, with the facility of personal estate; and which is very frequently uncultivated, and unproductive of any immediate revenue, though of increasing value.

1 Desaus. 109

Case III.

JOHN GLAZE v. CHARLES and JOHN DRAYTON.

(December, 1784.)

[*Specific Performance* ⇐=24.]

Decree for specific performance against the representatives of one of the contracting parties.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 55; Dec. Dig. ⇐=24.]

The object of complainant's bill was to obtain specific performance of a contract for the purchase of land, made by him with William Henry Drayton, the father of the defendant John, who was his heir at law, and the brother of defendant Charles, who was his administrator. The decretal order of the court is as follows:

Bill and answer read, whereupon ordered, that the defendant John Drayton execute ti-

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tles in fee simple to the *complainant, for the land in bill mentioned, on his paying to defendant Charles, as administrator of said William H. Drayton, interest from the 26th January, 1782, on the balance of the purchase money of the said land, and giving bond with security to be approved by the master for payment of the said balance and remaining interest, by instalments, at the times mentioned in the acts of assembly respecting the recovery of old debts; † and that the defendant's costs be paid by complainant; and that the said minor (John Drayton) have six months after coming of age, to shew cause against the decree.

† The legislature, in consideration of the distressed state of the country, after the war, had passed an act, preventing the immediate recovery of debts, and fixing certain periods for the payment of debts, far beyond the periods fixed by the contract of the parties. These interferences with private contracts, became very common with most of the state legislatures, even after the distresses arising from the war had ceased in a great degree. They produced distrust and irritation throughout the community, to such an extent, that new troubles were apprehended; and nothing contributed more to prepare the public mind for giving up a portion of the state sovereignty, and adopting an efficient national government, than these abuses of power by the state legislatures.

1 Desaus. 110

Case IV.

MILLER v. CAPE and Others.

(December, 1784.)

Compensation for dower. Vide post for report.

Bill and answer read, whereupon ordered, that on payment of one hundred and sixty pounds by the complainant to the defendant Mary Miller, an injunction do issue to stay proceedings at law: and that it be referred to the master to state and report the present value of the said Mary Miller's dower in the estate of the said Stephen Miller, and what is a reasonable compensation for her not having hitherto received any satisfaction for the same; and in what shares or proportions respectively the said sums should be rated or charged on the complainant and such of the defendants as in justice and equity are liable to pay the same.

1 Desaus. *111

*Case V.

Mrs. MILLER v. Executors of MILLER and Others.

(December, 1784.)

Vide ante. Allowance for dower, in money, with interest.

[Ed. Note.—Cited in Gibson v. Marshall, 5 Rich. Eq. 260.]

The master's report was read, whereupon ordered, that the master's report be confirmed, and that the executors pay the seventy pounds sterling, assessed (as dower) with interest from the 23d November, 1783, in March next. That the defendants, Bernard Beckman and Thomas Harvey pay one-third of the money assessed on the respective sums due by them, with interest, and give bond with security for the remainder, payable the first day of January, 1786, with interest: And that the executors do pay all the costs at law and in equity.

1 Desaus. 111

Case VI.

DE BRAHM and Others v. Executors of FENWICK.

(December, 1784.)

[*Wills* ⟸826.]

The court ordered estates devised to a son, to be sold, to pay legacies charged on it; and to reimburse estate for property taken away by the legatee and devisee.

[Ed. Note.—Cited in Williams v. McCardell, 14 S. C. 222.

For other cases, see Wills, Cent. Dig. §§ 2128–2138; Dec. Dig. ⟸826.]

Ordered that the master's report be confirmed, except in the following particulars. Several unimportant particulars are stated in the order, but there were two of a peculiar kind which merit notice. The testator had left a large estate, and a numerous family, consisting of a widow and many children, some of whom were adults, and some of them minors. During the troubles and confusion of the war, Thomas and Edward Fenwick, two of the testator's sons and legatees, had taken and removed some of the negroes of the estate, and appropriated and disposed of them to their own use. They then went and remained out of the jurisdiction of the court.

Upon this part of the case the court ordered, "that so much of Thomas Fenwick's estate (under his father's will) be sold as will be sufficient to satisfy the proportion that is to be raised out of it to pay the portions of his sisters, charged on it by their father's will, and to compensate the loss the estate of the testator has sustained by negroes and other property taken away by him. Ordered that the master do enquire and ascertain the loss the estate has met with by Edward Fenwick's having taken away some of the negroes, and other property belonging to the said estate, and report thereon next March."

1 Desaus. *112

*Case VII.

CLARKE v. TODD.—Vide post.

(December, 1784.)

Issue directed to try a fact.

Bill and answer read, with exhibits, and counsel heard on both sides: Whereupon ordered, that the honourable judges of the court of common pleas be requested to direct a jury of merchants to be impannelled to ascertain whether John Todd did ship from Bermuda in the year 1781, on board a ship the British Grenadier, captain Cheney, any and what quantity of rum; and whether said John Todd did consign any and what part thereof to defendant, S. Clarke, at Charleston; and that said judges be requested to certify the verdict of said jury in the premises to this court.

1 Desaus. 112

Case VIII.

Present—Chancellors Rutledge, Hutson, and Mathews.

TODD v. CLARKE.

(December, 1784.)

Decree for an account according to the finding of the jury.

On reading the certificate from the justices of the court of common pleas, ordered, that it be referred to the master to state and report the account between complainant and defendant, charging complainant with the nett proceeds of the goods, sold by him for defendant, and charging the defendant with the value of the rum shipped to him by complainant, as found by the verdict on the issue at law, which was directed by the court.

1 Desaus. 112

Case IX.

In the case of the master's report, HAIG and Others v. THE COMMISSIONERS OF CONFISCATED ESTATES.

(December, 1784.)

[*Judicial Sales* ⟸28.]

Attachment for non-compliance with terms of sale.

[Ed. Note.—Cited in Pope v. Frazee, 5 S. C. 271.

For other cases, see Judicial Sales, Cent. Dig. § 55; Dec. Dig. ⟸28.]

[*Judicial Sales* ⟸28.]

[Cited in Peake v. Young, 40 S. C. 55, 18 S. E. 237, to the point that a purchaser may be

ordered to show cause why he has not complied with the terms of a judicial sale.]

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 55; Dec. Dig. ⇐28.]

It was ordered, (a rule having been before taken out,) that an attachment do peremptorily issue against James Neilson, unless the term of sale are complied with in three weeks from this time.

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1 Desaus. 112

Case X.

BROWN and Wife v. Executors of WILLIAM CATTELL.

(December, 1784.)

[*Executors and Administrators* ⇐295.]

Order for payment of legacies, on giving bond to refund.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1187; Dec. Dig. ⇐295.]

Ordered, that the master's report be confirmed, and that the executors assign to the

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complainant, in right of *his wife, (who was the widow and legatee of the testator,) bonds to the amount of £8775 1s. 10d. and that the complainant give bond with security to be approved by the master to refund in proportion to the legacies bequeathed to his wife by the will of the late William Cattell, in case other debts against the estate shall hereafter appear; and for the payment of £3000 on the death of the wife, (given to her for life,) to the executors of the said William Cattell: That the costs of this suit be paid by the said executors out of the assets in their hands.†

† In this case the court was induced to authorize the payment of large legacies before the debts of the testator were paid, or fully known. The estate was known by all concerned to be very large, and no apprehensions were entertained by the executors, the counsel, or by the court, that the estate would be unable to pay its debts, after the large appropriation of its funds for legacies. But from various causes this actually happened; and it furnishes a strong caution, never to sanction the division of an estate, or the payment of legacies, till the debts are paid or completely secured.

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1 Desaus. 113

Case XI.

ANONYMOUS.

(March, 1785.)

Decree ordering a settlement; and protecting wife in living apart.

[*Husband and Wife* ⇐12.]

[At the suit of a wife, her husband was ordered to give bond to keep the peace, and also to settle on her, subject to her disposition, certain property descended to her, and to allow her children free access to her when she should wish to see them.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 58; Dec. Dig. ⇐12.]

"Ordered, that the defendant enter into recognizance to the master for £1000 with two sureties for £500 each, for keeping the peace towards the complainant (his wife;) and that the defendant be enjoined from proceeding at law against any person for receiving or entertaining her. That the estate which devolved to complainant on the death of her brother, be settled by defendant to the use of complainant and her children, and subject to her disposition amongst them; and that the defendant execute the necessary deeds before the master for conveying the same to ———— as trustees, for the purpose aforesaid: That it be referred to the master to examine into the value of the estate which defendant obtained on marriage with complainant, and of the defendant's estate, and to report thereon: That the complainant have free access to her children; that they be allowed to visit her when she shall desire to see them; and that in case of their sickness, she may have the care of them

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until their *recovery: That the parties may apply by petition from time to time for further or other directions; and that all the costs of this suit be paid by the defendant."†

† Many members of the bar were dissatisfied with some parts of this decree. It was alleged to have trenched too deeply on the marital rights: And as there had been no settlement at the time of the marriage, it was supposed to have gone too far in ordering a settlement to the extent, and in the unqualified manner which the decree did; including all the property acquired by the marriage, as well as what descended to the wife on the death of the brother, without making any provision for the husband or his creditors.

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1 Desaus. 114

Case XII.

CARMICHAEL v. ABRAHAMS.

(March, 1785.)

[*Judgment* ⇐764.]

[Chancery may create a lien directly by decree for that purpose.]

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1322; Dec. Dig. ⇐764.]

In this case the court under special circumstances, decreed, that "the defendant should have a lien in nature of a mortgage on a house and lot, (of complainants,) for the balance, if any, which might be due him on a settlement of accounts between the parties;" which accounts were referred to the master.—Each party to pay his own costs.

1 Desaus. 114

Case XIII.

DE BRAHM and Others v. Executors of FENWICK.

(March, 1785.)

[*Wills* ⟸821.]

Eldest sons' estates chargeable with daughters' portions.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2114–2119; Dec. Dig. ⟸821.]

[*Improvements* ⟸4.]

One of the son's estate ordered to be sold, without allowance to the purchaser from the son.

[Ed. Note.—For other cases, see Improvements, Cent. Dig. § 14; Dec. Dig. ⟸4.]

The court on considering the master's report in this cause, ordered and decreed, "that the three eldest sons' estates, (devised to them by their father the testator,) should each be chargeable with one of the three eldest daughters' portions: That the remainder of the defendant Thomas's real estates should be sold by the master, giving ——— week's notice: That the lot on the bay devised to Thomas Fenwick, be sold, without any allowance being made to the purchaser of the lot, Jonathan Simpson, for the buildings, which were put up contrary to the express notification of the executor, who gave Mr. Simpson notice that Thomas had no right to dispose of the same.††

†† The testator had devised and bequeathed large estates real and personal to his sons, charging them with legacies to his daughters, which had not been raised. During the confusion of the war, and the occupation of the country by the enemy, Thomas and Edward, two of

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*the sons, had possessed themselves of great part of the estates without consent of the executors, carried off part of the negroes, and sold part of the lands; Thomas sold this lot to Mr. Simpson.

1 Desaus. *115

*Case XIV.

Present—Chancellors Rutledge, Hutson, and Mathews.

Executor of CLIFFORD v. CHARLES CLIFFORD, a Minor.

(June, 1785.)

[*Infants* ⟸33.]

Sale of minor's estate, and compensation for dower.

[Ed. Note.—Cited in Gibson v. Marshall, 5 Rich. Eq. 260.]

For other cases, see Infants, Cent. Dig. § 66; Dec. Dig. ⟸33.]

Bill and answer read, whereupon ordered, that it be referred to the master to enquire whether it will be to the advantage of the minor to sell the land in bill mentioned, in preference to the personal estate: Also to report what will be a compensation to the widow for her dower, and in what manner the monies arising from the sale of the land shall be applied most to the advantage of the minor.

The master afterwards made a report recommending a sale of the land, which was confirmed; and a sale was ordered on a credit—the purchase money was to be paid by five instalments.

1 Desaus. 115

Case XV.

DE BRAHM and Others v. Executors of FENWICK.

(June, 1785.)

[*Wills* ⟸731.]

Devisee restricted from selling his share, until he accounted for property taken away by him.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1793–1800; Dec. Dig. ⟸731.]

The master's report was read, whereupon several orders were made. Amongst others it was ordered, that Edward Fenwick be restrained from disposing of any part of the estate left him by the testator, until he has fully accounted for the negro slaves taken away by him, from the estate, (without the assent of the executors,) and paid the incumbrances (legacies to his sisters) chargeable on his estate by the father's will.

1 Desaus. 115

Case XVI.

Present—Chancellors Rutledge, Hutson, and Mathews.

HAASUM ERNST v. THARON and MULLER.

(June, 1785.)

Master to put money out to interest.

The master's report was read by Gen. C. C. Pinckney, and ordered to be confirmed by consent; and that the balance of money in the hands of the defendant be paid to the master, to be by him put out to interest, on security, subject to the further order of the court.

1 Desaus. *116

*Case XVII.

[Ex parte DRAYTON.]

(September, 1785.)

[*Insane Persons* ⟸12.]

[Upon petition, supported by affidavits, chancery may issue a commission in the nature of a writ de lunatico inquirendo.]

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 20; Dec. Dig. ⟸12.]

A petition signed by W. Drayton and St. Drayton was presented by Mr. Bee, praying that a commission in nature of a writ de lu-

natico enquirendo may issue, to enquire of the lunacy of Thomas Drayton.—Whereupon, on motion of Mr. Bee, and on reading the affidavits of doctor Turnbull, and John Pritchard the goaler, ordered that the commission do issue.

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1 Desaus. 116

Case XVIII.

Present—Chancellors Rutledge, Hutson, and Mathews.

RALPH IZARD v. MIDDLETON, Executor of John Izard.

(March, 1785.)

[*Wills* ⇐58.]

Court refused to decree in favour of an agreement to make mutual wills, for want of sufficient proof.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 164, 165; Dec. Dig. ⇐58.]

[*Frauds, Statute of* ⇐52.]

[Under the provision of the statute, rendering void all contracts not to be performed within one year from the making thereof, unless in writing, signed by the party to be charged, it is not sufficient that the contract may be performed within the year, if the performance depends upon a contingency which does not occur until after the expiration of the year.]

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 79; Dec. Dig. ⇐52.]

[*Frauds, Statute of* ⇐129.]

[Where A. and B. entered into an oral agreement to make mutual wills in favor of each other, it was *held* that a will by A., the survivor, in pursuance of the agreement, was not such a performance as to take the case out of the statute as against B., who died more than a year after making the agreement.]

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 288; Dec. Dig. ⇐129.]

[*Specific Performance* ⇐24.]

[Cited in McKeegan v. O'Neill, 22 S. C. 467, to the point that a contract to make a will may be enforced against the representatives of the party failing to perform.]

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 54, 55; Dec. Dig. ⇐24.]

[Disapproved as to construction of statute of frauds in Turnipseed v. Sierrine, 57 S. C. 559, 577, 35 S. E. 757, 76 Am. St. Rep. 580.]

This cause came on to a hearing on the 23d March, 1785; and on the 2d April following, this entry is made in the register's book, "Ordered, that this bill be dismissed with costs." There are no reasons or grounds of the decree of the court put on record; for it was then the general practice of the court to assign the reasons of their judgment verbally.† But on examination of the papers of the late Chancellor Mathews, a brief of the bill and answer, together with his notes of the argument of counsel, and remarks on the cases cited were found.—That brief is as follows:

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*"The complainant by his bill charges, that in or about the year 1766, he and the late John Izard, Esq. of the state of South Carolina, being young men, and heads of two collateral branches, sprung from one common ancestor, who early settled in this country, entered into the following mutual agreement, viz. that if either of them should die without male issue, he should give and bequeath by will, the sum of five thousand pounds sterling to the survivor, for the purpose of keeping up the name and consequence of the family—but that being a young man, little informed of the formality required by law in such transactions, being likewise nearly related to and acquainted with the said John Izard, and having reliance on his honour and integrity in fulfilling the said agreement, the

† It is greatly to be regretted, that the minutes which remain of this case, which was very ably argued, by the eminent counsel concerned in it, are so imperfect. The evidence appears to be irrecoverably lost. But it seems that the alledged agreement between Mr. Ralph Izard and Mr. John Izard, to make mutual and corresponding wills, was not fully made out by sufficiently positive and legal proof; and that the court did not consider the presumption arising from Mr. Ralph Izard's having made two successive wills conformably to his understanding of a subsisting agreement, sufficient evidence to establish such an agreement, binding on Mr. John Izard. The court therefore, dismissed the bill of complaint.

This curious subject of agreements by two parties, to make mutual wills, in favour of each other, on certain contingencies, has not been often litigated in the courts either of England, or of this country—But some cases have occurred. The learning upon it is collected by Mr. Hargreave, in the 2d vol. of his juridical arguments and collections, from p. 272, 290 to 315. It appears that there is one class of cases in which actions have been brought at law, and have succeeded, for breach of agreements, upon the faith of which a person has made his will, or otherwise settled his affairs in a particular

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manner, or has omitted to *make provisions which otherwise he would have made.—1 Leon. 192, Croke Eliz. 163, Rockwood v. Rockwood 1 Ventr. 318, 2 Lev. 210. T. Raym. 302. 2 Freem. 285, case of Dutton and wife v. Poole.

Another class of authorities, on compacts, connected with promises of testamentary or other settlements, consists of cases, in which the courts of equity have enforced such compacts by decreeing specific performance at the suit of those for whose benefit the promises were intended to enure.—Berenger v. Berenger, lord Nottingham's cases; see 2d Hargr. 291. Chamberlaine v. Chamberlaine, Prec. Ch. 3. 2 Freem. 34. Thynn v. Thynn, 1 Vern. 296; another case in 1689, Prec. in Ch. 5. Leicester v. Foxcroft, cited in Gilb. Eq. Rep. 11. Devernish v. Baines, Prec. in Ch. 3. Reech v. Kennigale, decided by lord Hardwicke in 1748, taken from Mr. Capper's ms. notes, 2d Hargr. 294. Goilmer v. Battison, by Lord Nottingham, 1 Vern. 48. Cassey v. Fitton, by lord Nottingham, 2 Hargr. 296. Jones and wife v. Martin, Anstruther's Rep. 882; see important notes to this case, 2 Hargr. 298.

But the great case on this subject is, that of Durour and wife and others v. Perrara and wife and others defendants, in which lord Camden, who has treated the subject very luminously, decreed in 1769 that such agreements to

complainant neither demanded nor thought it necessary to demand, that the same should be in writing and subscribed by them, (in which opinion he was confirmed at a considerable time afterwards by speaking of the said agreement to the said John Izard, who neither denied nor disapproved of the same) —The complainant farther declares, that the said agreement when made, was neither unreasonable, nor unfavourable on the part of the said John Izard, as he the said John

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Izard was then a healthy *young man, and married to a young lady, who had already borne him a child, and the complainant himself was unmarried—That considering himself bound in honour and conscience to perform his part, he constantly inserted in every will which he afterwards executed, a clause bequeathing the sum of five thousand pounds sterling to the said John Izard, in such case as aforesaid, as may appear by a will ready to be produced, which was executed by him when embarking for Europe in 1769; and was further confirmed, except in some particulars not relative to the present matter, by a codicil in the year 1778; which said will and codicil were never cancelled till after the death of the said John Izard; and he refers to them as a proof of his having executed in part the said agreement; and as a further proof remarks, that at the time of executing the said will he was married, and had two daughters alive—that his wife was ensient of another, and that it would have been very extraordinary under such circumstances, that he should give away so large a sum from those children (and that to one already possessed of a large increasing estate, without any family but a wife,) if he had not considered himself obliged thereto by the said agreement—That in effect the said John Izard had very nearly succeeded to the said legacy, in consequence of the complainant's having narrowly escaped with life from a shipwreck on his return from Europe in 1770, in which case the said John Izard would have reaped all the advantage now claimed by him, as survivor, according to the said agreement, although at that time the complainant would have left a wife and two daughters alive—In consideration of all which he hoped, that the said John Izard had on his part equally provided for the performance of the said agreement by bequeathing to him five thousand pounds as aforesaid:

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But that the said John *Izard hath since died without any issue whatever, and hath not made any such provision as aforesaid, but by his will hath devised and bequeathed the bulk and residue of a very large estate to his sister Mary Middleton, of which will Arthur Middleton, of the state aforesaid, is sole acting executor, who refuses to execute the said agreement, as it ought to be on the part of the said John Izard, but gives out that the same was not made seriously and with intention to be executed, whereas the truth is otherwise, and it was in part executed by the complainant. Wherefore, that the said Arthur Middleton may be compelled fully to perform the said agreement, and to pay the said sum of five thousand pounds with interest from the death of the said John Izard, and that he may be relieved in the premises is the prayer of the bill.

"The defendant, Arthur Middleton, by his answer admits, that he is possessed of a considerable real and personal estate, formerly the property of John Izard, Esq., deceased, which was devised to defendant's wife, although he is not sole surviving executor of the will, nor has qualified, having been sent a prisoner from this state soon after, and not having returned till after the death of Mrs. Izard, the widow of John Izard, on which event the estate devolved into his hands—He denies that any formal requisition was ever made to him by complainant for payment of sum in bill mentioned, though he allows if there had, he should not have complied, and in his opinion with good reason, as by such compliance he should not only have failed in duty to his wife and children, for whom he considers himself a trustee, but also would have thrown a slur on the memory of his friend and benefactor—Says that he was a stranger to all the circumstances mentioned in bill, relative to agreement therein charged, never having heard the deceased utter a syllable upon the matter, although he lived in intimacy with him, and attended him in his dying moments. Nor does he believe that deceased ever considered any words which may have passed on the subject, as creating a positive agreement, or obligatory on either party, because being a man of known honour,

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had he thought so, he *would have fulfilled the same, more especially as there was nothing to prevent it, and his fortune was affluent—nor can defendant conceive that such omission could proceed from want of recollection, as deceased made several wills, in neither of which, as defendant is assured, was any notice of such agreement, or any legacy to complainant—And as complainant has appealed to his own will, as proof of his sense of the supposed agreement, defendant hopes he may offer to the court the last will of the deceased, as sufficient voucher, that his sentiments on the subject were very different—Defendant looks upon the will, as fully declarative of the fact, but if thought neces-

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make mutual wills, when properly proved, are *118 binding *on the parties, and will be enforced by the court of equity.—See 2d Hargr. 304 to 311.

In a later case, lord Walpole v. lord Orford, the lord chancellor Loughborough, without denying the doctrine of lord Camden, refused to sustain such an alledged agreement, for want of sufficient proof to establish it.—See 3 Vesey, jun. 402, and 2 Hargr. 272 to 315.

sary, the testimony of several persons can be produced, who have heard the deceased speak of the matter in a manner no way indicating an idea of his having bound himself by a promise—Defendant therefore hopes, that the court will not decree in favour of complainant, and thereby compel him to give away the property of his wife and children, vested in them by the will of her brother—a decree which would stigmatize the memory of the deceased, and though apparently advantageous to complainant, may hereafter affect his family by opening the way to a new and easy mode of diminishing their wealth: He trusts that your honours will never admit a principle, fraught with consequences pernicious to society, by exposing not only the unwary but the cautious to the wiles of the designing, which would be sufficient to shake the foundation of society, loosen every tie of property, and tend to corrupt the morals of a whole people. By expressing these sentiments and apprehensions, he declares that he does not mean to impute any sinister views to complainant, nor to cast the slightest aspersion upon one whose integrity and honour he holds in high estimation. Defendant insists on the benefit of the Statute of Frauds††—denies combination—and prays to be dismissed with costs."

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*The case was argued by Mr. William Drayton, Mr. Bee, Mr. Edward Rutledge, and General Charles Cotesworth Pinckney, who were counsel in the cause. The arguments of the counsel are not preserved, but the following cases appear to have been cited: For complainant, 1 Vern. 16, 17, 48. 1 Eq. Cases abr. 19-21. 1 Bac. abr. 75. 1 Bla. Rep. 353. 2 Vern. 98, 200, 253, 455. 2 Atk. 98–100. 1 Atk. 447, 13. 3 Atk. 4. 2 Chanc. Ca. 164. 1 Reps. in Eq. 3. 1 Domat. 34, 431—For the defendant, Parl. Cases, 76. 2 Vern. 215, 269, 291, 627. 2 Atk. 136, 467. 2 Eq. Cases, 45. 1 P. Wms. 618, 770. Cas. in Eq. 37. 1 Vesey, 279, 305. 1 Inst. 52. 3 P. Wms. 130. 5 Burr, 2804. 3 Bro. 257. 6 Bro. 45. 2 Cas. in Eq. abr. 48, 15. Lofft's Reps. 804. Gilb. in Eq. 238.

Chancellor MATHEWS commented on these cases; remarking, that in the case cited for plaintiff from 1 Vern. 48, the party in whose favour the agreement was decreed to be executed, was heir at law to the land in dispute. That the cases from Eq. Cas. abr. 2 Vern. 1, 2, & 3 Atk. and 2 Chanc. Cas. had no application: And that the decree stated in 1 Rep. in Eq. appears to have been founded on the acquiescence of the defendant for twenty-one years after he came of age, therefore an agreement strongly presumed to have been made between the parties: That the case from 1 Bla. Reps. 353, does not appear to contradict the case in Viner: That lord Mansfield does not deny the law on the statute of frauds; but said it was a fit case for the consideration of a jury. But it was widely different from the principal case—for the party contracting had received a valuable consideration, viz. the service of the plaintiff at very inferior wages, with a prospect of being compensated at a future day; therefore he sustained an injury by the defendant's testator not having fulfilled his part of the contract. But in the principal case, no injury has been done to the complainant, Mr. Ralph Izard, it being ab initio, a mere affair of chances. The chancellor stated his agreement with Viner and 1 Raymond, 316, who are opposed to Salkeld, 1 vol. 280.

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*The chancellor then proceeded as follows: "There are several points to be considered in this case—1st, Is it within the statute of frauds? If not, is there, 2dly, sufficient parol proof of the agreement? 3dly, has there been a performance of the agreement by either of the parties? On the first point, I am of opinion it is within the statute. The words of the statute which apply to this case are, 'or upon any agreement which is not to be performed within the space of one year from the making thereof, unless in writing and signed,' &c. This agreement rested on a contingency whether either of the parties died within the year, or not. This is the only doubtful point. But if the words and intent of the statute are thoroughly considered, the doubt vanishes, and gives place to certainty. I consider it as a catching bargain; in which cases it is an invariable maxim, 'that contingency shall be of no avail.' The first object of the statute was to prevent improvident and loose bargains from being carried into execution, as they had been repeatedly found to have been productive of frauds and consequent perjuries. In most of those agreements contingency was set up as the ground for the apparent inequality—but it has been uniformly reprobated. If it were not so, how easily it might be evaded in every instance. It would be requisite only to make the agreement executory within the year, with a condition annexed to extend the time on any probable contingency; and which might be carried on to the end of a man's life. Would not this pave the way for the perpetration of those very frauds against which the statute meant to apply a remedy? Would it not be too lax a construction of the statute to say, that because the agreement might have taken effect within the year, that this circumstance alone is to be regarded? And that the probability that it might not have taken effect within twenty years, is to be totally laid out of the case? And yet it is by this construction alone that such an agreement could be taken out of the statute. I think the words

†† ("Or upon any agreement that is not to be performed within the space of one year from the making thereof, unless in writing, and signed by the party to be charged.")

do not admit of that construction: because it would be opening the door for the admission of fraud, when the statute intended to exclude it. I admit there are many cases

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*which have been taken out of the statute, which by a very rigid construction might have been included. But these cases invariably are, where any evident injustice would arise, if it were not so; or where one of the parties would be a considerable loser by having fulfilled his part of the agreement, and the other not. Then consider, ought the clause in Ralph Izard's will to be considered as an execution on his part. I think not, for it does not even take notice that it was in consequence of such an agreement—but more especially it ought not, because it had neither substance nor permanency, for it was alone in his power each day to modify it, as suited his own interest, and finally to destroy every vestige of it. For these reasons I am of opinion that this case is clearly within the statute of frauds; because the fact is that Mr. John Izard did not die for many years after the agreement is said to have been made; consequently it could not have been carried into execution within one year. Therefore it not having been "reduced to writing, and signed by the party to be charged," the complainant can derive no benefit therefrom, but that defendant's plea ought to be admitted—and the complainant decreed to pay costs."

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1 Desaus. 123

Case XIX.

MORTON and Wife v. JOSIAH SMITH, Executor of Corker.

(September, 1784.)

[*Executors and Administrators* ⟸105.]

[Cited in Doud v. Sanders, Harp. Eq. 280; Pope v. Mathews, 18 S. C. 448, to the point that where an executor deposited funds in the state treasury without an order of court, but it appeared that the funds would have perished if retained in his hands, the court refused to charge him with a loss by depreciation of the state securities.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 399; Dec. Dig. ⟸ 105.]

This was a bill filed by persons entitled to certain parts of Mr. Corker's estate. The only question made in the case was respecting certain indents or certificates of the state, which were offered by defendant (the executor) as part of the estate. These were at that time considerably depreciated, and the complainants insisted that the executor had had funds of the estate in his hands, and had placed them in the state treasury improperly, and eventually to the prejudice of the heirs of the estate.

The court after argument was of opinion, that although the executor had not the sanction of this court for depositing the money in the state treasury, yet as in all probability if he had retained the money in his hands, as he had been directed to do, it would have

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perished there, *(as the paper currency of the country did during the war,) and the money totally lost, it would be very hard on the executor to punish him and make him liable, where he acted for the best.—It was therefore ordered, that the executor should assign to the complainant in right of his wife, her proportion of the indents, and should pay her proportion of the rest of the estate.

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1 Desaus. 124

Case XX.

ANONYMOUS.

(1785.)

[*Equity* ⟸378.]

Issue directed to try whether a deed was duly and fairly executed.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 797; Dec. Dig. ⟸378.]

Certificate that it was fairly executed; and decree in favour of it.

The bill, answer, exhibits and interrogatories were read, whereupon ordered, that an issue at law be directed to try whether the instrument of writing marked B, an exhibit in this cause, purporting to be a gift to one of the defendants, of slaves and other property therein mentioned is fraudulent, or signed bona fide by the complainant's testator.

At the sitting of the court in December, 1785, a certificate of the judges of the court of common pleas, was presented by General C. C. Pinckney, solicitor for one of the parties, "purporting that the instrument of writing submitted to the decision of that court, was legally and bona fide drawn up and signed"; and it was ordered to be of record in this court. And the court made a decree, for the delivery of the negroes and other articles specified in the instrument of writing above mentioned to the devisee.

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1 Desaus. 124

Case XXI.

WRIGHT and Others v. Executor of WRIGHT.

(1785.)

Notice to creditors to establish their demands.

The master's report was read, whereupon ordered, that the sale of the house and land reported by the master, as necessary to be made in this case, be postponed: And that the master do give notice to the creditors of the testator to come in before him, on or before the second Monday in December next, to prove and otherwise substantiate their de-

mands to his satisfaction: And that he do then report thereon to this court for their further consideration.

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1 Desaus. *125

*Case XXII.

WILLIMAN v. PETRIE.

(1785.)

Master to enquire and report what property was wasted after judgment at law.

Security bond to stand as a pledge for the sum wasted.

On motion of Mr. Edward Rutledge, and after hearing arguments on both sides ordered, that it be referred to the master to enquire and report what property, bound by the execution obtained by complainant Williman at law, against the estate of the said Edmund Petrie, has been made away with, between the time of the granting and the dissolution of the injunction, in this case; and that the bond given by Dr. James Clitherall do stand as a security for the payment of the value of such property, and the costs of suit in this court; and that on payment thereof in January next, the said bond be delivered up to said James Clitherall, to be cancelled.

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1 Desaus. 125

Case XXIII.

HAMPTON v. SNIPES.

(1785.)

[*Account* ⇐7.]

Defendant decreed to execute titles to complainant and to account for rents.

[Cited in Latimer v. Marchbanks, 57 S. C. 279, 35 S. E. 481.

[Ed. Note.—For other cases, see Account, Cent. Dig. § 21; Dec. Dig. ⇐7.]

It was decreed, that the defendant do forthwith execute titles to the complainant, in fee simple, for the house and lot mentioned in the pleadings: That he account with him before the master for what rent he has received on account of the premises from the time he dispossessed the complainant of them, (which it is referred to the master to state and report,) and that the costs of this suit be paid by the defendant.

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1 Desaus. 125

Case XXIV.

DRAYTON v. DRAYTON.

(1785.)

[*Wills* ⇐790.]

Case of election—To be made by the minors six months after coming of age.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2043; Dec. Dig. ⇐790.]

It was decreed that the complainants Ann and Susannah have six months after coming of age to make their election, either to take their share of the estate devised by their grandmother to the testator's children, after his death, or the legacies bequeathed to them by the testator, and in case they choose the former, that they abate the value thereof from their legacies: That the costs be paid out of the testator's estate.

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1 Desaus. *126

*Case XXV.

Ex parte ROBERT GIBBES.

(1785.)

Legatee to account for property he took away.

Executor authorized to invest money in negroes for minors, or as he should judge proper.

A petition was presented by Mr. Hugh Rutledge, and arguments being heard on both sides, decreed, that Mr. Edward Fenwick account before the master, for the value of sixty-four negroes, which belonged to the testator's (his father's) estate, and which he took away: And that he deliver to Mr. Gibbes, executor of Mr. Fenwick, deceased, negroes equal to the value of those, for the benefit of the testator's children, in such shares and proportions as they are entitled under the testator's will to the negroes belonging to the estate: That Mr. Gibbes be authorized to lay out the profit of John Rogers' estate in negroes, or such other manner as he shall think most conducive to the benefit and advantage of the said minor.

At the end of this sitting, William Frazer, Esq., register in chancery resigned, and John Neufville, jun., Esq., was appointed in his place.

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1 Desaus. 126

Case XXVI.

Present—Chancellors Rutledge, Hutson, and Mathews; Attorney-general Alex. Moultrie; Master in Chancery William H. Gibbes; Register John Neufville.

JOSEPH SALVADOR v. R. A. RAPLEY.

(December, 1785.)

[*Account* ⇐19.]

Deeds and specialties to be deposited by defendant in hands of the master.

[Ed. Note.—For other cases, see Account, Cent. Dig. § 95; Dec. Dig. ⇐19.]

Bill and answer read; on motion of Mr. Pringle solicitor for complainant, ordered, that all matters of account between complainant and defendant be referred to the master, to make his report thereon: And that all the deeds, specialties, and notes of hand, in the custody of the defendant, belonging to the complainant, be deposited with the master, subject to the farther direction of this court.

1 Desaus. 126

Case XXVII.

Ex parte EDWARD FENWICK.

(December, 1785.)

[*Wills* ⇐731.]

Devisee permitted to sell land under the direction of the master, and the bonds to stand as a pledge for his debt to estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1793 1800; Dec. Dig. ⇐731; Executors and Administrators, Cent. Dig. § 1184.]

A petition was presented by Mr. Drayton in behalf of Mr. Fenwick, praying that he may have permission either to mortgage his plan-

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tation on John's Island to the *executor of his father's will, or sell other tracts of land, for the purposes therein mentioned.† Whereupon ordered, that Mr. Fenwick be permitted to sell under the direction of the master, lands to the amount of the demands due by him to his father's estate, according to the prayer of his petition, after accounting with the master for the negroes which he is liable for: And that the bonds for the amount sales be deposited with the master as a security for such amount.

† He derived from the will of his father the lands in question.

Ordered, that attachments for contempt or non-compliance with a decree or order be granted by a judge at his chambers on affidavit, in the usual manner.

1 Desaus. 127

Case XXVIII.

Present—Chancellors Rutledge, Hutson, and Mathews.

WILLIAM SAMS v. BENJAMIN MATHEWS, EDITH MATHEWS, JANE SIMMONS, MARY MIDDLETON, ARNOLDUS VANDERHORST and Wife.

(September, 1785.)

[*Wills* ⇐623.]

[Cited in Beresford v. Elliott's Ex'rs, 1 Desaus. 189; Logan v. Ladson's Ex'r., Id. 272, to the point that where a testator devised an estate for life to his two children, to be equally divided between them, but at "their several deaths" the principal of "their respective moieties" was to be "equally divided among the respective issue of their respective bodies," for their use, forever, "or for default of such issue surviving of either of them, then, and not otherwise, the whole principal of both said moieties" was given to the survivor of the two children for life, "and at his or her decease to the issue of the body of such survivor, * * * and for default of all such issue" then to the right heirs of the testator, there were cross-remainders by implication between the issue of the children, and that, one having died leaving issue, such issue took the whole estate upon the death of the survivor without issue.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1445; Dec. Dig. ⇐623.]

The complainant stated as follows: That his testator, J. Stanyarne, on the 27th of August, 1772, made his will, and among sundry other bequests gave the following one to his grand-son Charles Sams and grand-daughter Sarah Mathews: "Another of the said six lots or shares, (viz. of the personal estate,) I hereby give and bequeath the use of, to and for my said grand-son Charles Sams and grand-daughter Sarah Mathews, equally to be divided as aforesaid between them, with all the issues and profits (except as hereinafter mentioned) arising therefrom after they my said executrixes and executors shall have deducted the sum of £5000 current money, which I hereby authorize them to do, and put out the said £5000 at interest on good security: thenceforward yearly and every year during the term of the natural life of their mother Mary M'Gillivray or Sams my daughter, &c.; and the several negroes or slaves which shall belong to their respective lots, and that shall be left after the deduc-

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tion of *the said £5000 and division between the said Charles and Sarah shall be made as aforesaid, shall during the respective natural lives of the said Charles and Sarah be used, occupied and employed on those or some of those lands which I have hereinbefore left them respectively the use of,—that is to say, by my said executrixes and executors for the use and behoof of the said Charles and Sarah during his and her respective minorities, and by themselves afterwards, but at their several deaths the principal of their respective moieties or one half part of the said one sixth part of my said personal estate remaining after the aforesaid deduction, and the offspring and increase of the females of the said negroes thereto belonging, shall be by my said executrixes and executors equally shared, divided and delivered to and between the respective issue of the respective bodies of my said grandchildren Charles Sams and Sarah Mathews lawfully begotten, for their several and respective uses and behoofs for ever; or for default of such issue surviving, of either of them, the said Charles Sams and Sarah Mathews, then and not otherwise the whole principal of both the said moieties or one half parts as last abovementioned, and the offspring and increase of the females of the said slaves, shall go, and be, and remain, to and for the use and behoof of the survivor of them the said Charles Sams and Sarah Mathews, for and during the natural life of such survivor, and no longer; and at his or her decease, to and for the use and behoof of the issue of the body of such survivor lawfully begotten and surviving, equally to be shared and divided between them as aforesaid if more than one; and for default of all such issue, then, and not otherwise, to my right heirs for ever." That testator nominated his daughters the defendants Edith

Mathews and Jane Simmons and complainant's wife executrixes, and complainant and testator's grand-son W. Mathews executors of his said will.—Bill further sets forth that testator, soon after making his will, died, leaving it in full force: That complainant proved the same, qualified as executor, and took upon himself the burthen and execution thereof: That the personal estate was di-

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vided as testator directed into *six equal parts, and the shares of the several legatees delivered them: Charles Sams and Sarah Mathews being entitled to only one sixth part, it was equally divided, and Benjamin Mathews received his wife's part, and Charles Sams was put into possession of his share: That sometime after the division, Sarah Mathews died, leaving a daughter, who was entitled to her mother's share: Charles Sams survived his sister several years, but is now dead without issue: And soon after his death complainant possessed himself of the share, to be distributed either amongst the legal representatives of the said Charles Sams, or the right heirs of the testator, who might be entitled: Soon after Benjamin Mathews set up a claim in the behalf of his daughter, and applied to complainant for that purpose; but he not thinking she had any right, refused to give up the estate; but Benjamin Mathews got possession of some of the negroes and retains them, and threatens suit for the remainder. The other members of the family of the testator also set up claims; and complainant himself being a residuary legatee of said Charles Sams, and he and his wife being grand-children, he thinks they have as good a right as the others, to a distributive share.—As complainant cannot undertake to determine these rights, he submits them to the determination of the court.

To the foregoing bill the defendant Benjamin Mathews has answered and admitted all the facts stated in the bill. Defendant denies that any of the other defendants have any right to the said estate, and insists that it being personal estate, the remainder over is void: That it was the manifest intention of testator that his grand-children and great-grand-children should stand in the place of such of his children as were their respective ancestors, and should have such estate as they (his children) would have been entitled to had they been living, as is evidenced by the general tenor of his will, and particularly by the bequests to the defendant Elizabeth Vanderhorst and his grand-daughter Mary Gibbes, who was the mother of the defendant M. Middleton. Defendant refers generally to the will; and not to any distinct

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clauses in it, and concludes *his answer in the usual manner.—The defendants Edith Mathews, Jane Simmons, A. Vanderhorst and his wife, by their answers severally, admit all the facts stated in the bill; and defendants believe and admit that the defendant Benjamin Mathews set up a claim in right of his daughter, but that complainant refused to give it up for the reasons in bill mentioned; and defendants are of opinion that he was justified in so doing, they being all of them more nearly related to testator than the said Benjamin Mathews's daughter: Defendants believe and have heard that the defendant Benjamin Mathews is in possession of several of the negroes belonging to said estate, of which they hope he will be obliged to account for the work and labour; and that their right to the said estate will be preserved to them—and deny all combination, &c.

The defendant Mary Middleton answers by her guardian, and says, that she knows nothing of the several matters and things charged in bill, but being an infant of tender years, she hopes the court will protect her in whatever right or title she may have in the estate now in question, and concludes her answer as usual.

The principal point that will be contested in this cause is, what construction the words of this clause of the will shall have, and particularly the last part of it, which disposes of the estate after the death of the survivor without issue among the right heirs of the testator—there being no provision at all made for the issue of the person dying first, in case the longest liver should not leave issue, but the estate in that event is bequeathed to the right heirs of the testator."

The cause came on to be heard on the 16th and 17th September, 1785.

Mr. Hugh Rutledge and Mr. Pringle contended, on the part of the complainant, that the limitation over was too remote, and the contingency never happened—Mrs. Mathews died before Charles Sams, leaving issue; Charles Sams left no issue: That the remainder over was void, and the absolute estate vested in Charles Sams: That this appears to have been the intention of the testator. The will confines the bequests to the

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testator's several daughters, *and their issue in a direct line, without any intention that any issue of one daughter should take any thing from the share of another daughter, but that it goes to his heirs generally. The use of the word "respective" in the will, destroys the cross remainder—cross remainders are not favoured. The counsel cited the following cases: 1 Vesey 54–153. 1 Atk. 432, 579. 2 Atk. 308. 4 Bac. 304, 332. 1 Chanc. Cas. duke of Norfolk's case. Eq. Cas. abr. 293, 444. Cowper's Rep. 31, 797. 2 Stra. 569, 969, 996. Fearn. 341, 7, 371, 353. 1 Ventr. 229.

Mr. T. Pinckney and Mr. Bee argued on the part of the defendant—That the testator meant to give an equal share of his estate

amongst his daughters in the first instance, and then to their issue. Then whilst any issue of a daughter is living, the right heirs (spoken of in the will) cannot be admitted to take. If they are preferred to the descendant of a daughter, this would create an inequality. The words "all such issue" are very material. The last clause in the will explains who are meant by the words "his right heirs"—the limitation over is not too remote—it is after a failure of issue of a life in being. The counsel quoted Fearn. 356, 363, 416. 1 Atk. 469. Mr. E. Rutledge cited 2 Vern. 545.

The view of the cause taken by the court, appears from Chancellor MATHEWS'S notes.

"To make cross remainders there must be either express words, or a strong necessary implication. Wills are to be construed liberally, so as to make the intention operate, if not against the express rules of law; but where the rigid rule of law is against the plain intention manifested by a strong necessary implication, it must be subject to such correction as will soften the rigor of the law, and make way for the real intention of testator: summum jus, summa est injuria.

"To find the true construction, the whole will must be taken together, and not disjointed parts of it.

"In the first place—It appears clearly to have been the testator's intention to divide his whole estate equally between all his children and their representatives then living: And that the share of each should follow the

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direct *line of the first taker, until her descendants were extinct. Even then the testator makes no other limitation than what the law made for him, viz. to his right heirs. If, therefore, the limitation to the right heirs was to take place, the primary object of the testator would be defeated, because one half of one of the first taken shares, would go away from her descendant living, which would create an inequality between his children, contrary to his intention.

"It must be admitted, there are words, which, by the strict rules of law, viz. 'respectively' and 'severally,' disjoin the estates of the issue of Charles Sams and Sarah Mathews, and apparently forbid cross remainders. Yet there are other words which strongly imply them, viz. 'and for default of all such issue, and not otherwise, to his right heirs.' These words exactly correspond with the first part of the will, which makes an equal division amongst testator's children in the first instance, and shews an intention to continue it in that line whilst there are any to take. Therefore the words 'all such issue', must refer to the whole issue of Charles Sams and Sarah Mathews; and the other words 'and not otherwise' are a confirmation of such intention. If this had not been his intention, he would have used words less emphatic, as 'and in default of such issue:' Then the words such would have reference to the next antecedent 'issue of the survivor.' But as the words are 'all such' 'and not otherwise,' they must have a more general reference, and go back to 'a default of such issue of either of them, then and not otherwise' 'to his right heir.' If this construction is not to prevail, the limitation over to the right heirs is so remote a possibility as the law will not allow; for the first limitation is to the issue generally after a life in being, and then to the right heirs: This may run to a century, and lord Macclesfield says, in cases of executory devises, the utmost extent to be allowed ought not to be more than thirty years. Besides, here is the issue of the lives in being, interposed between them and the right heirs, which bars the limitation over to them. Then if the issue generally of Charles Sams and Sarah Mathews are not meant by 'all such issue,' and the limitation

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to the right heirs *is too remote, who is to take the remainder? It has been said, it is an interest vested in Charles Sams as survivor of Sarah Mathews. This cannot be, because he has no more than a life estate, 'and no longer,' therefore it cannot be such a vested interest in him as he can dispose of; but it must still remain subject to the disposition under the will of J. Stanyarne, if that can be properly ascertained.

"It therefore appears, that there is so strong a necessary implication of a cross remainder, to make the will consistent, and to fulfil the intention of the testator, that the construction must be in favour of cross remainders between the issue of Charles Sams and Sarah Mathews, and that the issue of Sarah Mathews must take the 'whole principal of both of said moieties,' agreeable to the words, and also the true intent and meaning of the testator."

And the court decreed, that the share of the testator, John Stanyarne's personal estate, bequeathed to Charles Sams, is vested in defendant's daughter; and that the same be delivered by complainant to defendant in trust for her: That the complainant account before the master for the profits of the negroes, from the time of Charles Sams' death, and pay the amount thereof (after deducting the costs of suit) to the defendant, in trust for his daughter.

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1 Desaus. 133

Case XXIX.

NEILSON and SARRAZIN v. DICKENSON.

(September, 1785.)

[*Equity* ⟸345.]

[The answer of defendant, so far as responsive to the bill, must be taken as true unless it be overturned by two witnesses, or one with strong corroborative circumstances.]

[Ed. Note. For other cases, see Equity, Cent. Dig. § 722; Dec. Dig. ⟸345.]

[*Equity* ⇐345.]

[The uncorroborated testimony of one witness will not overcome a responsive answer.]

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 722; Dec. Dig. ⇐345.]

[*Sales* ⇐166.]

[A vendor, who makes no warranty or assurance as to the quality of the thing sold, is not answerable for defects of which he had no knowledge.]

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 391; Dec. Dig. ⇐166.]

This was a bill filed by the complainants to procure an injunction to a suit at law brought against them on a bond, which they had conditioned to pay—£1000. This bond had been given on the purchase of a brig, from the defendant Dickenson, in July, 1783. The complainant's charge, that the seller declared the brig was sound and good, British built, and British bottom: That complainants purchased on these assurances: But that the complainants afterwards, in a few months, discovered that the vessel was American built, worn out, and unsound: And they procured a survey of shipwrights, masters of vessels, &c. who declared the brig unfit for sea, and that she had been so for eighteen months.

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*An injunction was granted in the first instance—On the answer coming in, the defendant admitted the sale, and that the bond was taken for the purchase money: But he denied that at the sale, or previous to it, he had assured the purchasers the brig was British built, and was sound and good, or that purchasers had bought on that ground; or upon representations of that kind from defendant: That the brig did not belong to defendant, but to his employers, who sent her to Charleston for a cargo; but being disappointed, consulted with the commercial correspondents of the owners, who advised a sale of the brig: That defendant told Neilson, one of the complainants, that he believed the vessel was British built, and a good one, as she had been lately bought as such by the owners—but she had been a prize, and he could not speak positively. He told him he could not warrant her, and desired him to have her examined if he wished to purchase. Defendant believes the vessel to be British built; and he thinks she was not unsound, or unfit for sea, when he sold her—but understands she suffered material injury in the storm of October, 1783, before she was examined.

On the trial of the case, three witnesses swore that Dickenson did say the vessel was British built—one witness thought she was British built, but six were of a different opinion. It was, however, only an opinion, and they had no knowledge of the vessel originally. The court, therefore, laid that fact out of the case. One witness alone deposed that defendant had assured Neilson that the vessel was sound and seaworthy; so that his testimony was directly opposed to the answer on this point: But the court said the evidence of a single witness, without strong circumstances, could not overthrow the answer.

The court in delivering its opinion said, "that the principal question is, whether the seller is so far liable for the defect of the thing sold, as to vitiate the contract in case of defect. The plaintiff's counsel contend, that although no warranty had been given, if any defect should be found in the thing sold, whether it be with or without the knowledge of the seller at the time of the sale, it vacates the contract. There has been no attempt to

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shew *that defendant knew the vessel was unsound. The whole matter is reduced to this single point, whether the seller is answerable for defects he did not know, and where there is no warranty. I think not: For if this doctrine was to be established by this court, it would create endless confusion in the sale of property: for if one man sells, and makes no assurance of the good or ill qualities of the thing sold, and the buyer should afterwards discover defects, or probably not find those qualities which he might have supposed were in the thing bought; or if he finds he has made a bad bargain, it is easy enough to discover some defect or other, and if therefore the bargain is to be vitiated, there will be no end to suits: and no man can tell when he has really disposed of his goods, and the terrors of a lawsuit will be constantly hanging over his head. This would give such a stab to a free trade, as must be productive of fatal effects. If a man wants to buy, and the seller will not warrant, it is certainly his business to inform himself of the qualities of the thing he wants to buy; but if he does not, and he should afterwards find he has made a bad bargain, it is his own laches, and he must abide the consequence. —I am, therefore, for dissolving the injunction."

It was ordered and decreed that the bill be dismissed with costs.

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1 Desaus. 135

Case XXX.

Present—Chancellors Rutledge, Hutson, and Mathews.

JOHN ROGERSON per Guardian v. WILLIAM BLAKE.

(December, 1786.)

It was ordered and decreed, that it be referred to the master to state an account between the complainant and defendant, in which the former shall be charged with the money paid by Daniel Blake, Esq. in discharge of the mortgage in bill mentioned: That the complainant be credited in the said

account with the value of the complainant's house, taken down and removed for the use of the said Daniel Blake; and with rent of the complainant's land from the time when the said Daniel Blake took possession of the same until his death, at the rate of

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11*l.* 8s. 6d. per an*num: That complainant be allowed interest on the balance due on the said account, from the time when the balance became due; and that the money be paid to the master, subject to the further order of the court.

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1 Desaus. 136

Case XXXI.

[Ex parte DRAYTON]

(December, 1786.)

[*Insane Persons* ⟸69.]

[Chancery may order a sale of the real estate of a lunatic, upon petition by his guardian.]

[Ed. Note.—Cited in Cathcart v. Sugenheimer, 18 S. C. 130.

For other cases, see Insane Persons, Cent. Dig. § 116; Dec. Dig. ⟸69.]

A petition was presented by Mr. William Drayton, in behalf of the guardians of Thomas Drayton, a lunatic; the assistant master's report thereon read, and on motion ordered, that it be confirmed: and that certain tracts of land be sold agreeably to a schedule, annexed to said petition.

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1 Desaus. 136

Case XXXII.

Present—Chancellors Rutledge, Hutson, and Mathews.

GRANT, Executor of Graham v. WILLIAM STEWART.

(March, 1787.)

[*Equity* ⟸418.]

Bill to be taken pro confesso, and decree founded on it.

Complainant to give security to abide the order of the court, on the defendant appearing.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 965; Dec. Dig. ⟸418.]

Bill and affidavit read—Ordered, that the bill be taken pro confesso: That the bond and mortgage in bill mentioned be deemed fraudulent and void; and that the defendant do bring and cancel the same before the master of this court, and pay the costs of this suit: And that the complainant give security, to be approved by the master, in the sum of 250*l.* conditioned to abide such order as may be made on the defendant appearing to the suit, and paying such costs to the complainant, as this court shall order.

1 Desaus. 136

Case XXXIII.

Present—Chancellors Hutson, and Mathews.

THOMPSON v. THOMPSON.

(June, 1787.)

[*Equity* ⟸381.]

[Where, upon an issue directed to ascertain the validity of a deed of gift, the jury find that the deed was forged, the verdict of the jury finding such fact was properly made a part of the record in the court of equity.]

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 813; Dec. Dig. ⟸381.]

On motion of Mr. Edward Rutledge, with the concurrence of Mr. Bay, ordered, that an issue be directed to ascertain the validity of a deed of gift, as mentioned in the bill of complaint in this cause.

Afterwards (in December, 1787,) the bill was dismissed with costs; and it was ordered, that the verdict of the jury at Camden, proving the forgery of a deed of gift in bill mentioned, should be filed, and become of record in the registry of this court.

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1 Desaus. *137

*Case XXXIV.

ALEXANDER ROSE v. JOHN and A. HAMILTON.

(June, 1787.)

[*Injunction* ⟸151.]

On application for injunction, opposition may be made on the merits, as they are disclosed by the bill: Nothing extraneous to be admitted.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 336; Dec. Dig. ⟸151.]

On reading this bill, and on some contention arising relative to entering into the merits thereof, the court ruled, that upon an application for an injunction, the merits may be entered into without answer filed; but the adverse solicitor is in his opposition to confine himself to the allegations in the bill, and cannot produce any extraneous or foreign matter in proof, until the answer be brought in. The merits of this case being argued by the solicitors, Mr. Drayton and Mr. Read, it was decreed that the bill be dismissed with costs.

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1 Desaus. 137

Case XXXV.

Present—Chancellors Hutson and Mathews.

SEALY and Wife, Executrix of Samuel Ball v. HENRY LAURENS, Executor of Elias Ball.

(December, 1787.)

[*Wills* ⟸539]

Testator directs estate to be equally divided, but if any of his children happen to die,

his share to go to survivors: the court limits this to a dying in life time of testator.

[Ed. Note.—Cited in Beresford v. Elliott's Ex'rs, 1 Desaus. 189; Drayton v. Drayton, Id., 331; Deveaux v. Barnwell, Id. 499; Robert v. Ellis, 59 S. C. 158, 37 S. E. 250.

For other cases, see Wills, Cent. Dig. § 1163; Dec. Dig. ⟸539.]

[*Wills* ⟸627.]

[A devise to several persons, "to be equally divided between them," constitutes a tenancy in common, unless clearly qualified by other words in the will.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1454; Dec. Dig. ⟸627.]

The bill was filed in this case to recover an estate to which the complainant's testator was alleged to be entitled, under the will of his father Elias Ball. The testator by his last will, executed on the 18th August, 1757, after directing the payment of debts, bequeathed the remainder of his estate, real and personal, to be equally divided among his four children, William, Ann, Helena, and Samuel: And in case his son William or any of his other children happened to die, he ordained and willed the remaining parts of his or their interests to be equally divided amongst his surviving heir or heirs. William and Helena died soon after the testator, under age and unmarried. Ann married Mr. John Hunt, and upon her application the executor divided the personal estate into two equal parts, and delivered one half thereof to the said John Hunt and Ann his wife, some time in February, 1769: And the acting executor H. Laurens retained the other moiety for the other child Samuel, then a minor; and afterwards sold the negroes, stock, &c. and his half of the land, and retained the securities in his own hands. Samuel Ball

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attained the age of twenty years, *and then intermarried with the present complainant Beulah. He soon afterwards, on the 15th May, 1775, made his will, whereby (inter. alia) he bequeathed his wife 7000*l.* currency; and appointed her executrix, with a Mr. Yarborough. Samuel Ball dying soon after, his widow, who afterwards married Sealy the complainant, qualified on the will, and required a settlement of Samuel Ball's estate, from Henry Laurens the executor of Elias Ball. But he declined it, on the ground that by the testator Elias Ball's will, the whole estate went to the surviving child Mrs. Hunt, now that all the other children were dead. Some question was made about the regularity of Samuel Ball's marriage with the complainant Beulah, and the validity of his will; he being of weak mind, and under age, at the time of his marriage, will and death.

But there being no proof of any imposition in the marriage, or of his imbecility amounting to more than ordinary weakness, these points were not insisted on at the hearing, and the cause was argued on the single ground, of what was the true construction of Elias Ball's will, with respect to the survivorship among his children. Read and E. Rutledge contended for complainants, that the bequest was not a joint tenancy, but a tenancy in common, and cited 1 Eq. Cas. abr. 292, 293. 3 Burr. 1881. 1 Salk. 226. 3 Bac. 478. Also 3 Atk. 17, to prove the right of Samuel to make a will, though under twenty-one years of age. Drayton for defendant cited, 2 Vern. 233, 617. 1 Vern. 23. 1 P. Wms. 304. 1 Wilson, 165, Hawes and Hawes. 1 Raymond, 441.

The court took time to consider this case, and in December, 1787, Chancellor HUTSON delivered the opinion of Chancellor MATHEWS and himself. Chancellor RUTLEDGE having been absent at the time of the argument, attending the convention at Philadelphia, gave no opinion. The opinion delivered is as follows:

"The single point which the court is in this case called upon to decide is, whether from the words of the will of Elias Ball, his children are to be considered as joint-tenants or tenants in common. It will contribute not a little, we presume, towards forming an

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opinion in this *case, to premise two fundamental and incontrovertible maxims, which ought always to govern chancery in their decisions in such cases. The first is, that in the construction or exposition of wills, the intention of the testator, as far as it may be collected from the words of the testament, subject to a liberal construction of law, should be primarily and principally regarded; and in the second place, that the words of the will, should if possible, be so construed and expounded, as all to stand together, or in other words, that they may all have their due effect and operation.—We now proceed to examine the will before us upon these principles.

"The first devise runs in the words following: 'After all my just debts are paid, I give and bequeath my remaining estate, both real and personal, to be equally divided amongst my children.' The words 'equally divided,' or 'to be equally divided,' (whatever ambiguity may still adhere to them in the construction of deeds in the common law,) it has been long established in this court, beyond a possibility of doubt, that, in a will, they do, (unless otherwise clearly restricted or corrected,) uniformly create a tenancy in common, as well with regard to real as personal estate. Were we therefore to stop here, not the least shadow of doubt could exist. But the subsequent clause, in the words following, 'if my son William Ball, or any of my other children, happen to die, I, in that case, ordain and will the remaining part or parts of his, her, or their interests, to be equally divided among my surviving heir or heirs,' seems to induce somewhat of an apparent

ambiguity. Should this clause not be admitted in the sense, which we shall in the sequel attempt to establish, it may constructively appear to constitute a survivorship, and to militate against the clause above recited; but when brought to the test of the aforementioned maxims, the seeming difficulty will, we presume vanish and disappear. The intention of the testator, as far as it may be collected from the words of the first clause, subject to construction of law, appears manifestly to be, that all his children should be placed upon the foot of perfect equality, and

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that they should equally and *alike share the benefit or advantage to be derived from his estate; but should the words in the subsequent clause, without restrictions or limitation prevail, this intention might be in the event totally defeated. Let us suppose, for instance, that the clause in question should, in respect to time, be left vague, indefinite and indeterminate as it at present stands, without any period for vesting being fixed, it would then follow by necessary and inevitable construction of law, that should three of the legatees marry and decease leaving issue, the survivor, who may have no issue, would take the whole estate, and might devise it away to an entire stranger, to the utter exclusion of the testator's grand-children. But this no one can consistently with reason, and the most obvious legal construction of the first mentioned clause, suppose to have been his intention. Hence arises the apparent and absolute necessity of fixing and ascertaining some determinate period, at which the estates intended to be conveyed should vest. And here we must, as necessity enforces, revert to the two fundamental maxims first laid down, that the apparent intention of the testator should be preserved, and that the words of the will should all be so construed and interpreted, as to have their full effect and operation. That the intention of the testator, as expressed in the first clause, according to legal construction, would not be preserved, if the time should be left entirely vague and indefinite, we think, has been made sufficiently to appear, as, in that case, one heir might eventually take to the entire exclusion of the representatives of the rest. And if the latter words should be supposed to create a joint-tenancy, the former words, 'to be equally divided,' which, as has been before observed, do indisputably, in the exposition of wills in this court, create a tenancy in common, would be altogether superfluous, nugatory and inefficient.

"From this train of reasoning, the court find themselves constrained to adopt a construction, in which they think themselves warranted and supported by a crowd of concurrent authorities; which is, that when, in any instance, the words 'equally to be divid-

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ed' are made use of *in one part of a will, and the naked and indefinite expressions 'if any should die, his share shall go to the survivor,' is introduced in another part, it must be intended, if any of the legatees should die in the life-time of the testator; as by that construction, every word of the will will have its effect and operation; and the constructive consequence of a lapsed legacy will be effectually barred. Nor do we think ourselves warranted to adopt any other construction, as the arrival at a certain age, or the event of marriage, these periods with respect to many purposes in law being wholly arbitrary, and entirely at the discretion of the testator.—To our interpretation, it has been objected by the counsel for the defendant, that it could not have been the intention of the testator, in the present instance, as he was in a declining state of health at the time of making his will, and did not survive long.—To this it may be opposed, that however nearly impending the period of dissolution may appear, it is not uncommon for mankind to flatter themselves with an extension of the thread of life; and we well know that a general prejudice, however ill-founded, prevails against making wills. The testator therefore might have intended, in case of recovery, that the present will should continue for a length of time.—But to support the contrary doctrine, the case of Hawes and Hawes has been quoted. Upon this case it is to be observed, that the opinion of the court was there grounded upon the custom of London, which fixes the precise time at which children are to take legacies, which is not the case here.

"And the lord chancellor says, he thinks lord Cowper's reasoning, in the case of Bindon and Suffolk, was very right; that the surviving must be applied to some particular time, and not to a dying indefinitely. He thought, dying in the testator's life was the time intended; but the house of lords adjudged it to be the time of payment, from the nature of the debt, as it was on government security. But if there can be no other construction upon his will, he goes on to observe, then his shall prevail. But this custom does not prevail here, as was before observed, and there is no similar circumstance

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to designate *the time of payment over; but the legacy is entirely unfettered and unincumbered, and might have been transferable, the day after the death of the testator. To us it appears therefore, that the present case would by no means have warranted the reversal of the lords; but that lord Cowper's decree would have stood firm and unshaken. Nay it is supported by a subsequent determination, in 1 Eq. Cas. abr. 292, 293.—Upon the whole, we think ourselves fully warranted by law, reason, and precedent, to adopt

the construction mentioned above, that the testator intended that the estate should pass to the survivors in case only of the decease of any of the legatees antecedent to his death.

"And it is therefore decreed, that the defendant Henry Laurens, do render an account, and pay over to the complainants, the one half of the estate of Elias Ball, to which his son Samuel was, at the time of his death, and under the will of the said Elias Ball, his father, entitled: And the defendant do pay the costs of suit from the proceeds of the estate.

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1 Desaus. 142

Case XXXVI.

Present—Chancellors Rutledge, Hutson, and Mathews.

BOURKE v. BOCQUET.

(March, 1786.)

Specific performance decreed, on payment within a limited time.

This was a bill for the specific performance of a contract for a tract of land.

It was decreed, that it be referred to the master to state and report, what is the balance due on the contract in the bill mentioned: And that on payment thereof with interest, and of the costs of suit, within one month from this day, the defendant execute title to the complainant in bill mentioned.

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1 Desaus. 142

Case XXXVII.

Creditors of M'KENZIE v. Administrator of W. BURROWS.

(March, 1786.)

Administrator of ancient master to pay to the creditors (suitors in this court) proportionably. Notification to creditors.

Ordered, that Joseph Atkinson, administrator of W. Burrows, (late master in chancery,) do pay over to the present master, the specie in his hands, as admitted by

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*his answer: And that a settlement be made by the master of the proportion due to the several creditors whose demands have been allowed: And that the master do settle the same, with such creditors out of the bonds and securities in his hands, as far as they amount, according to their several proportions: That Mr. Atkinson do account for interest on the money in his hands: And that the costs be paid out of the same.

It was also ordered, that a notification should be published in the Gazette, calling on all persons claiming any of the money which was in the hands of Mr. Burrows, Esq. late master of this court, at the time of his death, and which has been paid over by his executors to W. H. Gibbes, Esq. the present master, to prefer and support their claims before the said master within twelve months next ensuing: And the said master is thereupon to make his report to this court.

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1 Desaus. 143

Case XXXVIII.

Present—Chancellors Rutledge, Hutson, and Mathews.

JOSIAH TATTNELL and Wife v. Executors of FENWICK.

(September, 1786.)

[*Husband and Wife* ⇐12.]

Husband suing for a legacy, directed to make a settlement.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 58; Dec. Dig. ⇐12.]

Bill, answer, interrogatories and depositions read, and arguments heard on both sides—Whereupon ordered, that it be referred to the master to report what the complainant Harriet Tattnell is entitled to under her father's will: the funds for the payment thereof; and what will be a proper settlement to be made by her husband, the complainant, Josiah Tattnell.

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1 Desaus. 143

Case XXXIX.

Present—Chancellors Rutledge, Hutson, and Mathews.

DUPONT v. GOFFE and Others.

(December, 1787.)

[*Ne Exeat* ⇐11.]

Leave of absence for a month given to a person bound by ne exeat.

[Ed. Note.—For other cases, see Ne Exeat, Cent. Dig. § 13; Dec. Dig. ⇐11.]

On motion of Mr. Edward Rutledge, and with consent of Mr. Read, ordered, that C. B. Goffe, one of the defendants, have leave of absence for one month, notwithstanding the bond given on the writ of ne exeat, but without prejudice to the party complainant on the bail bond.

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1 Desaus. *144

*Case XL.

Executors of JAMES LAURENS v. Executors of PHILIP HAWKINS.

(December, 1787.)

Executors authorized to retain and apply assets of estate to pay partnership debts.

[Ed. Note. Cited in Ex'rs of Drayton v. Drayton, 1 Desaus. 559.]

Bill, answer and exhibits read, and arguments by counsel, whereupon it was decreed, that the estate of Philip Hawkins be sold by the executors, agreeably to the terms of the instalment act; and that the executors retain for the use of the creditors of Hawkins, Petrie & Co. so much as shall be sufficient to satisfy Philip Hawkins's proportion of the debts of Hawkins, Petrie & Co. and that the costs of this suit be paid out of the sales of Philip Hawkin's estate.†

† It is understood that this order of the court was founded upon the fact, proved on the enquiry before the master, that the estate purchased in his own name by P. Hawkins, had been purchased and paid for with the copartnership funds.

1 Desaus. 144

Case XLI.

HAIG and Others v. COMMISSIONERS OF CONFISCATED ESTATES.

(December, 1787.)

[*Judicial Sales* ⇐27.]

Order on purchaser to shew cause why there should not be a re-sale, at his risk.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 52; Dec. Dig. ⇐27.]

On motion of general Pinckney, it is ordered, that James Neilson shew cause before the judges of this court, why the property called Greenwood's wharf, purchased by him at the sale directed by this court, to be made by the master thereof, should not be again sold, and the said James Neilson be answerable for any deficiency that may happen in the price for which the same may be re-sold; the said James Neilson having refused to give security for the purchase money, agreeable to the terms of sale.

1 Desaus. 144

Case XLII.

Ex parte THOMAS DRAYTON.

(December, 1787.)

[*Insane Persons* ⇐29.]

Commission of lunacy superseded, on proof of recovery of his senses.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 42, 140, 150; Dec. Dig. ⇐29.]

A petition was presented by Mr. Pringle in behalf of Thomas Drayton, setting forth that a commission of lunacy had been issued against him, and an inquisition found thereon; in consequence of which his person and estates, real and personal, were committed to the care of certain guardians: That for many months past the petitioner had recovered his perfect senses, and been of sound

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*mind, memory and understanding, as was manifested by the affidavits of his physician, (a man of skill and judgment,) and of several other persons.—Therefore he prayed that the commission might be superseded, and the inquisition quashed. And the said petition and affidavits in support thereof being read and fully considered, it was ordered, that there be a cassetur of the inquisition and supersedeas of the commission; and that the said Thomas Drayton be restored to his liberty, and the re-possession of his property.

1 Desaus. 145

Case XLIII.

DR. WILLIAM READ v. PRINCE and Wife.

(December, 1787.)

[*Ne Exeat* ⇐12.]

Ne exeat suspended on terms prescribed.

[Ed. Note.—For other cases, see Ne Exeat, Cent. Dig. § 14; Dec. Dig. ⇐12.]

On motion of Mr. Drayton, it is ordered, that the operation of the writ of ne exeat, as far as it relates to the defendant C. Prince personally, be suspended, on his executing in the presence of, and leaving with the master of this court, a power of attorney to some citizen of this state resident in the city, to join with his wife in making titles to the house and lot mentioned in the bill of complaint, and to abide any further order of this court: And that in the mean time all the estate, real and personal, of the deceased C. Lempriere, in the hands of the administratrix, be impounded.

1 Desaus. 145

Case XLIV.

JONATHAN SIMPSON v. R. GIBBES, Executor of Edward Fenwick, Deceased.

(December, 1787.)

[*Wills* ⇐744.]

A purchaser of an estate, charged with legacies, and impounded by order of the court, will not be permitted to hold the estate, nor be paid for buildings erected by him on it.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1571; Wills, Dec. Dig. ⇐744.]

[*Wills* ⇐731.]

The legatee having carried off part of the estate, his part of the real estate held liable as a security to make good the loss.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1793–1800; Dec. Dig. ⇐731.]

[*Vendor and Purchaser* ⇐220.]

[The protection extended to the purchaser of the legal title, who pays the purchase money without notice of the outstanding equity, will not be extended to one who has no semblance of title.]

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 462; Dec. Dig. ⇐220.]

The complainant stated that Thomas Fenwick, a son and devisee and legatee of Ed-

ward Fenwick, became indebted to complainant in the year 1779; and in the year 1780, offered him the sale of a lot of land on the Bay of Charleston, which was devised to him by his father: That finding Thomas Fenwick could not pay him in any other way, he agreed to purchase the lot, and the price was fixed, by appraisement, at 620*l.* sterling.—Whereupon Thomas Fenwick executed titles for the lot to complainant on the 1st August, 1780; and after

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discounting his debt, there *remained a balance due to Fenwick of 300*l.* for which complainant gave his note of hand: That the title deeds were sent to complainant executed; at which time Mr. Hall and Mr. Sams happened to be at complainant's house—He mentioned to them what the deed was; and Mr. Hall informed him that Thomas Fenwick had no right to sell any part of his estate, by his father's will, until his sisters' legacies were paid; which complainant alledges was the first notice he ever had of any incumbrance on the said lot: That complainant afterwards questioned Thomas Fenwick on the subject, who acknowledged there was some incumbrance thereon; but that the rest of his estate being sufficient to answer every purpose of his father's will, he considered it of little importance: That complainant endeavoured to obviate the difficulty by various proposals to the said Thomas Fenwick, and even offered to rescind the contract altogether, and to receive his original debt from him, although complainant had incurred considerable expense by preparing to build thereon—But Fenwick refused his offers, and sued complainant on his note of hand, in the board of police,† and recovered the money. Thus unfortunately situated, complainant applied to Mr. Williams, then an eminent counsellor, on the safety of building on the said lot, as by its continuing unimproved, he could derive no advantage from the possession of it.—Mr. Williams informed complainant, that Thomas Fenwick's estate was sufficient to satisfy all the incumbrances on it, without having recourse to this lot; and that, at any rate, a court of chancery would allow for the expense of any improvements made thereon by him: That complainant, relying on this opinion, laid out considerable sums of money in buildings and improvements, on the lot in question: That complainant had no notice

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from the executor; and never *paid but one sum (75*l.* on the 14th August, 1780,) to Fenwick voluntarily—the balance he was compelled to pay by order of the board of police: whence he infers that he could not then (on the 14th August) have known of his being exposed to the incumbrances.

Complainant further complains, that this lot has lately been sold, with other parts of Thomas Fenwick's estate, by a decree of this court, to which the complainant was not a party, to discharge the incumbrances; in which decree it was ordered that no allowance should be made to complainant for the buildings erected by him; on the ground, as complainant understands, that the executor had given him previous notice; and that Thomas Fenwick had no right to sell: But complainant insists that he had no such notice from the executor or any person previous to the purchase: That the amount sales of the said lot, and other parts of Thomas Fenwick's estate, exceeds considerably the amount of the incumbrances thereon, imposed by his father's will, as appears by the master's report; but the executor refuses to apply any part of the surplus to reimburse complainant for his expenses aforesaid; which is the harder on the complainant, as the buildings placed by him on the said lot, certainly raised the value and price of the same, at the sale made by order of this court.

Complainant prays that the executor may be decreed to pay him the surplus of the price of the said lot and buildings, over and above the incumbrances imposed on Thomas Fenwick's estate by his father's will: And that some other allowance may be made him in compensation for his costs and expenses in the premises.

The defendant, the executor, in his answer, stated his ignorance of the transactions between complainant Simpson and Thomas Fenwick. All that he knew was, that some time about the end of the year 1780, or beginning of 1781, Thomas Fenwick endeavored to prevail on defendant to execute titles jointly with him for the lot to complainant, which defendant refused, and forbade said Thomas from selling the lot: That Mr. Williams called on defendant at complainant's request, to

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know if he would join *in the conveyance of the lot to complainant; but defendant refused, and stated to Mr. Williams, that independent of the charge of paying one of his sister's legacies, the said Thomas had carried off a great number of negroes, of his father's estate, beyond his proportion, the value of which would be more than his lands would sell for; and that he, defendant, would endeavour to recover back the land for the testator's children, in compensation for the negroes so carried off. Defendant admitted that complainant expended some money in repairing the buildings on the lot, and the value was thereby somewhat encreased; but that complainant incurred the expense after

† The board of police was a court constituted by the authority of the British military commanders, then occupying Charleston as a garrison. It had none of the characteristics of a regular court of justice, according to British or American forms; and rested for its authority on no other foundation than the pleasure of the military commander-in-chief.—Its proceedings have never been recognized as legal in this country.

notice of the incumbrance, and claim of testator's estate thereon; and therefore the loss, if any, is in consequence of his own conduct; but defendant does not believe the injury to complainant to be great, as he let the stores, for some years, at a great rent: That defendant does not know whether the amount sales of the estate of Thomas Fenwick exceed the incumbrances imposed on it by the father's will; but defendant hopes, that on proof of the real loss sustained by the testator's estate, from Thomas's carrying off more than his proportion of the negro slaves, the surplus of his estate may be applied to make the same good; and that the balance only, if any, be paid to complainant, he at the same time accountable for the rents: Defendant thinks himself justified in refusing to reimburse complainant, inasmuch as the greatest part, if not the whole of the expense of building, was incurred subsequent to complainant's knowledge of the incumbrances on the said Thomas's estate, and the claim for taking away negroes.

On the hearing of this case, on the 18th and 19th December, it was contended for complainant, that he had no notice of the former order of the court of chancery, directing that no part of Edward Fenwick the testator's estate should be sold, till the debts and legacies were paid; the court of chancery being at the time of the purchase by the complainant in a state of annihilation, the British being masters of the country: That Thomas the son was devisee and owner of the lot of land, and had a right to sell it, subject only to the burthens imposed by the will: That

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Mr. Simpson the complainant was a fair purchaser, for valuable consideration, and ought to be protected: That the lot ought not to be taken from him, or that in all events, he ought to be paid for his great and expensive improvements.—The following cases were cited, 3 Bac. 642-5. 1 Eq. Cas. abr. 322, 333. 2 Vern. 30, 156, 600.

For defendant, it was insisted, that the complainant was informed, before he paid the money, that the devisee Thomas Fenwick had no right to sell the lot, unless subject to all the regulations of the will, which charged daughters' portions on the sons' estates; and that the estate was impounded by a then subsisting order of the court of chancery; and that Thomas's share of it was liable for the amount of the negroes of the estate, carried off by him, beyond his share.—The counsel cited, 3 P. Wms. 387, and 3 Atk. 392, Worsley v. Earl of Scarborough.

The court, on the 22d December, 1787, decreed that the bill should be dismissed with costs.

No reasons were put on record, but chancellor Mathews's notes of the case contain the following remarks: "The order of the court (impounding the estate) must have been made under an impression, that Thomas and Edward Fenwick were likely to make away with the estate; as such an order is unusual in any other case, where there are executors or trustees to carry into execution the will of the testator. The depredation was committed by Thomas Fenwick long before any debt was contracted with the complainant—Therefore the minor legatees were become creditors on Thomas Fenwick before any alienation. But if the sale is valid, on whom will the loss fall? On the two younger sons, who are to raise four of the portions, which could only be done by their utter ruin: For if almost all their negroes were taken away, their lands would produce no profit; consequently they would be sold to pay the incumbrance, so that they must be ruined, and Thomas Fenwick thereby benefitted so much more than his portion, as their loss amounts to. The deeds were executed on the 1st August, and no money paid (by the complainant) till the 14th August. Therefore from complain-

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ant's own shewing, it is highly pre*sumable it must have been on the day, or within a day or two after the execution of the deeds by Fenwick, that they were brought to complainant, at which time Mr. Hall gave him notice of the incumbrance. If after this he would venture to pay money, and to erect buildings, he did it at his own risk, and with his eyes open. The payment made by authority of the board of police, we have nothing to do with, and can pay no regard to it. Besides, the complainant is secured for his purchase money, (by a bond of indemnity from Thomas Fenwick, with the security of Mr. Valk, taken by advice of Mr. Williams.) The complainant therefore has no equity. The property was impounded by the court of chancery, and suit pending, at the time of the purchase. The minor legatees were fair and equitable creditors long prior to any debt contracted with the complainant. If relief were to be granted to complainant, it would be to the ruin of the two younger sons, and to the unjust emolument of Thomas Fenwick's estate, so far beyond what he was entitled to. The complainant had notice before he paid the money or erected the buildings: and besides he is otherwise secured, which renders the interposition of this court unnecessary—And to that security he must have recourse for relief."

Drayton, Bee, Edward Rutledge for complainant; Hugh Rutledge and General Pinckney for defendant.

It was ordered that the interrogatorial part of bills be omitted; and that replications and rejoinders be disused; and that prolixity and unnecessary length of pleadings be avoided.

1 Desaus. 150

Case XLV.

JAMES LINDSAY and Others v. Administrators of LINDSAY.

(December, 1787.)

[*Executors and Administrators* ⊂⊃155]

Executors cannot on paying debts of estate, take the estate to themselves, without regular sale.

[Ed. Note.—Cited in Richardson v. Manning, 12 Rich. Eq. 485.

For other cases, see Executors and Administrators, Cent. Dig. §§ 632, 633; Dec. Dig. ⊂⊃155.]

[*Equity* ⊂⊃67.]

[Mere lapse of time, unless very great, will not bar a claim against an executor for a legacy.]

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 195; Dec. Dig. ⊂⊃67.]

[*Executors and Administrators* ⊂⊃34.]

[A man, by marrying an executrix or administratrix, has the administration cast upon him.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 226; Dec. Dig. ⊂⊃34.]

[This case is also cited in Hill v. Hill, 1 Strob. Eq. 24, regarding marriage settlements.]

The complainants brought their bill against defendants for an account of the rents and profits of their father's estate; and for distributive shares of his personal estate. The facts of the case were, that Patrick Lindsay,

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the fa*ther of complainant, died in the year 1744, leaving a widow and five children, and a small estate, which he divided among them by his will, giving his wife, (in case of her marrying again,) only a child's share of the personal estate. She qualified as executrix, and possessed herself of the estate, and made an inventory in March, 1747. The estate was in debt, but was considered able to pay its debts. Afterwards, in about two years, she married John Winter, a man of very small property. Winter possessed himself of the estate, lived on it, and received the rents and profits thereof, and applied them to his own use; except that the children were maintained on the plantation, on common country fare, and clothed in homespun cloth, made on the place. He sold some of the personal property to pay the debts; but retained a valuable woman slave, named Cloe, who has had a very large family of children and grand-children, who form the principal object of this suit. There was a small balance due at Lindsay's death for the slave Cloe, to the person from whom she had been purchased. This was paid—and it is insisted by Winter's representatives, that the payment was made by Winter with his own money. But this is at least doubtful; and the weight of testimony seemed to establish, that it was with money of the estate; all the proceeds of which came into his hands, from his marriage till his death. Mrs. Winter died in 1781 or 1782—Mr. Winter in 1785. He made no division of Patrick Lindsay's estate, but the whole of it came into the hands of his representatives, who also administered on the estate of P. Lindsay, with the will annexed.

They are defendants to this suit, and they insisted, that the estate of Patrick Lindsay could not have paid its debts without Winter's aid, funds and management: That he maintained and brought up the children, the costs of which would have exhausted the estate: And that the executors of Lindsay, sensible of that, had consented to Winter's keeping to his own use, absolutely, the woman slave Cloe, and her children, and the stock, which was all that remained of the personal estate of Lindsay, to compensate

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him for his trouble and expense in bring*ing up the children, and paying the debts of the estate.

The defendants also insisted that the children of Patrick Lindsay knew and acquiesced in all these circumstances; for they never brought any suit against Mr. Winter, during the life of himself, (though forty years elapsed between his marriage and death,) or his wife. They had indeed intimated some claims on Cloe and her children; which induced Winter before his death to desire his family, if ever such claim was attempted to be enforced, to make out an account against them for maintenance and support—but not otherwise.

The cause came to a hearing in December, 1787, and was argued by Hugh and Edward Rutledge for complainant, and by Pringle and General Pinckney for defendant.

For complainant it was insisted, that the statute of limitations will not run against legacies or distributive shares of an estate; and that the presumptions arising from the staleness of the claim, were rebutted by the facts that the complainants were brought up in great ignorance, and did not know their rights for a long time; and they were also restrained by respect for their mother, who, as acting executrix must have been sued together with Winter: That she did not die till 1782, and the court of chancery was not re-established till 1784; soon after which they brought their suit against Winter's representatives, he dying in 1785: That their claim for distributive shares was incontestible, as no act had been done to change the property: That executors were not at liberty under our act of 1745 to take the estate, even at an appraisement, and convert it to their own use.

For defendants, the great length of time, and the staleness of the claim were relied upon. It raised a presumption that the complainants had acquiesced in Winter's keeping the property absolutely, which could only have resulted from their consciousness that

the full value of their father's personal estate had been exhausted by Winter, in paying debts and maintaining the children.

The court delivered its opinion, stating that the property in Cloe and her descendants remained in the complainants: That al-

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though by the act of assembly (of the *25th May, 1745, 3d sec.) executors are made liable for the full value of the property of the estate, which came to their hands, this was not intended to enable them to change the property, and take it to themselves at an appraised or estimated value; but the true intent and meaning of the act, (as appears by the preamble of this clause, and other parts of it,) was to prevent executors from changing or taking the property in any other way than by a fair, open, and public sale: And this court will support the real object of that law, whenever it can lay its hands on the property of the testator, without subjecting the parties to any singular hardship, by unravelling accounts and transactions of a very distant period, when it is probable many important papers might have been lost, and prejudice result to the parties, especially if the executors are dead. But such inconveniences cannot result here—the claim is for a specific property, which the defendants acknowledge is in being, and in their possession, the restoration of which is very simple. That the right is in the complainants there is no doubt. The executors had no right nor authority (if they really had attempted it) to transfer the property to Winter, on such a consideration as it has been contended they did. But to put the matter beyond all doubt, Winter, by marrying the widow and only acting executrix, became in her right an executor, and was equally with her a trustee for the children, and accountable as such; and not holding and accountable as a mere stranger. If defendant's statement of the accounts is allowed, in its full force, and that Winter paid the debts, yet it appears very strongly, that there was only a small balance (87*l.* old currency,) due on the debt for Cloe. It is proper that Cloe and her descendants should be decreed to complainants, reserving to Mrs. Winter's representatives, her sixth part under the will of her first husband Lindsay. But there ought not to be any account for the hire and labour of the negroes, because of the laches of complainants in not prosecuting their claims earlier.

Decreed, that the negroes named in the exhibit C. (Cloe and her descendants,) be appraised and divided by lot, under the direc-

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tion of the master, and that five sixths *of them in value, be delivered by defendants to complainants as their distributive shares of the estate of Patrick Lindsay, and in full satisfaction for such shares.—Costs divided.

1 Desaus. 154

Case XLVI.

Present—Chancellors Rutledge, Hutson, and Mathews.

PRESBYTERIAN CHURCH OF BETHEL v. Executor of DONNOM.

(March, 1788.)

[*Religious Societies* ⟸9.]

Trustee cannot by his act alter the destination of funds.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. § 67; Dec. Dig. ⟸9.]

[*Religious Societies* ⟸23.]

A congregation with funds, becoming incorporated, has a right to the funds.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. § 150; Dec. Dig. ⟸23.]

This was a bill filed by complainants to have an account of the estate and of the profits arising from the personal estate formerly in the hands of Mr. James Donnom, as a trustee for a Presbyterian church then unincorporated. The congregation had been formed of persons residing in St. Bartholomew's parish, on the west bank of Ponpon river, and its vicinity; and the funds collected by voluntary subscription to uphold a church and parsonage for the use of the congregation and minister, near Ponpon river. The trustees were to be residents; and if they removed out of the parish, or declined acting, their places were to be supplied. James Donnom, the surviving trustee, had possession of the estate for a considerable time; and directed by his last will, that the property should go to certain persons whom he names, to be held in trust; and two-thirds of the income to be applied to support a minister at the church near Ponpon river; the other one-third to be applied to support a minister at the Saltcatcher church, (within the parish of St. Bartholomew, but above twenty miles from the church on Ponpon river,) to which place he, Donnom, had removed. The other facts and points in the case related merely to an account. The congregation became incorporated by the name of the Presbyterian church of Bethel in St. Bartholomew's parish. Their bill is to recover the whole property from defendant's representatives.

On hearing the arguments of counsel, the court was of opinion, "that Donnom had no right to divert the funds of the society to different purposes than what they were originally intended for, viz. for the meeting-house and parsonage at that time established

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on the west side of *Ponpon river: And whatever part of said society chose to move to another place (although in the same parish) it was a dereliction of their share of the

funds of the society."—(See Chancellor Mathews's notes).

The court decreed, "that it be referred to the master to state the accounts: And that the funds in bill mentioned be assigned over to complainants for the benefit of Bethel church."

Gen. C. C. Pinckney and Mr. E. Rutledge, solicitors.

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1 Desaus. 155

Case XLVII.

Present—Chancellors Rutledge, Hutson, and Mathews.

TODD and Wife, Executors of Darrell v. Executors of RIVERS.

(June, 1788.)

[*Evidence* ⟸462.]

Bonds apparently absolute may be shown, by evidence, to be merely counter securities.

[Ed Note.—Cited in Lloyd v. Inglis's Ex'rs, 1 Desaus. 339.

For other cases, see Evidence, Cent. Dig. §§ 2134–2139; Dec. Dig. ⟸462.]

This was a bill filed by the complainants to set aside and cancel certain bonds and mortgages given by their testator to colonel Rivers, the defendants' testator. They purported to be absolute, but it was insisted for the complainants, that they were really given to counter secure colonel Rivers against certain debts, in which he was security for complainants' testator.

The defendants denied any knowledge of these bonds and mortgages being given as counter securities, and insisted upon them as absolute debts due to his estate.

On full examination the court was satisfied, from clear and indisputable evidence, founded partly on concurrent facts, proved by witnesses, and partly on colonel Rivers's own declarations, that part of these bonds and mortgages, though apparently absolute, were given by Mr. Darrell to colonel Rivers as counter security, and accordingly decreed, that on the bond to Mr. Burrows (which was given by Darrell for a house, and to which Rivers was security,) being discharged by Darrell's executors, the bond and mortgage (from Darrell to Rivers) should be delivered up and cancelled, and satisfaction entered thereon.

But there being no sufficient proof that the other bonds and mortgages from Darrell to

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Rivers were counter secu*rities, the court refused to decree them to be given up, and left them to be paid by Darrell's executors.

E. Rutledge for complainant.—C. C. Pinckney for defendant.

1 Desaus. 156

Case XLVIII.

THOMAS SMITH v. J. E. POYAS and Wife.

(June, 1788.)

[*Wills* ⟸727.]

Permission given by father's will, to his daughters, to reside on his plantation during their lives, gives a life estate, and they may plant there.

[Ed. Note.—Cited in Nicholson v. Drennan, 35 S. C. 339, 14 S. E. 719; Newton v. Odom, 67 S. C. 7, 45 S. E. 105.

For other cases, see Wills, Cent. Dig. § 1748; Dec. Dig. ⟸727.]

[This case is also cited in Jacobs v. Mutual Ins. Co. of Greenville, 52 S. C. 118, 29 S. E. 533, without specific application.]

[For subsequent opinion, see 2 Desaus. 65.]

The testator Henry Smith devised his Goose-creek plantation to his son Thomas Smith (the complainant) and his heirs, and directs him to pay certain legacies to his daughters. In a codicil to the will the testator directs that his wife should have a right to dwell on the Goose-creek plantation, with liberty to plant thereon, and make use of the necessary fire-wood, timber, &c. and that each of his daughters should have a right to dwell on the said plantation, during their natural lives; after which it is to go to his son Thomas, and his heirs: And he discharges his son from the payment of the legacies to his sisters, which he had imposed by his will.—The wife is dead, the daughters are living, and reside on the plantation, and plant thereon—one of them married Mr. Poyas the defendant.

This cause came to a hearing on a case arising out of testator's will and codicil, the substance of which is stated above.

The complainant's counsel contended, that the permission given by the testator to his daughters to reside on the plantation, was a mere residence, not accompanied by any power to plant, or to clear land, or to cut timber for any other purpose than for fire-wood and other necessary purposes: That he gave his daughters pecuniary legacies, and could not have contemplated that on his four daughters marrying husbands who had negroes, that they should all settle on this single tract, and cut down all the timber to make four different plantations—which would waste and ruin the estate. He expressly gives his wife the right to plant; and though he gives the right of residence to the daughters in the same clause with the mother, he does not give them the right to plant. This withholding the gift of the right, was a distinct negative of the right.

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*The defendants' counsel contended, that the right of residence could not mean a mere naked living in the house. It was to be a home with all its advantages, and rights, and powers of improvement and enjoyment.

Where the law gives a thing, it gives impliedly whatever is necessary to the use of it. Where the use of a real or personal estate is given to one, it is now settled law that the thing itself is given; for life, where a life estate only appears to be intended: But if it is encumbered with legacies or money to be paid out of it, then it is considered, under the late decisions, as vesting an absolute estate. The counsel insisted, the defendants had a right to plant, as flowing necessarily from the right of residence for life, (which is really a life estate,) but not to commit waste. If waste was attempted, the complainant might obtain an injunction. The complainant has no right in the land till the death of the daughters, and the extinction of their rights. If he can derive no benefit, shall they have none? Could it be the father's intention that none of his children should plant this land? Surely not. He meant a full benefit to the daughters for life: At their death, an absolute estate is given to the son: He is discharged from paying certain legacies to the daughters, on the right of residence being given to them.—The counsel cited for defendant 1 Eq. Cas. abr. 400. Co. Inst. 53. 1 Vesey 265, 548, 281.

The court was of opinion, "that the daughters had a right (under the codicil) to reside on the plantation, and to plant there during their lives:"—(Chancellor Mathews's notes.) And accordingly decreed that the complainant's bill be dismissed with costs.

Bee and Smith for complainant.—E. Rutledge and C. C. Pinckney for defendants.

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1 Desaus. *158

*Case XLIX.

Present—Chancellors Rutledge, Hutson, and Mathews.

POSTELL and Wife, and SMITH and Wife v. Executors of JAMES SKIRVING.

(June, 1789.)

Commissioners to divide estate, reserving funds for annuities.

[*Wills* ⇐637.]

No time fixed by the will for legacy to vest, marriage will vest it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1520; Dec. Dig. ⇐637.]

[*Husband and Wife* ⇐12.]

Orders for settlement of estate, by husband of a minor, dispensed with in the case of a wife of full age consenting on an examination by the court.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 66; Dec. Dig. ⇐12.]

[*Joint Tenancy* ⇐4.]

[A joint tenancy is severed by an order of the court for a division.]

[Ed. Note.—For other cases, see Joint Tenancy, Cent. Dig. § 3; Dec. Dig. ⇐4.]

The court decreed after hearing counsel, that a writ of partition should issue to five commissioners, to divide and allot the real estate, in bill mentioned, between the complainants and their infant sister Elizabeth Skirving: That the executors do account for the personal estate of the testator, reserving such a capital, as will pay the annuity of £225 to the widow during her life; and another sum to James Liddell: That the residue be divided among the three daughters of Mr. Skirving.

Chancellor MATHEWS, in his notes on the brief of this case remarks, that the testator appoints no time by his will for the legatees to take either the real or personal estate, but the court decreed, (as in Sealy and wife v. Laurens, executor of Ball,) that marriage was such a consideration as ought to give a sanction to the vesting of an estate, when no time is appointed by the will: And that the joint-tenancy in the land, is severed by the order of this court for a division.

Afterwards a question arose respecting settlements to be made by Mr. Postell, and Mr. O. B. Smith, on their wives, of the estates acquired by them, whereupon the court made the following decree:

The court having in private examined Mrs. Postell, who has attained twenty-one years of age, and the said Mrs. Postell being very desirous that no settlement should be made on her; and it appearing to the court that Mr. and Mrs. Postell have constantly lived together in the greatest harmony; and he being a gentleman of fortune in his own right, it is not requisite that he should make any settlement on his said wife. With regard to Mr. O. B. Smith, his wife is not of age to make such request as Mrs. Postell has done, (although the court entertains a similar opinion of him as of Mr. Postell,) they find themselves bound to order that the said O. B. Smith do make the usual settlement on his

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wife, of the fortune she is enti*tled to from her father; that is to say, that the same be settled under the direction of the master, in trustees, in trust for his use during their joint lives. If she survives him, then to her heirs, executors and administrators for ever: If he survives her, she leaving issue, then to him for life, and after his decease, to such issue: If he survives her, without her leaving issue, (or leaving issue, such issue should die in his life time, and without issue,) then to him, and his heirs, executors, and administrators for ever.

1 Desaus. 159

Case L.

Present—Chancellors Rutledge, Hutson, and Mathews.

BOWMAN and Wife v. T. MIDDLETON.

(December, 1788.)

[*Judicial Sales* ⇐27.]

Issue directed to try title to land, before a purchaser compelled to accept the title.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. §§ 52, 54, 97–99; Dec. Dig. ⇐27.]

On shewing cause why a specific execution of the contract made by Thomas Middleton, for the purchase of the brick house tract of land, late the property of Mr. Cattell, deceased, and sold under a decree of this court, should not be directed, and on motion of Mr. Parker, defendant's solicitor, with consent of Mr. Moultrie for complainant,—it is ordered, that an issue be directed to ascertain whether the said Mr. Cattell died entitled in fee simple to all the lands contained within the lines of the plat of the said tract, exhibited at the sale, or what part thereof: In which issue the complainants are to be considered as plaintiffs in ejectment, and that the said plat be filed, and be of record in this court.

1 Desaus. 159

Case LI.

JOHN RUTLEDGE and Others v. Executor of Mr. WILLIAMSON.

(December, 1789.)

Life estate of wife to be valued by master.

[*Executors and Administrators* ⇐495.]

[The delivery up of bonds by an executor under an order of court is not such a payment of money as to entitle him to commissions.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2097; Dec. Dig. ⇐495.]

[*Executors and Administrators* ⇐497.]

[An executor is not entitled to commissions for receiving interest on money loaned by the testator, and he will be left to his action at law for compensation for his extra services.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2122; Dec. Dig. ⇐497.].

[*Life Estates* ⇐27.]

[A court of equity may decree a sale of land subject to a life estate in a third person, directing compensation for the life estate.]

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 49; Dec. Dig. ⇐27.]

Chancellor Rutledge withdrew from the bench.

On reading the master's report, and on motion of general Pinckney, solicitor for complainants, it was ordered and decreed, that the real and personal estate of the said Wm. Williamson be sold by the master, on certain terms prescribed by the court: And that it be referred to the master to compute

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the value of the life estate of Mrs. *Williamson, (the widow,) in the estate or property to be sold.†

General Pinckney for complainants.—Bee, for defendant.

† In this cause two important questions were decided relative to executors' commissions. On the brief of the bill and answers in this case, prepared for the use of chancellor Mathews, there are the following words in his own handwriting: "In this case, Thompson, the executor, (of Williamson,) charged the usual commission, on delivering up certain bonds, ordered by this court to be delivered up to Gadsden and Bonsall, as so much money by him paid: But as the law says, an executor shall receive two and a half per cent. for monies received, or paid, the court could not consider the mere delivery of a bond to be a payment—therefore disallowed this charge.

He (the executor) also charged ten per cent. commissions on receiving the interest on money let out by the testator, but as the law only allows this charge on interest money received by the executor, on money which had by him been let at interest, and made a capital of, it was also disallowed: And referred him to his action at law for compensation for his (extra) services, as the law itself directs."

[To this action the executor accordingly resorted: but the jury did not see any thing in the claim to justify the allowance of extraordinary compensation.—The verdict was against the executor.]—Editor.

1 Desaus. 160

Case LII.

Present—Chancellors Hutson and Mathews.

QUINCE v. CALLENDER and Others.

(March, 1789.)

[*Interest* ⇐2.]

Interest of this state allowed, where the contract, though made in North Carolina, had reference to lands in this state.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 2, 55; Dec. Dig. ⇐2.]

The master having represented to the court that the defendants in this cause had objected to the allowance of seven per cent. as not being the legal interest of North Carolina, where the marriage bond, in bill mentioned, was dated, the court were of opinion, that as the lands on which the settlement was made, lay in this state, the interest of this state should be allowed: And therefore ordered, that the interest of seven per cent. being the legal interest thereof, should be allowed.

1 Desaus. 160

Case LIII.

Present—Chancellors Rutledge, Hutson, and Mathews.

WILLIAM RUGGE v. RICHARD ELLIS.

(December, 1788.)

[*Specific Performance* ⟸10.]

Court refused to decree specific execution of contract, in a hard case, and where the other party had not complied with terms.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 23; Dec. Dig. ⟸10.]

The bill filed in this case was for the specific execution of a written agreement,

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entered into by R. Ellis with *the agent of Wm. Rugge, on the 10th August, 1785, by which he contracted, in consideration of £3000 to convey two tracts of land, called the old and new quarter house, on Charleston neck; the former containing thirty-eight and a half acres, and the latter one hundred and fifty acres; bounded in the manner described in the agreement; and intended to comprize all the land known by the names of the old and new quarter-house, which Ellis had bought of John Creighton. Ellis was to keep possession till the 1st of January ensuing, and to pay a shilling rent, and then deliver quiet possession to Rugge.

The agent of Rugge on his part, by a counter agreement of the same date, (10th August, 1785,) agreed to pay and secure the consideration of £3000 as follows: To assign a bond of P. Butler to said R. Ellis, on which there was then due £1350 a note of D. J. Greene of £500 and to mortgage the new quarter house tract for the balance of £1150 of said purchase money.

The complainant charges that the bond of P. Butler was assigned and delivered to Ellis; and complainant has requested of defendant the completion of the said contract, the execution of good titles, and the delivery of the possession to complainant. But defendant has always refused to comply with his agreement, under pretense that the bond of P. Butler was partly paid off; though the fact was not so, and complainant has urged defendant to bring suit to try that question, but defendant has neglected to do so. And complainant offered to perform his other stipulations whenever the defendant would execute titles: That defendant keeps possession of the property, and has committed waste thereon, in the buildings and woods, and refuses to deliver possession to complainant, or to execute titles: The complainant further charges that he has discovered that the new quarter house tract, does not contain one hundred and fifty acres, as contracted for, but only sixty acres; notwithstanding which the complainant offered to comply with the contract on his part, whenever the defendant would execute titles, only deducting for the deficiency, in a rateable proportion, and making compensation for the damages done by

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defendant to the premises. The bill *prays that the defendant may be decreed to execute titles, for the said two tracts of land, and to deliver possession thereof to complainant, and to make a deduction from the purchase money is a rateable proportion for the deficiency of ninety acres; and to account for the rents and profits, and to make compensation for the damages done.

The defendant Ellis, in his answer, admitted the contract as stated by the bill. He admits that in pursuance of the agreement, the bond of P. Butler was delivered to him, the note of D. J. Green tendered him, and the mortgage of the land offered him: But he says that P. Butler refused to pay the bond, when payment was demanded, alleging that he had made a large payment thereon, for which he was entitled to credit, which defendant believes was true: That however, he put the bond in the hands of an attorney for suit, but judgment hath not yet been obtained on it—With respect to D. J. Green's note, he gave notice to defendant that he had paid it off wholly—Defendant submitted his case to the court, hoping that as complainant had not paid him a shilling for the purchased premises, that he (defendant) may be either released from the contract, or secured in his possession till the sums alleged by complainant to be due on the bond and note, shall be ascertained to be really due; in which case he will readily comply with his contract.—Defendant admits that there is not the quantity of one hundred and fifty acres within the lines of the tract called the new quarter house; but he denies that he intended to deceive the complainant, or that he knew the quantity to be less, previous to the sale: That when he left Charleston to join the American army, he delivered to the care of James Rugge all his titles and papers respecting one of the quarter tracts: That the papers relating to the other tract were lost during the war; but that James Rugge, (the agent of William Rugge, in the contract with defendant,) was as well acquainted with the lines as the defendant: That the sale was not made with a view to any particular quantity, but to comprize all that defendant had purchased from Creighton; and defendant desired Rugge to satisfy himself at the register's office, as to the

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quantity and boun*daries of the land, which he informed defendant he had done. Under these circumstances the defendant thinks it would be an extreme hardship if he were compelled to make any deduction from the price, for any deficiency in the land. Defendant denies waste, farther than the cutting down timber for the supply of his house-hold in firewood.

The cause came on to a hearing in December, 1788. No trace of the argument is preserved; but Chancellor MATHEWS remarks, on the back of his brief, "that the court refused to carry the agreement into execution—for he who seeks equity must do equity; and as defendant offered to annul the agreement, if the complainant was not satisfied with the land as it was, the court thought it a reasonable and an equitable offer; for to compel the defendant to abate pro rata, for the deficiency, would be such a reduction of the price, as would bear too hard on him; especially too as Butler's bond had been partly paid before the assignment to the defendant; and Green's note was entirely paid."

It was therefore ordered and decreed, that the bill be dismissed, each party to pay his own costs.

Read and Pringle for complainant.—E. Rutledge and general Pinckney for defendant.

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1 Desaus. 163

Case LIV.

Present—Chancellors Rutledge, Hutson, and Mathews.

BOWMAN and Wife v. MIDDLETON.

(October, 1789.)

Court ordered new trial, in a case where a verdict was given on an issue directed here.

On hearing Messrs. Moultrie and Pringle, solicitors for complainants, on a question for a new trial at common law, on an issue formerly directed and verdict found for defendant; And on hearing Mr. Parker, solicitor for defendant against the motion, ordered, that a trial at law be had de novo. The court also recommended that in consequence of a difference of opinion in the surveyors employed in surveying the lands in dispute, that other surveyors be called in.

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1 Desaus. *164

*Case LV.

Present—Chancellors Rutledge, Hutson, and Mathews.

Ex parte H. C. FLAGG and RACHEL, His Wife.

(December, 1789.)

Court refused to exonerate executors.

A petition was presented by general Pinckney, praying that the petitioners might be appoin'ed guardians of the persons and estates of the infant children of the petitioner Rachel, by a former marriage. On motion ordered, that the prayer of the petition be granted so far as respects the guardianship of the persons of the infants. But the court refused its aid to exonerate and acquit H. Allston, surviving executor of W. Allston, jun. deceased, of his care and direction of the said infants' estate.

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1 Desaus. 164

Case LVI.

Present—Chancellors Hutson and Mathews.

Executrixes and Executors of General GREENE v. JOHN FERRIE.

(June, 1790.)

[*Guaranty* ⟸100.]

A person guarantees the debt of a commercial house; the partners supposing there are profits, divide some of the funds and allot to one partner a bond, with which he purchases a plantation: That plantation shall be liable to the guarantee on his satisfying the debt of his principals.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 112; Dec. Dig. ⟸100.]

It appeared to the court in the investigation of this cause, that John Banks, in September, 1782, purchased in Charleston, of Newcomen & Collet, and Harris & Blachford and others, goods to a considerable amount, on conditions mentioned in articles of agreement; and that Ferrie & Patton, by bonds of the same date, guaranteed that payment should be made to them, in the particular mode specified in the said articles, which have been exhibited in this cause. It also appeared by an agreement made between Banks & Ferrie, on the 22d of October, 1782, (reciting the above purchase,) that Ferrie is interested one third in the said purchases. It further appeared, that on the 30th of June, 1783, an account was stated by Banks & Ferrie of the goods purchased as above, which they termed the Charleston speculation; and the profits on them were estimated at one hundred and eighty-five pounds per cent. on the first costs; and that in consequence, Ferrie's third being set down at seven thousand two hundred and fifteen pounds eleven shillings and three pence, a debt due

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to the house of John Banks & Co. by *Pierce, White & Call, was assigned by Banks to Ferrie, towards payment of that third; and that Ferrie obtained from Pierce, White & Call, the plantation called Nelville, towards satisfaction of that debt. It further appeared, that general Greene, in April, 1783, guaranteed to Newcomen & Collet and others, payment of their debts by Banks & Ferrie and others. It appeared also to the court, that a considerable part of the goods of the Charleston speculation (to a larger amount than the sum Ferrie's share of the profits was estimated at) was not paid for. And they were of opinion, that Banks had no right to make such assignment to Ferrie under an idea of profits, before such profits were really and actually ascertained. And it also having appeared that the said Nathaniel Greene

had given his private bonds to said Newcomen & Collet, for the payment of the debt which he had guaranteed. The court, after a full discussion, decreed, that the plantation called Nelville in bill mentioned, be sold by the master, on a prescribed credit, with interest on bonds, to remain subject to the further order of this court; and that the defendant Ferrie join in the conveyance of the premises: That an account be taken by the master of the profits on the goods purchased by John Banks, of Harris & Blachford, Newcomen & Collet and others, and of the balance still due on those purchases; and of what general Greene and his representatives have received towards satisfaction of the guarantee entered into by him as in bill mentioned. —And the master having afterwards reported, that in obedience to the said decree, the said plantation called Nelville had been sold, and that the defendant Ferrie has joined in the conveyances of the premises, thereby accounting for the fund which the complainants have alleged to be vested in the said plantation: But that the profits on the said goods (if any) have not been and probably could not be ascertained, as the parties who are possessed of the said books, are without the jurisdiction of the court.—the court therefore decreed, that the master, after applying such of the securities as shall be sufficient to satis-

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fy a mortgage to which *the land was subject when purchased, shall deliver to the executors of general Greene the remainder of the securities, for which the said plantation was sold: And that the said Ferrie be discharged from any further claim of the complainants, on account of the said speculation; unless it shall appear from the return of the commission sent forth for the purpose of taking a statement of profits, that the goods of the Charleston speculation have sold for less than prime costs, in which case the said Ferrie shall be obliged and he is hereby decreed to pay to the complainant one third part of the said deficiency, in conformity to his agreement with John Banks, on the 22d of October, one thousand seven hundred and eighty-two.

E. Rutledge for complainant.—Gen. C. C. Pinckney for defendant.

1 Desaus. 166

Case LVII.

At a meeting in the chambers of the honourable Judge Mathews. WILLIAM WIGHTMAN and SARAH, His Wife v. JOSEPH and CHARLES BROWN, Executors of Joseph Brown, Deceased.

(July, 1790.)

[*Wills* ⇐747.]

Injunction to restrain executors from committing waste or selling estate of testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1933; Dec. Dig. ⇐747.]

The bill was for an account and settlement of an estate.—On motion of Mr. Pringle, solicitor for complainants, and cause shewn in support thereof, it is ordered, that an injunction do issue to restrain the defendants from committing waste and selling or disposing of any of the remaining part of the testator's real estate, until the further order of this court.

The court afterwards decreed, that the executors should account and pay over to complainant and his wife, who was a legatee, what should appear to be due to them, and ordered a reference to the master for that purpose: And that the executors (who were the testator's sons and devisees) should sell as much of the real estate of their testator as would be sufficient to pay the legacy, in preference to the private creditors of the executors and devisees, who were much embarrassed in their affairs.

1 Desaus. *167

*Case LVIII.

Present—Chancellors Rutledge, Hutson, and Mathews.

WATLINGTON v. HOWLEY, BURKE, BAKER, and Others.

(December, 1787.)

Bill taken pro confesso.
Complainant to give security.

[*Judgment* ⇐68.]

Judgment confessed by executor on false pretences decreed to be fraudulent and void.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 113, 116, 118, 120, 123, 125, 127; Dec. Dig. ⇐68.]

[*Executors and Administrators* ⇐168.]

Sale of certificates by executrix pendente lite, decreed to be fraudulent, and the note obtained for them be subjected to the debts of the estate: But that the purchaser of the note should be paid what he actually advanced for it.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 644, 646; Dec. Dig. ⇐168.]

[*Equity* ⇐420.]

[Though an absent defendant is by the statute allowed four years in which to come in and answer a bill taken pro confesso against him, the decree will be treated as final in the meantime, and will be enforced.]

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 970; Dec. Dig. ⇐420.]

[*Lis Pendens* ⇐24.]

[After a bill against an executor, to restrain him from disposing of certain securities, had been taken pro confesso, he sold the securities. *Held*, that the lis pendens, and, a fortiori, the decree, were notice to the purchaser of the rights of the plaintiff.]

[Ed. Note.—For other cases, see Lis Pendens, Cent. Dig. § 42; Dec. Dig. ⇐24.]

On reading the register's certificate that due notice has been given of filing this bill, and no appearance entered for defendant, on motion of Mr. Read, ordered, that the bill

be taken pro confesso against H. M. Burke and John Baker, two of the defendants, named in complainant's bill, and that a decree be prepared accordingly; on the complainant's giving security to abide such order as may be made on the defendants' appearing and paying such costs as the court shall order. And that it be referred to the master to consider and receive such security in the terms of the act of assembly of the 21st March, 1784, as he may judge sufficient in the said cause.

March, 1790.

After many preparatory orders, the cause came to a hearing before Chancellors Hutson and Mathews.

The bill charged that Mrs. Howley, the executrix of R. Howley, had combined with Burke and others to defraud the testator's estate, and defeat the just claims of his creditors: And that for such purpose she and Burke pretended that certain valuable certificates of public debt, which belonged to the estate, were their private property; and they clandestinely sold them, and took a note of hand from the purchaser, and passed away the same, at an inferior price, to George Parker, who is charged as a confederate and made a defendant. The bill sought to set aside these transactions, and to have an account of the estate.

Mr. Read for complainant contended, that when the note was passed away, this suit had been instituted: That this was lis pendens, and that is notice to all the world—A blank endorsement of a note conveys no interest in it—Buller, 275–8. A bare endorsement of a note does not transfer any property—1 Salk. 126, 130. Raym. 872, 1361. A note or bill given, payable out of a particular fund, not negotiable—Strange 1271: Viner 127. A bill filed and subpœna served is sufficient notice—2 P. Wms. 482.

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*Mr. E. Rutledge for complainant insisted, that mala fides attached to the whole contract. In the case in Brown, the note had been purchased before the bill filed. In the case of Simpson v. the executors of Fenwick, the decree was in the desk of the counsel, yet deemed to be a sufficient notice against Simpson the purchaser. 3 Atk. 392. 1 Atk. 463.

Mr. Pringle for defendant contended, that an executor has a right to alienate the property of testator; and if he does so improperly it is a devastavit, and he must be answerable out of his own estate, but the alienation is valid. There was no proof that the defendant Burke had not paid a valuable consideration for the note; Mrs. Howley, the executrix, in her answer admits that he did—viz. 250*l*. 1 Burr 452. Douglas 611—A bill of exchange with a blank endorsement, although stolen, is recoverable against the maker or drawer by an innocent holder or endorser—A blank endorsement is to all the world; it is equal to its having been made payable to bearer.—As to the lis pendens, see 1 Vesey 244. 3 Atk. 243.

June, 1790.

The court took time to consider, and at its present sitting delivered its decree as follows:

"All that we conceive necessary to be done at present with respect to Mrs. Howley is, to refer the matter to the master, to enquire what part of the testator's estate came into her hands, how the same has been disposed of, and what part thereof is now in her possession or power, and to report accordingly.

The next defendant Baker, having suffered the bill to be taken pro confesso as against him, the law clearly points out in what manner he is to be proceeded against.

The defendant Milligan having positively denied all the charges in the bill against him, we shall proceed to the last defendants, Burke and Parker, who will more immediately attract our attention in considering that part of the bill which relates to the note of hand in question. On this head the primary and most essential subjects of consideration are, whether the certificates given for this note were the property of the estate of Richard Howley; and next, whether they

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were fairly sold for a valuable *consideration. The bill charges, that the certificates were the property of the estate of Howley, and that the transactions respecting them, between Mrs. Howley and Burke, and the note said to be given as a valuable consideration for them, were founded in fraud. And Burke, one of the principal actors in the business, having suffered the bill to be taken pro confesso against him, has tacitly acknowledged the charges in the bill. The question then is, whether, and how far, the fraud in this case, will effect the note in Parker's hands, who solemnly avers himself to have been a fair and bona fide purchaser, for a valuable consideration, without notice of the fraud, or any determination of this court in consequence thereof. This is a question of the highest importance, and for that reason we have taken unusual time to consider it. On this court the security of property in the hands of executors and administrators materially depends, and if a strict guard is not kept over their conduct, it would be very easy for them to waste an estate of whatever value, in the most fraudulent manner, to the great injury of creditors and legatees. That an executor has a right to dispose of the property of the testator for the payment of debts, is unquestionable. If then the creditors of an estate should see the property of the testator, their debtor, frequently disposed of, and no part of the proceeds applied to the extinguishment of their claims, and, from an apprehension of some fraudulent conduct in the executors, should thereupon institute a

suit in this court, to oblige them to account, and pending such suit, the executors should still continue to find purchasers for, and to dispose of, the property of the estate, regardless of the claims of its creditors, and no remedy could be applied to the evil, the consequence would be, that both the estate and creditors might be ruined, and the superintending powers of this court, over the conduct of executors, be rendered entirely nugatory. How far the lis pendens alone might be deemed sufficient notice, is a question not necessary for us at present to determine; for in this case, there are much stronger grounds of notice, as there had been decrees against several of the defendants, and in

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particular *against Burke, before the purchase of the note by Parker. Can it ever be admitted then, that after such decree, (and which at present must be considered as final against Burke,) that a purchaser is not to be charged with notice? This is a doctrine too absurd to require a serious refutation. It is well known that decrees of this court are equally binding with judgments at law, and it is a maxim, that ignorance of the law excuses no man. Therefore Parker's setting up a want of knowledge of the fraudulency of the note, cannot avail him against a solemn decree of this court. The case of Simpson and Fenwick has been quoted as a case in point, and we think it is.

"With regard therefore to the decree being sufficient notice, we think the cases are parallel, and a fortiori in this case, Simpson being a stranger and out of this state at the time the decree was passed, and if the decree in that case was deemed sufficient notice, so must it be in this.†

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*"This question then arises, how far the original fraud will attach itself to the transaction, so as to render all subsequent dealings relative to the subject of the fraud, equally fraudulent. We have met with a case in 2d Vesey, 516, How v. Weldon and Edwards, which we think contains strong features of the principal case on this point." —[The court then proceeded to examine that case minutely, and to apply it to the one under consideration, declaring it to be conclusive.]

"We have said the decree v. Burke must be considered as final, and carry with it all the force of a judgment at law. It may be necessary here to explain our reasons for this opinion, that no doubt might be left on the matter. It is true, the act for establishing this court allows the party against whom a bill is taken pro confesso, four years to come in and answer, if without the limits of the United States—as is the case at present with Burke: But until he does come in and answer, the decree must be considered as final, and carried into execution; for we must consider this case upon the same principles

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*as in the case of a bill of review or rehearing. In neither of these cases is the decree appealed from ever suspended, even after the motion is granted; much less then can it be

† The doctrine of lis pendens is of great importance, and the neglect of it is frequently of great prejudice to purchasers. The lis pendens is, of itself, notice to a purchaser; and will set aside his purchase, though he gave valuable consideration, and had no actual notice. Even lord chancellor King, who was one of the strictest common law lawyers that ever sat on the chancery bench, states this to be the doctrine to prevent the justice of the court being evaded; and is founded on sound reasons; analogous to the real action at common law, where, if the defendant aliens after the pendency of the writ, the judgment in the real action shall overreach such alienation. But lord chancellor King said, the rule though a necessary one, worked so much hardship on a fair purchaser for valuable consideration, without actual notice, that in such a case, if there was any defect of proof, he would not help the party by letting in new proof after publication—Nor would he give leave to amend. See Sorrell v. Carpenter, 2 P. Wms. p. 482, 483.

The controversy in court respecting a will is lis pendens, and the grantee of the heir, or of the devisee, would be bound. See Garth v. Ward, 2 Atk. 174.

And this doctrine of notice is carried so far, that if a man gets notice of an equitable lien or incumbrance on the estate, after his purchase and after paying part, and after bond given, it is sufficient notice, and he ought not to go on. Tourville v. Nash, 3 P. Wms. 307. Or if he has notice after payment of the money, but before the execution of the titles. Wigg v. Wigg, 1 Atk. 382, 384.

The lis pendens, after the bill is filed, commences from the service of the subpœna. But the question must relate to the estate, and not

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*merely to collateral matter, such as money secured on it. Worsley v. Earl of Scarborough. 3 Atk. 392. And a bill to perpetuate testimony of witnesses, is a sufficient lis pendens. Garth v. Ward, 2 Atk. 174.

In the case of Sorrell v. Carpenter, (3 P. Wms. 482, 483,) lord chancellor King says, "though this court will oblige all to take notice of its decrees, as much as of judgments, yet there does not seem to be the same reason for obliging people to take notice of the filing of a bill. But lord chancellor Hardwick, a few years later, (1746,) said, "that there is no such doctrine in this court, that a decree made here shall be an implied notice to a purchaser, after the cause is ended; but it is the pendency of the suit which creates the notice."

It is difficult to form an opinion between two such authorities; but it would seem reasonable that if the mere pendency of a suit should be implied notice to all the world that the right was in controversy, that a decree settling that right should be a higher notice, to deter and prevent purchasers from buying in opposition to the decree. But where a thing assigned is only a chose in action, though the assignment be without notice, yet as no legal estate passes, the assignment which is prior in time must take place. See latter part of the case of Tourville v. Nash, 3 P. Wms. 308—See too 1 Schoals and Lefroy, Rep. 152.—See the cases of purchasers without notice, collected in Fonbl. 2d. b. ch. 6, § 2, p. 151. Sudgen, Law of Vendors, 119, 476, 479, 488. Cooper's Justinian, in the notes, p. 473.

suspended in this case, from the mere contingency of Burke's coming in at some future day and answering the bill. If that should be the case, the cause will be then again opened, and he might avail himself of any equity he might have, in the same manner that a person could do on assigning error in a bill of review. So at law—in case of a motion for arrest of judgment being allowed, the party in whose favour the judgment is, is not deprived of the benefits thereof till a final hearing and decision on such motion, but can in the mean time avail himself of all the benefits derived to him from it. On the whole, we are of opinion, and it is decreed, that the defendant Sarah Howley do account before the master for such part of the estate of Richard Howley as came to her hands, or was in her power as his executrix,—how the same has been applied,—and what part thereof remains in her possession or power, and that he report accordingly: That the judgment confessed by Sarah Howley to John Baker be considered as fraudulent, and null and void: That the purchase of the certificates, said to be made by H. M. Burke to S. Howley be deemed fraudulent, and the note obtained by him from Jacob Reid for the sale thereof, be considered as the property of the estate of Richard Howley, and that Parker, the present holder thereof, be ordered to deliver up the same to the complainant, he indemnifying Parker for what shall appear to have been bona fide paid by him for it, to be ascertained by the master: That Corbett do pay his own costs in this suit, and the remainder be paid out of the estate of Richard Howley."

July, 1791.

Afterwards the master reported, that the consideration given by George Parker for the note of hand in question, was £190 on the 1st May, 1788, which with interest to the 2d August, 1791, amounted to £233. 4s. 6d. which report was confirmed.

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1 Desaus. *173

*Case LIX.

Present—Chancellors Hutson and Mathews.

JAMES POSTELL v. Executors of JAMES POSTELL.

(October, 1790.)

[*Conversion* ⇐15.]

Lands ordered to be sold, considered as money.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. § 28; Dec. Dig. ⇐15.]

[*Equity* ⇐429.]

[Where it appeared that the decision of the court of equity under a former organization was clearly erroneous, such decree was modified.]

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1022; Dec. Dig. ⇐429.]

This case was for the settlement of an estate, and the construction of a will. It was fully argued by general Pinckney, and Mr. E. Rutledge, Mr. Bee and Mr. Desaussure, the parties' solicitors—but no traces of the arguments have been preserved.

The court after some days, delivered its opinion on the points in controversy, a few only of which deserve notice.—The court gave its decretal order briefly, merely stating the points, and deciding on them.

4th point.—The court have with great attention examined both the wills of the testator, but cannot conceive upon what principle the court at that day† could have been governed, in making the decree they then did; it appearing to us as plain a question as ever was brought into this court, that the will of 1770, never having been legally revoked, the limitation over of Gerardeau's real estate, to the surviving sons, must have its full operation; for there does not appear to be even a constructive intention to defeat that clause, in either of the wills, supposing that they could legally be taken together as such, for the very words of limitation in the first are repeated in the second (intended) will.—We agree perfectly with them, that the £10,000, to Gerardeau must be considered as real estate, but that on his death it went over to the surviving sons: Therefore the former decree must be thus amended.

6th point.—The lands directed to be sold, and which were sold, must be considered as money, and consequently equally divided among the surviving children.

7th, 8th & 9th points.—We agree with, and establish the former decree on these points.

† The court here spoken of, was anterior to the organization of the court in 1784.

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1 Desaus. *174

*Case LX.

Present—Chancellors Hutson and Mathews.

BELLINGER, Executor of Skottowe v. J. L. GERVAIS.

(September, 1790.)

[*Principal and Agent* ⇐62.]

Agent not liable for depreciated money which perished in his hands.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 102; Dec. Dig. ⇐62.]

Commissions to agent, two and a half per cent. on money received and paid, and one per cent. on delivering up bonds.

This case related to the settlement of the affairs of the late Mr. Skottowe, which had been in the hands of Mr. Gervais as his agent, during the war. The principal question related to some depreciated paper money, which sunk in his hands. The court was of opinion that, as the defendant swore positively he never had applied to his own use

any of the money received for Skottowe, he ought not to be accountable for it in any other way than the depreciated paper in his hands. He could not loan it during the war, and the times were such as to embarrass every man in deciding what was best to be done with funds.—On the claim of commissions for monies actually received and paid away by defendant, (except the depreciated paper,) the court, after hearing the master's report, decreed, that the defendant be allowed two and a half per cent. on receiving, and two and a half on paying or remitting the money received; and one per cent. for delivering over the bonds and notes due to the testator. —Each party to pay their own costs, but Mr. Bellinger to deduct his from the funds of the estate.

This is all that appears entered in the register's book: But in chancellor Mathews's notes of the case, accompanying the brief, are the following words: "And that the above be the standing rule with regard to attornies or agents."

C. C. Pinckney, complainant's solicitor.—E. Rutledge, defendant's solicitor.

1 Desaus. 174

Case LXI.

Present—Chancellors Hutson and Mathews.

A. BETHUNE and WILLIAM COOKE v. BERESFORD and Wife, and SAUNDERS and Others.—WARD and Others v. SAME.

(September, 1790.)

Bills to have payments out of the settled estate of the wife, on bonds in which she joined with her husband.

[*Husband and Wife* ⟸31, 147.]

That Mrs. Beresford had not a separate estate, in præsenti, which would constitute her a feme sole—and which she could bind by her contracts: But the whole income being her husband's under the settlement, that is liable to his debts; reserving a reasonable allowance for her maintenance.

[Ed. Note.—Cited in Boggs v. Reid, 3 Rich. 161, 165, 166.

For other cases, see Husband and Wife, Cent. Dig. §§ 188, 566; Dec. Dig. ⟸31, 147.]

The bill of Bethune charges that he was applied to by Charles Ferguson, the factor

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or agent of Mr. and Mrs. *Beresford, to supply necessary articles from his store for their use, and assured him that he was employed for that purpose, and that he would be paid out of her settled estate: Upon which he furnished them with articles to a considerable amount; many of which were furnished on Mrs. Beresford's own application by letter, filed with the bill. That complainants would not have trusted Mr. Beresford, but relied for payment on Mrs. Beresford's estate, derived from the will of her first husband Charles Elliot, which, upon her marriage with Mr. Beresford, was settled on her by deed of settlement, of which Thomas Ferguson and R. P. Saunders were trustees, to the use of Mr. R. Beresford during their joint lives, and upon the death of Mrs. Beresford, to the use of such persons as she should appoint by her will: That the said Richard and Ann his wife, being unable to pay the account, joined in a bond to complainant, conditioned to pay £342, copy of which is filed: That R. Beresford has no estate, but that of his wife, secured by settlement; and is deeply involved in debts, and unable to pay them; and the defendants insist that the settled estate is not liable to this debt.

The complainant W. Cooke, charges that R. Beresford was indebted to him, in a large sum, for goods furnished Mr. and Mrs. Beresford, at the request of the said Ann Beresford: And being unable to obtain payment, required security. But they said they were unwilling to involve their friends, but would give a joint bond to secure the debt; which was accordingly executed on the 1st August, 1789, conditioned to pay £867. and to which R. P. Saunders was a witness—being called on as trustee expressly to sanction the proceeding, by subscribing the bond as a witness. But the complainant is now informed that the defendants insist the said bond is only binding on R. Beresford, and cannot subject the estate to the debt. The bill prays relief, and that the defendants may be compelled to pay the said debt out of the settled estate.

The defendant R. P. Saunders, the trustee, in his answer states, that he is ignorant of the transactions charged by complainant Bethune, respecting the debt contracted by Mr. and Mrs. Beresford with him. He admits that

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*Mrs. Beresford had a considerable estate, which was settled, on her marriage with Mr. R. Beresford, in the manner stated by the bill: That he knew nothing of the debt to Cooke till he was called upon to witness the bond; "and he did sign the bond as witness and trustee," but did not know the extent it might have in its operation; but he would not have consented to bind the settled estate, if that had been distinctly stated to him as the object, having promised Mrs. Beresford's father, Mr. Ferguson, never to consent to any act which should subject her settled estate to the debts of her husband—But he was taken suddenly and unawares, and signed without due reflection, when called on by Mr. Beresford to sign as trustee, his wife being present.

Defendant insists that the settled estate ought not to be made liable to this debt.

The answer of Mr. and Mrs. Beresford admits that Charles Ferguson may have applied to complainant Bethune for the articles they wanted, but they deny that they authorized

him to pledge the settled estate for the payment. They admit they were furnished with the articles, and Mrs. Beresford admits that she took up some of them personally, and wrote for others—but that she acted only as the wife of R. Beresford. She admits she was possessed of a considerable estate, which on her marriage with Mr. Beresford was settled as in bill stated. She admits that she joined her husband in executing a bond for said goods to said Bethune, as in bill mentioned, and that she joined therein to prevent the necessity of her husband's applying elsewhere for security.

Defendants admit that said Richard was indebted to complainant Cooke, partly for goods purchased; but defendant Ann denies that she promised said Cooke to bind her particular estate for payment. She allows she might have said the debt would be paid when the (then) next crop should be sold; but she considered herself as acting merely as the wife of R. Beresford, and not to bind the settled estate: That the remainder of the debt was in bonds purchased up by complainant Cooke, who demanded security for the whole: That R. Beresford told Cooke his

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*wife had an estate settled on her, and she might become his security: And defendant Ann admits that to prevent discord she did join with her husband in the said bond, to the amount of the goods and bonds purchased by Cooke.

Defendant Richard admits he did tell Cooke that he would ask R. P. Saunders to agree to and sign the bonds; but he does not recollect that he ever spoke to him on the subject, before he sent for him when he was about to sign the bond. Defendant Ann submits whether her signing said bonds binds the settled estate: And said Ann prays the court to consider that it was in a manner compulsory on her to sign said bonds; and that the natural affection a woman entertains for her husband, is so great, that at his request, and to ward off difficulties, she would join him in many transactions which might tend to injure her unless protected by the court.

The bill of the executors of John Ward states, that they sold a tract of land under the testator's will to Mr. Beresford, and that Mrs. Beresford joined in the bond voluntarily, and with the approbation of Mr. Saunders the trustee. The bill prays payment out of the trust estate of any deficiency after sale of the mortgaged property.

The answers admit the facts, but deny that the trust estate is liable; and Mr. Saunders answers, he would not have consented to any act which could be supposed to bind the trust estate, as he had promised Mrs. B.'s father never to do so.

Mr. I. P. Ward testified that he advised the executors to be cautious of receiving a married woman as a security; but Mr. R. P. Saunders, who was present, said, they were secure, for Mrs. Beresford had too much honour to violate her engagements.

Mr. Joshua Ward and Dr. Fayssoux proved that Mrs. B. executed the bonds voluntarily.

These cases were argued in September, 1790, by Mr. Pringle for complainants, and general Pinckney, Mr. Rutledge and Mr. Parker for defendants.

The court on the 2d day of October, 1790, delivered the following decree, which is

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extracted from Chancellor *MATHEWS'S notes, and the register book: The court said it had considered the subject, and examined the decided case with great care: That the principal point relied upon by complainants' counsel was, that Mrs. Beresford had a separate estate under the marriage settlement, which was liable to pay the complainants. Several of the cases cited would have been conclusive, if it could have been shewn that Mrs. Beresford had a separate estate. But the court did not think she had. By the marriage settlement she conveyed the whole estate to trustees, to the use of her husband R. Beresford, during their joint lives; and upon her death, for the use of such person as she should appoint or direct by deed or will. This is unlike any of the cases in the books. She has divested herself of the legal estate, and has reserved no equitable estate, but that right to a support from the husband, which the law gives every wife. She has no rights in the estate during life; she can only dispose of it to take effect after her death. This then is not such a separate estate, vested in her, as will induce a court of equity to call her a feme sole. All the decided cases are, "where the wife has a clear, distinct, independent, separate estate, which has induced the court of equity to consider her a feme sole; and as such has made her contracts obligatory on her—whereas at common law they would have been void. The case quoted from 2d Equity Cases abridged, 136, and Talbot 41, is a good deal like the present, and the court held the wife bound; but it was because she had joined her husband in levying a fine, one of the most formal and binding acts of the law; in which she had a fair opportunity to refuse to act. But in the case under consideration, the signing the bonds is in a private room, under the eye and control of the husband. The chancellor relied upon this public solemn act, and said that a fine has the same operation on trust estates as on legal estates. The case of Hulme & Tenant, 1 Bro. C. C. 16, comes nearest to the case under consideration; and the court has gone further in that case in enforcing the contracts of the wife, than in any other. In all the other cases, (except

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Penn v. Peacock and wife, *in Talbot,) the decree has never gone further than to bind the rents and profits of the wife's separate

estate to answer for her contracts: but in Hulme and Tenant it is extended to the personal estate, as well as the rents and profits. But still this is on the principle of a sole, separate estate, and the wife is in consequence considered as a feme sole. Could we consider Mrs. Beresford in this light, we should think ourselves bound by such strong authorities: But we have said she is not so to be considered; therefore the cases are not applicable to the present one.

The counsel have next relied on the case of Baynton and others v. Ward, in 2 Atk. 172, where it is decided, that a wife having power to dispose by appointment of a reversion in fee, and no disposition is made, it shall be assetts to satisfy specialty creditors. And it is contended, Mrs. Beresford had at least a reversionary estate, disposable by appointment, which ought to be made liable. But Mrs. Beresford has not, strictly speaking, a reversionary estate. It would be premature to say what effect would result from Mrs. Beresford's dying without exercising her power of appointment; which might assimilate it to the case above mentioned. If that event occurs, it will be time enough for the court to decide upon the effect.

We will now examine the cases cited for defendants, and the arguments founded on them. The two first are from 3 Atk. 162, and from 2 P. Wms. 506, with respect to the strict execution of the powers. And complainants' counsel has admitted, that any deviation in the execution of the powers under the deed, would be fatal; were it not that Mrs. Beresford had a separate estate, and joining in the bond, with the assent of the trustee; evidenced by his witnessing the bond; this enlarged her power. But she had not a separate estate—And the bond is not executed under the powers of the deed of settlement, which required her appointment to be made in presence of three witnesses. The enlargement of the power the court will look at with a jealous eye, and will not sanction it, especially on such presumptive circumstances.

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*It is said that Cooke's case stands on stronger ground; as the trustee has expressed his assent deliberately, and subscribed as a witness. But in this case the execution of the power is not correct; there being but one witness, instead of three. And if it had been correctly exercised as to form, it is premature: It is done in the life time of the husband, whereas by the settlement her power of appointment is not to be executed during his life, and can only operate after her death. The trustees had no authority to enlarge her power, to charge or encumber the estate. They are to protect the estate and the interests of the cestui que use, and not to assist in injuring or encumbering them. His assent therefore, cannot give effect to an act otherwise unauthorized and invalid—Such an assent is a breach of trust. But the assent was an act of surprize, as the trustee swears in his answer: And he declares he did not know the effect which such subscription as a witness might be construed to have on the trust estate, or he never would have signed the bond as a witness; for he had promised the father of Mrs. Beresford never to sanction any act encumbering the trust estate.

With regard to the complainants, it appears that they were apprized of the settlement, and presuming that Mrs. Beresford had a separate estate under it, and had authority to charge that separate estate, they solicited her to join in the bond. She did so, but she did not mislead them—there was neither suggestio falsi, nor suppressio veri, on her part. It was proved that she promised Bethune that the debt should be paid out of the crop; but there is no evidence that she directly promised to make the trust estate liable: And her declaration to one of the witnesses, who called for payment of the bond, that it was a debt of her contracting, and should be paid, (though she had only written orders on a store for goods, as other married women do,) does not alter the question as to the liability of the trust estate. If it were a debt of Mrs. Beresford's contracting, and she had a separate estate, liable to it, there was no necessity to join Mr. B. in the bond, and the complainants had no confidence in him. If she was considered as a feme sole, her bond

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alone was *sufficient. If not, her joining in the bond was a void act: Mr. B. was looked upon as the principal, and signed the bond first.

In Cooke's case reliance is placed on the fact that the bond refers to the settlement, as securing her estate to her, and evidences an intended reference to, and dependance on that estate for payment, to which the trustee consented by signing as a witness. But this cannot alter the case. This reference to the settlement cannot make the trust estate liable, if it were not so independently of that circumstance. It conferred no new powers of charging the estate on her. No deed can be defeated by a deed of less solemnity. 2 Vern. 473. 5 Com. 595. No subsequent deed can invalidate a prior one, where no power of revocation is given; and none is given by the deed of settlement.

If the creditors relied on this security on a mistaken ground of the powers of Mrs. B. to make the trust estate liable, it is not for this court to give them relief. The situation of Mrs. B. is not that of a free agent. A wife witnessing the distresses of her husband, would do any act to relieve him. This court is bound to protect her against her own misguided acts, and prevent her ruin. The court cannot consent to make her liable, because the creditors have mistaken her powers and her liability: More especially as the whole settled estate proceeded from her.

Mrs. Beresford never was applied to, to join in bonds, till her husband was found to be incapable of paying. The creditors relied for payment on the income of the trust estate, which was at his disposal. But when that was found inadequate to pay his debts, then he is pressed, and he proposes to procure his wife to join in binding her reversionary interests—They agree to this proposal, and she is persuaded to do so by her husband. If this court should sanction such an act, it would be a death blow to all marriage settlements.

On a full consideration of this case, "the court is of opinion, that Mrs. Beresford is not to be considered as having a separate es-

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tate in presenti, under the mar*riage settlement: therefore she cannot be considered as a feme sole, whose contracts, such as they are, can be binding on her, they wanting that solemnity, which is required by the express words of the deed of settlement, and which indeed would, by the rules of law, be also required: That her reversionary interest in the estate, is not immediately affected by those bonds she has entered into. However, there can be no doubt that Mr. Beresford's interest in the estate is liable for his debts, and must be made answerable for them. At the same time Mrs. Beresford must have some allowance made her, for her maintenance, out of the trust estate which flowed originally from her.—It must therefore be referred to the master to enquire, what are the whole of the debts of Mr. Beresford; what can be considered as the average value of the profits of the estate annually, and what would be a proper allowance for Mrs. Beresford out of them, and report accordingly.

"As to the case of the executors of Ward v. Beresford and others, we do not see that it differs from the others just now determined, except that the executors of Ward have a right to foreclose the mortgage.

"With respect to the case of Saunders v. Washington and others, we shall defer giving any decree on that case, till the master's report comes in."

Afterwards, on the master's report being made, the court made the following decree:

"Decreed, that Mr. and Mrs. Beresford be allowed the sum of three hundred pounds per annum for her maintenance; the use of the mansion-house at Woodville, and household furniture, with the gardens and out-houses, except such as are necessary for plantation purposes; the following servants, viz. Wall, Doll, Phebe, Affey, Jenny, Mimba, Billy, Johnny, Cupid, Rachael, Gardner, and two boys, and Hunter, also, Sibby, Maria, and Saul, with the usual plantation allowance of provisions for them, the use of the horses, the use of the stock (excepting the working oxen) for family use, necessary pasture, and as much of the offals of the plantation as may be requisite for their subsistence: And

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that the entire management of *the rest of the estate be committed to colonel William Washington, and colonel William Skirving, and captain Roger Parker Saunders, removable on application to the court, who are hereby directed after the payment of the above annuity to Mrs. Beresford, and the plantation expenses, to divide the remaining profits of the estate among the creditors in equal share and proportion: that the injunction be perpetual—Provided notwithstanding, that nothing in this decree contained, shall be construed to prejudice or impeach the claims of any persons who may have had demands against the said estate previous to the intermarriage of Mr. and Mrs. Beresford: And that costs of these suits be paid out of the proceeds of the estate."

March, 1791.

Mr. John Rutledge, the senior judge of the court of chancery having been elected by the legislature, chief justice of the court of common pleas and sessions, in the month of February, 1791, and he having accepted that office, Mr. Hugh Rutledge was elected a chancellor in his place—So that the court is now composed of the following judges: Richard Hutson, John Mathews, and Hugh Rutledge.

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1 Desaus. 183

Case LXI.

Present—Chancellors Hutson and Mathews.

RICHARD BERESFORD and Wife, W. WASHINGTON and Wife, and Others, v. Executors of Colonel BERNARD ELLIOTT.

(December, 1790.)

Bill to have an account of an estate, and certain property delivered up to complainants.

Question on the limitations of a bill.

[*Wills* ⇐545.]

The limitations over, not too remote and void; but within the admissible limits, & good.

[Ed. Note.—Cited in Logan v. Ladson's Ex'r, 1 Desaus. 272.

For other cases, see Wills, Cent. Dig. § 1173; Dec. Dig. ⇐545.]

This is a case arising out of the will of Thomas Law Elliott. He being seized and possessed of a considerable real and personal estate, made and duly executed his will on the 6th of December, 1756, wherein, after giving a specific legacy to his wife, he bequeathed as follows: The use of all hereafter mentioned to his son Thomas Elliott; viz. two tracts of land, (which he describes;) also several negro slaves (by name)—and the half of all the rest of his personal estate. To the use of his daughter Mary Bellinger Elliott, two negro slaves, (by name:) and the other half of his personal estate.

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*In case his son Thomas Elliott "dies and leaves no lawful heirs of his body, then all the abovementioned to his daughter Mary B. Elliott, and the heirs of her body; and if his son leaves any heirs of his body, then to them and their heirs for ever." In case his daughter "dies and leaves no lawful heirs of her body, then all the abovementioned to his son Thomas and the heirs of his body; but if his daughter leaves any lawful heirs of her body, then to them and their heirs for ever." In case his son Thomas and daughter Mary should both die, "and leave no lawful heirs of their bodies," then the abovementioned real and personal estate to be equally divided between his, (the testator's) brothers and sisters, to them and the heirs of their bodies lawfully begotten, to them and their assigns for ever."

The testator appointed his brothers John and Charles executors, and died on the 7th December, 1756, leaving his will in full force and effect. The executors qualified on the will, and possessed themselves of the property. At the testator's death he left the following family and relations: A wife,—his son and daughter abovementioned,—two brothers, Charles and John Elliott,—and two sisters, the complainant Mary, wife of Robert Rowand, and Sarah, wife of Archibald Stanyarne.

A few months after the death of the testator, his son Thomas Law Elliott died, an infant and unmarried, whereupon the whole estate devolved on the daughter Mary; who in the year 1766 intermarried with Bernard Elliott; on which the surviving executor suffered the said Bernard Elliott to take possession of the estate, and receive the rents and profits thereof.

Mary B. Elliott died on the 11th December, 1774, never having had issue born alive: On which, it is contended by complainants, that the said Charles Elliott and Mary Rowand, the surviving brother and sister of the testator, (the other brother and sister having died before the daughter Mary, without issue,) became entitled under the will to the whole estate, and the increase thereof, to be divided between them: That being so entitled, they demanded the same from colonel

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Bernard Elliott, and on *his refusal to deliver up the estate, they filed a bill in chancery for the recovery of the same, in August, 1778; but the suit was abated by the death of colonel B. Elliott, in October, 1778; who left in full force a will, by which he bequeathed his estate to his second wife and his son Bernard. His executors qualified thereon, and possessed themselves of his estate.

Charles Elliott, the brother of the testator Thomas Law Elliott, died in January, 1791, having first bequeathed his estate to be equally divided between his wife Ann and his daughter Jane Riley Elliott; the former of whom hath since married Richard Beresford the complainant, and the latter W. Washington the complainant: And they have, upon the death of the executors of Charles Elliott, administered on his estate, with the will annexed. They, together with complainant Rowand, applied to the executors of colonel Bernard Elliott for an account of the estate of Thomas Law Elliott, and for the delivery up of the same to them, being entitled thereto under the limitations of his will: But this they have refused to do, and complainants pray for an account of the rents and profits, and of the increase of the slaves, and for the delivery of the estate to them.

The executors of colonel Bernard Elliott admitted in their answer, all the facts stated in the bill; except that they allege, that the inventory of Thomas Law Elliott's personal estate returned to the office, differs essentially from that filed with the bill of complaint. The defendants also say that some time after the death of Thomas Law Elliott, Thomas Elliott, the grandfather of the said Mary Bellinger Elliott died, leaving her by his will one fifth of his personal estate, which Charles Elliott took possession of, and kept the same, together with what estate his niece Mary B. was entitled to from her father, until the month of April, 1766, when she intermarried with colonel B. Elliott: And on that event the said Charles Elliott delivered to said Bernard Elliott a number of negro slaves; but the defendants do not know the names or the number of those so delivered; nor which of them came from the

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estate of *the grandfather or the father; nor which were bought with the profits of the estate of Mary during her minority.

The defendants say, that colonel Bernard Elliott continued in the quiet possession of the property from April 1766, till August 1778, when and not before a suit was brought in the court of chancery to recover the pretended rights of complainants; which suit abating by the death of said B. Elliott, has never been renewed till the present suit—wherefore the defendants pleaded the statute of limitations: That with respect to the discovery of the particulars and amount of the value, interest and profits of the said personal estate of the said Thomas Law Elliott, which came to the hands of the said B. Elliott, the defendants say they have no knowledge of the subject, nor is there any way by which they can come to a knowledge of it; for the inventory of that estate was made nine years before the marriage of B. Elliott with his wife Mary: That the defendants have as good a right to claim of complainant an account of the estate, whilst it was in the hands of Charles Elliott, the executor of Thomas Law Elliott, under whom the complainants claim, and who they are informed

and believe, never did account for the profits to colonel B. Elliott, either as executor of Mrs. B. Elliott's father or grand-father: That many of the negroes of the estate were lost by death or desertion to the British, as the complainant Mr. Rowand himself declared in a memorial to the board of police, which is produced: That colonel B. Elliott and his representatives have uniformly contested the right of the complainants to any part of the estate which said Bernard Elliott obtained by his marriage with Mary B. Elliott, and held an adverse possession: That in any event defendants should not be made liable for the accidents of death or the calamities of war.

The case came to a hearing on the 23d December, 1790, and was argued by Read and Pringle for complainants; and Marshall, E. Rutledge, and T. Pickney for defendants.

For complainants it was insisted by Mr. Read, that the limitation over to the broth-

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ers and sisters of the tes*tator, on the event of the death of his children, without leaving lawful heirs of their bodies, is within the limits prescribed by law; and therefore not void, but must take effect. The distinction is, between a dying without issue generally, and a dying without leaving issue at the time of the death of the first taker. The limitation in the will under consideration, is on a dying without leaving heirs of their bodies. This is a sufficient restriction of the limitation, and prevents its being considered an indefinite failure of issue. See Mosely 182, 8. 1 P. Wms. 432. 3 P. Wms. 258. 2 Eq. Cas. 325, 346. 8 Viner 141. 1 Salk. 225. 2 Brown, C. C. 33, 127. The limitation over is good, being confined to a life or lives in being. 3 Atk. 285. 1 P. Wms. 198, 534. 2 Atk. 642. The intention too must have great weight, and that must be collected from all parts of the will. That intention is manifest here, and is not opposed to any rule of law.

Mr. E. Rutledge contended for defendant, that no case like this had ever been decided by any of our courts of justice: That the devise of the use of a thing, is a gift of the thing itself. Butterfield v. Butterfield. There are no words in the will under consideration to restrain the limitation to heirs living at the time of the death. There is a difference between legal and trust estates. Sams v. Mathews decided in this court was a trust estate. Atk. Read v. Snell, Bagshaw v. Spencer, and Colson v. Colson. 1 Vesey 133, 4.

If the answer is taken for true, as the defendants deny any knowledge of the property, and the discrimination of it from other property of the same kind, no discovery is obtained; and the bill must be dismissed, as no decree can be made upon it. No discovery being made, they cannot be let into proof of it: For if the complainants have proofs, and have any right, they have a remedy at common law. See Harr. 45, Bunburry, Alcot v. Thompson. 1 Vesey 446.

Mr. Marshall for defendant contended, that the limitation over was too remote; and that the limitation over of a personalty, being a vested estate tail, cannot be made: "A dying without heirs of their bodies," in this

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case, *gave cross remainders. 1 Vesey 155. Vesey, Daw v. Pitts. 2 Atk. 308.

Major T. Pinckney for defendants insisted, that the limitation over was too remote. Mathew Manning's case was the first case of executory devises—A trust estate is distinguished from a legal estate. In the first, the intention will be supported on slight grounds —not so in the latter.

Mr. Pringle for complainants in reply.—He insisted that though this was an executory bequest, depending on a contingency, the limitation is not too remote. The ultimate limitation extends no further than to a life in being, which is permitted. The legal meaning of a failure of issue generally, or indefinitely, is on a failure of issue from generation to generation. The same rule governs executory devises as trusts. Fearn. 378. Executory devise good, though depending or limited over, on ever so many lives in being. The court favours the preservation of the limitation over, if it can be done legally, because that gives effect to the testator's intention. The court has always laid hold of any words to tie up the generality of a dying without issue; and confine it to a dying without issue at the time of the death. 1 P. Wms. 433, 664. Forth v. Chapman, which is a leading case. 3 P. Wms. 3 Atk. 283, 396. If the words had been a dying without issue, the limitation would have been too indefinite, and therefore void, and the estate would have vested in the first taker, Mrs. Mary B. Elliott. But the words are, dying without leaving issue—The word 'leaving,' restricts the clause to a dying without issue, at the time of the death taking place, agreeably to the case of Forth v. Chapman. 2 Atk. 646. 6 Bro. P. C. 309. D. and East, 593. 2 do. 720. Leaving issue, a good limitation. Fearn. 368, 371. The same rules govern legal, as trust estates. Fearn. 354. 1 Eq. Cas. 192. 2 Vesey 646.

March, 1791.

Opinion of the Court.

The court delivered its opinion as follows —"This case is comprised within a very narrow compass, viz. Whether the limitation over to the brothers and sisters of the testator T. L. Elliott, is so remote a contingency, as will not be favoured in law, whatever

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might have been *his intention. It is a well known rule, that in the construction of wills, the testator's intention is to prevail,

if not against the rules of law. The intention of the testator in this case, to give the estate to the brothers and sisters on the death of his children, without issue, is as plain as words can make it. The question then is, does the rule of law interpose its authority, to prevent the operation of such intention? That it does and renders the limitation void, by reason of the remoteness of the contingency, and the generality of the words, has been very ably argued, and many authorities quoted in support of such argument. To go into a minute investigation of them, would, we think, be unnecessary; as the case is to be decided on a very plain rule of law; one that is as old as the law itself, and which has never been impeached on any fair grounds—We mean the construction of limitations: and where they have been confined to lives in being, they have ever been admitted to take their full operation. We therefore find no difficulty in our minds, when we say, that in the present case, the limitation over to the brothers and sisters of T. L. Elliott, being confined to lives in being, and some of whom were actually in being at the time, (and one is so still,) the estate ought to have vested in them, viz. on the death of Mary B. Elliott, without leaving issue, is such a limitation as always has been, and must now be supported. And if this doctrine should ever be reversed, it appears to us, that it would impeach most of the estates in this country now held under wills, which have received the same construction we have now given to the present; though perhaps not by judicial decisions. As to the generality of the words being such as renders the limitation void on that account, and vests the estate in the first taker, in nature of an estate tail, we can by no means admit this to be the case, because from several decisions in this court, viz. in the case of Ladson and others v. Ward [1 Desaus. 314], Sealy and others v. Executors of Ball [1 Desaus. 137], and Sams v. Mathews and others [1 Desaus. 127], and in the court of common pleas, the case of Keating v. Reynolds [1 Bay, 80], the words of the wills (on which the decisions of those cases were

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founded,) were more general, and envel*oped in greater obscurity than in the present case; yet the intention of the testator governed in all those cases, on account of the liberal construction that was given to the words of the will. In the present case, the words "and should die and leave no lawful heirs of their body," we conceive so far impugn the generality of the other words of the will, as takes it out of the rigid rule of law, and makes way for the equitable construction we have given them, viz. leaving no issue at the time of their death, at the same time it lets in the limitation as far as it goes to the lives in being. We therefore think the limitation to the brothers and sisters of T. L. Elliott, is good, and such of them as were entitled must take accordingly. Let it be referred to the master to enquire what part of the personal estate of the testator, Thomas Law Elliott, came into the possession of Bernard Elliott, deceased, on his intermarriage with Mary Bellinger Elliott; what remains of said estate in possession of the executors or representatives of the said Bernard Elliott; and what have been the profits of the labour of the negroes since the death of Mary Bellinger Elliott, and report accordingly.

August, 1791.

Afterwards the master's report was made and read, and on motion of Mr. Read, solicitor for complainants, ordered that the same be confirmed; that the defendants deliver over to complainants the fifty-four negroes first mentioned in the list annexed to the report: That they account for the other fourteen negroes, at the rate of fifty pounds each; and that they pay over the sum of four thousand pounds to the complainants, in three annual payments, with interest from the 18th March last, reserving the share of the negroes which are claimed by the complainant R. Beresford; and also the share of the four thousand pounds in right of his wife, till the further order of court, and that the defendants do pay the costs of this suit.

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1 Desaus. *191

*Case LXIII.

Present—Chancellors Hutson, Mathews and Rutledge.

Executrix of JOHN STOCK v. Executor of RACHEL STOCK.

(July, 1791.)

[*Executors and Administrators* ⟸118.]

Bill for an account and settlement of estate. Under special circumstances depreciated balances during the war, not to be mingled with undepreciated balances before the war.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 475; Dec. Dig. ⟸ 118.]

[*Executors and Administrators* ⟸104.]

Executors not bound to put money out to interest, nor to pay interest.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 424; Dec. Dig. ⟸ 104.]

This was a bill filed for the settlement of an estate, and the case turned chiefly on questions of depreciation—Some of the transactions of the executor being before, and some during the depreciation of the paper money during the revolutionary war.

The annual balances before the war, were uniformly and largely in favour of the estate, and for a year or two after. The balances during the rest of the war, and the depreciation, were in favour of the executor; but this was produced chiefly by his paying

large orders of Mr. Stock, who, though a legatee and heir of the estate, was a minor.

The first point made by the counsel for the complainant was, that neither the will of the testator nor the law sanctioned the acting executor in permitting such an unexperienced heir, legatee and executor as John Stock, who was actually a minor, to draw such large sums out of his hands, and thus diminishing the executor's debt to the estate. There was also another question—Whether the executor was liable to pay interest on the balances in his hands at the end of the year.

The case came to a hearing on the 12th of July, 1791, and was argued by Mr. Pringle and general Pinckney for complainant, and by Mr. Holmes and Mr. E. Rutledge for defendant.

On the question of interest, the counsel for complainant argued, that it would be just and reasonable that interest should be allowed by the defendant. He was executor of the estate, and at the same time engaged in the factorage business, and the crops of the estate were sent to his factorage house: That they sold the crops, and there were large balances at the end of several years in their hands. It was the duty of the executor to have taken those balances and paid the debts of the estate, if any, and if none to have put the money out to interest. He had done neither; nay, kept it in the hands of his factorage concern, and made that

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neglect the foundation of a *claim to connect those undepreciated balances with running accounts subsequent to the commencement of the depreciation, and take the ultimate balance, and depreciate that, which would be a great and unjust loss to the complainants. As to executors and trustees being bound to put money out to interest, or being liable to pay it, the counsel cited 1 Vesey, 407. Brown v. Pring. 1 Vern. 197. 1 Eq. Cas. abr. 238. 3 Bro. Par. Cas. 319.

The defendant's counsel insisted, that it was the custom to let balances remain in factor's hands from year to year: And the rule of this court was not to charge executors with interest; at all events only where they made interest—which the executor had not done in this case: That the balance of account, before depreciation was transferred to the next years' accounts and mingled with them—of course the last balance must be depreciated.

The court said, there were two questions, viz. 1st, Whether the balances on accounts for 1775 and 6 (previous to depreciation) should be accounted for in specie, or the whole looked upon as a running account from the death of the testator to the close of the transactions in 1779; and, 2dly, Whether any and what interest should be allowed.

If this were a case between persons of full age, of mutual dealings before and subsequent to depreciation, there would be little difficulty; but this is a case where defendant is executor and factor of an estate, with which he has accounts, which makes it different from all other cases. In 1775 and 6 there were large balances in defendant's hands, where they remained till November, 1779. John Stock, whom complainant represents to have been a minor, drew large sums from the executor, which changed the balance. The court is guardian, and will not suffer him to be prejudiced by acts in his minority. It was not just in the executor to apply specie funds to discharge the depreciated balance of 1779. It was unjust to close the accounts in November, 1799, for the purpose of raising a balance to wipe off the specie fund.—2d, As to interest—No law obliges the executor to place money out at interest; and no authority was given to do

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so in this will—*The profits were bequeathed to complainant, therefore no interest to be charged.†

† This certainly appears to have been the old law. It is so stated expressly in the text attributed to Mr. Ballow, to which Mr. Fonblanque has attached his valuable notes. After stating that a bailiff, who is charged as receiver ad computandum, shall answer only for the money, or thing delivered, without increase or profits, he adds,—"So in chancery, an executor or trustee not being bound to lend, if he do lend it is at his own peril: and if it be by that means lost, he shall answer the same out of his own estate; and therefore, as he shall bear the loss, he shall have the gain." And he says, "This is a fixed rule of the court, and they will not change it, even where the executor calls in the money on good security."††

Mr. Fonblanque expresses his astonishment that such a principle should ever have had the weight which it appears to have received in some cases. 2 Chan. Cas. 35, 152. 1 Vern. 197. 2 Atk. 106. Adams v. Gale; and 2 Atk. 603, Child v. Gibson. There were, however, cases decided differently, even at that time. See 1 Vern. 196, Radcliffe v. Graves; 2 Vern. 548, Lee v. Lee. And lord chancellor Thurlow solemnly considered the subject, and denied the old rule to be the law of the court. See 1 Bro. C. C. 359, Newton v. Bennet. So that an executor or trustee may now be considered as chargeable with interest, when he appears to have made interest. See 1 Bro. C. C. 375, Perkins v. Bayntum. 1 Bro. C. C. 384, Treves v. Townsend. And he shall not only be chargeable with interest, but if he appear to have employed his trust money in trade, whence he has derived profits, beyond the rate of interest, he shall account for all such profits. See 2 Bro. C. C. 430, Forbes v. Ross. And it has been further held, that if a trustee or executor retain money in his hands (unnecessarily) for any length of time, which he might by application to the court, or by vesting in the funds, have made productive, he shall be charged with interest thereon. 2 Vern. 744. 1 Bro. C. C. 375, Perkins v. Bayntum. 3 Bro. C. C. 73, Littlehales v. Gascoigne. Ibid. 433, Franklin v. Frith. And an executor vesting money in the funds, and appropriating the same, shall not be liable to the fall of Stocks. See ex parte Champion, cited in Hutcheson v. Hammond, 3 Bro. C. C. 147.

The later decisions of our own court of chancery have been conformable to these decisions;

†† 2 Fonbl. ch. 7, § 6, p. 188, 1st Lond. Ed.

It was therefore decreed, that it be referred to the master to examine the accounts of the defendant, and to state the balance due thereon at the end of every year anterior to any depreciation: That as to the remainder of the said accounts, the master do only

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depreciate the sum *due on the last balance, and report the same to the court: That such balances, when liquidated, shall be paid in specie by defendant to complainant, in equal proportions, in one, two and three years, together with the annual interest to grow due thereon: And lastly, that defendant do pay the costs of this suit.

The master afterwards made his report conformably to the above principles; which was confirmed.

Pringle and general C. C. Pinckney for complainants. Holmes and E. Rutledge for defendant.

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and interest is chargeable to executors and trustees, wherever there were disposable funds of the estate in their hands, which the exigencies of the estate did not prevent being placed out at interest. Vide postea, case of executors of Gadsden v. Executors of Lord, and other cases.

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1 Desaus. 194

Case LXIV.

Present—Chancellors Hutson and Mathews.

Executor of NEILSON v. Mr. HUGH RUTLEDGE, the Attorney of Dickenson.

(July, 1791.)

[*Interest* ⟸55.]

Interest recoverable on bond debts due to British subjects during the war.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 128; Dec. Dig. ⟸55.]

This bill was filed to obtain an injunction against the present defendant, to prevent his getting interest on a bond debt, during the war with Great Britain, on the ground that the debt being due to a British subject, interest ought not be allowed to run during the interruption of the intercourse, and when the funds and revenues of the debtors to British subjects were cut off or diminished by the acts of that government and its armies.

An injunction had been granted in the first instance. The case was fully argued, and the court took time to consider the question. The court delivered its opinion as follows:

There are two questions in the case—1st, Whether the circumstances of it are such as will distinguish it from the general question, whether interest is to be allowed on any debt due from a citizen of the United States, to a subject of Great Britain during the war: And, 2dly, Whether interest ought to be allowed in the present case. This being a bond debt, given in this state, on which large sums have been paid during the war; and the defendant during the whole of that time having an attorney on the spot, certainly renders this case distinguishable from simple contract debts. It being a specialty, it

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speaks for it*self, and will admit of no dispute if fairly obtained; and that it was so, is admitted. On the present occasion we are thrown into an entire new situation; heretofore we have had the general law of the land for our guide in all our decisions; but that we are now altogether deprived of; as there is no case in any of the books that is in any wise analogous to the one now before us, and the only rule by which we can be at all directed, is the treaty of peace between the United States and Great Britain. One of the articles in that treaty declares, that no interruption shall be given to the recovery of just and bona fide debts on either part. That this is such a debt, is not disputed: But it is contended, that there was a period during which interest ought not to be allowed, although on the face of the bond it is the mutual agreement of the parties that it should. This court has taken a very unusual length of time to consider this question; and although frequently called upon for a decree, we have declined it, in hopes some new light might be thrown on the subject, by which we might be enabled to tread on some firm ground, in this new and by us untrodden path. This light has been afforded us, from a quarter that we are persuaded would never lead us astray. The authority is so high, and so truly respectable, that we candidly confess, our minds have been so much swayed by it, that however we might have heretofore doubted, these doubts are now removed. The determination we allude to is that of the chief justice of the United States, in a case in the state of Connecticut, on the 30th of April, in the present year, where the chief justice went so far as to say, that although the law of Connecticut enabled their state courts to deduct interest on bonds due from citizens of the United States to British subjects during the war, yet that such law was an infringement of the treaty of peace; and as upon common law principles, interest was recoverable, he adjudged it should be so in the case then before him. As the case now before us is also a bond debt, as there has been no impediment of any kind thrown in the way of the recovery of interest on such contracts, by the legislature of this state, on the contrary, they have always studiously

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*avoided intermeddling in this question,—we think ourselves bound to adopt the opinion of a judge of great and extensive law knowledge, who is directed in his judgment by the same laws we are, and that we might also preserve a uniformity of decisions on the same questions. If then he decided even

against a law of the state in which the cause was tried, and in support of the treaty of peace, how can we do otherwise where our legislature have chosen to be silent on the subject, and when we are equally with him bound by the articles of peace in our decisions? On the whole we are therefore of opinion, on the authority of the decision we have referred to, and on the best judgment we have been able to form of the case now before us, that we ought not to grant the prayer of the complainant's bill, but that the injunction ought to be dissolved.

It is accordingly decreed, that the complainant's bill be dismissed with costs.—Injunction dissolved.

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1 Desaus. 196

Case LXV.

Present—Chancellors Rutledge, Hutson, and Mathews.

ELIZABETH GREENLAND alias BROWN v. CORNELIUS BROWN.

(September, 1789.)

[*Husband and Wife* ⇐12.]

A husband declaring his intention to abandon his wife, and to sell all the property he got in marriage, and to carry off the proceeds, the court will restrain him, and compel him to convey the property to trustees, for their joint use, with other proper limitations.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 58; Dec. Dig. ⇐12.]

[*Marriage* ⇐50.]

[Upon a bill by the wife for relief on account of a prior marriage by the husband, proof that the husband had cohabited with a woman, and that he had spoken of her in his letters as his wife, was *held* to be insufficient evidence of the marriage.]

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 85; Dec. Dig. ⇐50.]

The bill charges that the complainant was a widow, possessed of a considerable real and personal estate, and in March, 1788, intermarried with Cornelius Brown, an Englishman who had recently settled in the country—And he, by virtue of the marital rights, took possession of the estate, and appropriated part of the profits to the purchase of a plantation called Battersea: That it has been recently reported, that the said C. Brown was a married man, at the time of addressing and marrying the complainant: And that his view in marrying her, was to get possession of her property, to dispose of the same, and to convey the proceeds to his wife in England: That the said C. Brown wrote several letters to his friends in England, which disclose his situation and his views—copies are filed with the bill. In one of them, written to his brother in law Mr.

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Dunn, he speaks of his wife, in Eng*land, and desires him to bless her "for her unfortunate husband." And in another letter to his sister Mrs. Dunn, he speaks of his wife, in England; and hopes they will meet ere long never to part again—In both letters he desires his situation in America to be concealed, and that he should be represented as at Madras. He assures his sister, that he will "try his utmost to realize all that he can, to make the object of his soul more happy than she had been," and requests his sister to keep her in good spirits. In a postscript he states, that since some intimation of his situation had been given, about a wife in England, "the old woman has taken a different bed," which does not disturb him: That she being now convinced he did not marry her for love, would be glad to find the report true, in order to save her property—but "hopes she will be disappointed."

The complainant states, that she has the strongest reason to believe that the said Cornelius Brown is about to dispose of her property, and remit the amount to England, and leave her in penury and want.

The bill prays that the said C. Brown may be ordered to deliver up the property he got by complainant, and to account for the profits, and prevented from wasting the same; and that the same may be impounded in this court till the final decree; and that the property may be restored to complainant, and she relieved in the premises.

The defendant in his answer admitted that he married the complainant in 1787: That she was possessed of two tracts of land, thirty six negro slaves, and some stock, of which he took possession: He denies that he was married before he married the complainant, but confesses that for some years before he left England, he cohabited with a woman, who was commonly reputed to be his wife: That he did not make known his real situation, because he had promised that woman not to marry whilst she lived; which promise he would have kept, but for a false report of her death: That he endeavoured to make complainant happy, and she behaved well for some time, but afterwards drank to excess, and was frequently intoxicated; and behaved otherwise improperly, assuming the

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sole management of *the property, and ordering the overseer not to obey him, but to abuse him: That despairing of reclaiming her, and of any domestic happiness, he wrote the letters set forth by complainant, hoping they would induce the complainant to come to a separation: That they were written for that purpose alone, and never intended to be sent to England; but were placed in a drawer to which his wife had access, that they might fall into her hands. He admits that he took possession of the property: That the crop of 1787 was not sufficient to feed the negroes; which obliged him to purchase corn for their use with his own money: He says,

that since this suit has been brought, he has been driven off the plantation by the overseer, with a rifle, acting under the orders of his wife: That he never disposed of any of the negroes but one; and that with consent of his wife, who has the value of him: That he purchased the plantation called Battersea for five hundred guineas, part of which he paid out of his own pocket, and gave his bonds for the balance: That all the money he received from the estate, together with an additional sum of thirty-seven pounds, he applied to its uses; and he advanced forty pounds to complainant before marriage; and for his wife and sister after marriage about ninety pounds: Denies, notwithstanding what is said in the letters, that he had any intention to remove from this country, or of remitting money to England; though he admits he offered a large premium for bills of exchange, but it was to effect a payment on the purchase of Battersea, the bonds being offered low for cash.

Upon reading the bill of complaint, verified upon oath, together with the affidavit of James Lawrence, jun. it was ordered, that a writ of injunction do issue against the defendant, and that he be held to bail thereon, in the sum of £5000; and also that a writ of ne exeat do issue, in the sum of £1000.—the sureties to be approved by the master of this court.

June, 1790.

On further argument of this case, it was ordered, that the defendant Cornelius Brown do convey to — — as trustees, all the property which he claims by virtue of his marriage with the complainant, to be subject to the

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*future order of the court: And that Battersea plantation, which he purchased subsequent to said marriage, continue to be impounded until the further order of the court: And that the defendant be bound in the sum of £100 with two sureties in £50 each, not to molest either the person or the property of said complainant.

Afterwards it was further ordered, that the complainant and her agents be restrained from committing waste on the Battersea plantation, or the stock: That the defendant and complainant shall each be entitled to receive one half of the money arising from the sale of the wood, in the hands of the factor: And that on the defendant giving the security and executing the conveyances heretofore ordered, the writ of ne exeat be discharged, and the defendant set at liberty.

This cause came to a hearing on the 24th September, 1791.—It was fully argued by General Pinckney and Mr. E. Rutledge for complainant, and by Mr. Read for defendant.

For complainant it was insisted, that the letters were conclusive evidence of the fact, that C. Brown the defendant was a married man when he married the complainant: That Harris's evidence is express that defendant told him in 1785 that he had a wife living in London: That if a man lives with a woman, and acknowledges her as his wife, he shall not be admitted to say that he is not married, but shall be liable for her debts. See Burr. 2177. See Espinasse 207,—Man made liable for the debts of a woman with whom he cohabited, though he afterwards swore he was not married. Marriage by reputation is admitted to be made out in all cases but two, viz. bigamy and crim. con. See Buller 27. 4 Burr. 2057. Marriage by reputation is sufficient to support a claim of inheritance. Bla. Rep. 632. This court is bound to give relief, on the ground of fraud; so that no ecclesiastical jurisdiction need be exercised here. If his marriage is not nullified upon the evidence, and he keeps the property, may he not be subjected to the debts of the first wife?

For defendant it was insisted, that the proofs of the first marriage were not conclu-

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sive, nor sufficient to esta*blish it, so as to authorize this court to act. Defendant swears he was not married in England. If a decree was given against defendant on this evidence, he might be prosecuted for bigamy. It would be dangerous to set up marriage on such evidence.

Chancellor MATHEWS, in his notes, remarks that "the evidence was too slight and superficial to prove the fact of the marriage of defendant with the woman in England, alleged to be his wife: More especially as he denies in his answer that he was married; which not having been contradicted by any evidence of equal validity, his answer must be taken for true. However, as his own letters shew a dishonest intention to make a new property of his wife, by selling what he got by her, and abandoning her, the court will so far interpose as to prevent this exercise of his powers over the estate.—The following is extracted from the decree book.

"The bill stated that the defendant had courted and married complainant, although he was then a married man, as has since appeared: And that he was making away with the complainant's property, and was going off with the proceeds. The court did not consider the testimony (consisting of defendant's verbal declarations, and some letters) sufficient to establish the first marriage. The cases do not go so far; they only allow a man to be made liable for debts contracted by a woman whom he permits to pass as his wife: But such evidence would not be sufficient to convict in a criminal prosecution, or to impeach a real second marriage. But as the defendant has behaved very ill to this lady, the court, to prevent his making a new property of the unfortunate lady, decreed, upon the authority of Gardiner v. Walker, Stra. 504, and of a case decided in this court,

that the husband shall execute deeds of settlement, to be prepared by the master, of the whole real and personal property of which complainant was possessed at the time of the marriage, to the use of complainant and defendant during their joint lives, and to their issue after their deaths. If no issue, and he survives, the personal estate to go to him, and the real estate to her devisee: But if

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she survives him, the whole *estate to go to her. The injunction heretofore granted, to be retained till the execution of the deeds—then dissolved.

E. Rutledge and general Pinckney for complainant. Read for defendant.

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1 Desaus. 201

Case LXVI.

JOSEPH WILKINSON v. EDWARD WILKINSON, a Minor.

(September, 1791.)

[*Specific Performance* ⇐24.]

Specific execution of contract decreed against an infant heir, on clear proof of contract and part execution by the ancestor.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 55; Dec. Dig. ⇐24.]

The bill states, that the complainant Joseph Wilkinson being seized in fee of an island in Wiltown river, exchanged the same with his uncle Morton Wilkinson, now deceased, for a plantation situate on the east side of Edisto river; and in addition to the island thus exchanged, agreed to pay him two thousand pounds sterling: But although this exchange was agreed upon, yet no titles were ever executed by either party. Afterwards some other sales and exchanges took place between the complainant and his uncle, the terms of which are set forth in the bill, but no writings of any kind were drawn or signed: In consequence of this agreement, the said Morton took possession of the said island, and put the complainant in possession of the land he was to have in the arrangement between them: That the said Morton Wilkinson during his life, and his representatives since his death, and your orator, have cultivated the same, from the time of the contract until the filing of this bill—But the said Morton neglected to make your orator titles for his purchase; and your orator, although he has received considerable payment for the sale of his said island, did neglect to make titles for the same, but that he is willing at all times to complete the former part of his contract.—Your orator further sheweth, that the said Morton Wilkinson suddenly died intestate, in December, one thousand seven hundred and ninety, leaving Edward Wilkinson, a minor, his son and heir.—Your orator is advised and believes, that although the facts herein stated are known to the mother of the said Edward Wilkinson, and to his nearest connexions and relations, yet that in consequence of the minority of the said Edward, your orator can obtain relief only in this

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*honourable court: He therefore prays your honours to decree the said Edward Wilkinson to confirm the said contract, to convey over to your orator the lands herein charged to have been purchased by him from the said Morton Wilkinson—Upon your orator's making due proof of the allegations herein contained.

The answer of Edward Wilkinson the minor, heir at law of colonel Morton Wilkinson, was in the usual form, neither admitting nor denying the facts charged in the bill, but praying that his rights might be protected.

The case came to a hearing on the 21st September, 1791, and was argued by Mr. E. Rutledge for the complainant, and Mr. T. Parker for defendant. The solicitor for complainant produced and read the examinations of Thomas Martin and James Legare, and the affidavit of Mrs. Susannah Wilkinson, the mother of the defendant, whose testimony established the facts alleged in the bill.

Whereupon the court ordered and decreed, that the complainant Joseph Wilkinson do forthwith make good and sufficient conveyances in fee simple to Susannah Wilkinson, the mother and guardian of the defendant the minor, and in trust for him, of the island in bill mentioned: And that the said E. Wilkinson the minor, by his said guardian, do make good and sufficient conveyances in fee simple to the complainant, of the land in bill mentioned: And that this decree be binding on the infant, unless on being served with subpœna to shew cause against the same, he shall, within six months after coming of age, shew good cause to the contrary. The testimony to be perpetuated.

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1 Desaus. 202

Case LXVII.

Present—Chancellors Rutledge, Hutson, and Mathews.

JOHN MAYRANT and ISABELLA, His Wife, v. W. R. DAVIS, Executor of Jared Neilson, Executor of Mathew Neilson and Others.

(September, 1791.)

[*Wills* ⇐820.]

The appointment of a particular fund for the payment of pecuniary legacies, does not necessarily restrict the payment out of that fund.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2114–2119, 2121; Dec. Dig. ⇐820.]

[*Wills* ⇐732.]

The court will, unless a contrary intent appears, direct the payment out of the general

residuary estate (tho' that is bequeathed) on the failure of the particular fund.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1810; Dec. Dig. ⟸732.]

This was a case of great extent, and involved in it many matters of fact, and questions springing out of them, which required the

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interposition and direction of *the court. There was however, but one point decided by the court of sufficient importance to report. It was on the construction of Mr. Neilson's will, as to a pecuniary legacy, bequeathed to Mrs. Mayrant.

The bill charged that Mathew Neilson made his will on the 12th January, 1771, and devised to his mother Mrs. Ellen Neilson, during her life, the use of his plantation, negroes and stock; and after payment of plantation expenses, and house expenses, the proceeds to be applied towards the payment of the legacies mentioned in his will. He bequeathed several pecuniary legacies to different persons: And to his niece Isabella the complainant, a legacy of £5000 currency, and directed that she should be maintained and educated out of part of the interest of it: And he gave a similar legacy to his niece Mrs. Davis. He devised his plantation on which he lived and the lands adjoining to his brother Jared Neilson, with several limitations over; and bequeathed the residue of his personal estate to his said brother Jared: And he directed that his other lands (named and described) should be sold at the discretion of his executors, and the money arising therefrom, "to be applied towards the payment of the legacies" given in his said will. Jared Neilson alone proved the will, qualified as executor, and took possession of the estate on the death of the testator. The testator's estate was a large and clear one, that of Jared the executor and residuary legatee, much embarrassed. After the death of Mrs. Ellen Neilson, the mother of testator, which happened about the year 1776, Jared got possession of all his brother's estate. He never paid the legacies to complainant or her sister, nor the interest on them—but he did pay the expenses of the two legatees, nieces of testator, during a very short time that they were in Charleston for education; but he had possession of their grand-mother's estate also, which was bequeathed to them, and which might have furnished sufficient funds for that purpose—That Jared sold the lands which were directed to be sold, and the money to be applied towards the payment of the legacies; but they were alleged to be insufficient, and never were applied at all

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to that purpose. *Nor were any part of the profits of the crops so applied, so that the legacies remain wholly unpaid: And from the accumulation of debts and interest, and the losses of crops, negroes, &c. it is said to be doubtful whether Jared Neilson's estate will pay his debts, though Mathew Neilson's estate is perfectly solvent, if it can be discriminated. Mrs. Mayrant, the niece and legatee of Mathew Neilson, filed this bill together with her husband, for the recovery of the legacy.

The executor in his answer admitted all the facts charged by the bill; and stated that it was believed the surplus profits of the crops during the life estate of Mrs. Ellen Neilson, the mother of the testator Mathew, (to whom the income of the estate was bequeathed during life, charged with the legacies,) had not been sufficient to pay any part of the legacies; and that the lands directed to be sold for that purpose, (one of the tracts having been recovered by a better title,) were also insufficient: And that Jared Neilson, the executor and principal residuary, devisee and legatee of Mathew Neilson, who it is believed, but not known positively, sold those lands, had applied no part of the proceeds of the sale to the payment of the legacies; and his estate was likely to be insolvent, and complainant might suffer, unless she could make Mathew Neilson's property liable—That Mathew Neilson's estate was large, and clear; but that it had been so blended by the executor Jared Neilson with his own for a considerable time, that it was impossible to distinguish them—That several specific bequests of negroes had been delivered to legatees under Mathew Neilson's will: and the executor submitted, that the legacy to the complainant Mrs. Mayrant, was so particularly charged and located on the profits of the estate, and the lands directed to be sold, that she was not entitled to have the legacy raised from any other part of the estate generally; however insufficient the particular funds on which it was charged, or however misapplied by the executor.

The cause came to a hearing, and was argued by Messrs. Desaussure, Ford and Pringle for complainants, and by Mr. E. Rutledge for defendant.

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*The complainants' counsel contended, that the testator's providing a particular fund, out of which the legacies were to be paid, is no ground to defeat the legacy on the failure of that fund. 1 P. Wms. 777, 8, 9, Savil v. Blacket, where lord chancellor Macclesfield decided that a legacy devised to be paid out of a particular fund, should not, on failure of that fund, be lost, but be paid out of some other part of the estate—the lord chancellor said it was possible for a legacy to be charged in such a manner upon a certain fund, as that upon its failing the legacy shall be lost. But this depends upon the circumstances, and the apparent intention, taken in connexion with other provisions of the will. It weighed with the chancellor that this was a considerable estate; and that if a legacy be given to one, to be paid out of a particular debt, and there should not

appear to be such a debt, or the fund fail, the legacy ought to be paid: for the failing of the modus appointed for payment should not defeat the legacy. So 2 P. Wms. 164. Crocket v. Crocket. Ambler 401. 566. 2 Eq. Cas. abr. 553. 5. 568. 9. In Ellison v. Airey. 2 Vesey 569, it is said by the chancellor, that in such cases the testator only means that a particular fund should be first applied. See too 2 Atk. 625. Walker v. Jackson. 1 Bro. C. C. 145, Samwell v. Wake.—That the testator, in the case under discussion, did not expect that the annual profits of his estate, (after paying the plantation expenses, and his mother's household expenses,) would pay the legacies; for he superadds a direction to sell certain lands, for the purpose of paying the legacies; and he did not consider it certain that even that would be sufficient; for he says, the proceeds of the sales should be applied "towards paying the legacies." This expression indicates his meaning to be, that he looked to these funds merely as the primary, and not as the sole fund. If he had intended to restrict the amount of the legacies to these funds, he would have said the surplus income of his estate, and the amount sales of the lands ordered to be sold, should go in satisfaction of the legatees: But he fixes a precise sum, £5000 apiece, and points out the sources first to be resorted to

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"towards the payment." *The testator's intention is manifested by considering the state of his family. He had a mother, a brother, and a sister's children, but neither wife nor child of his own. He provides for his mother for life, gives legacies to his nieces, and a large estate to his brother Jared. He meant to make at least a certain provision for his nieces; and put himself in the place of a parent so far as even to direct their education. It is not therefore at all probable that he meant the amount of their legacies to be uncertain and contingent, dependant on crops, and on the sale of lands of doubtful value.—Then, as to the situation of the estate: Mathew Neilson's estate was large, and clear. Jared Neilson, the executor and residuary devisee and legatee, took possession of the whole. His mingling the estate with his own, and his representatives disposing of part of it, and pledging part of it for his debts, cannot prejudice the legatees. His conduct and that of his representatives was a breach of trust as to the legatees, and the court will follow the property. 1 Atk. 418. 2 Eq. Cas. abr. 421. Jared Neilson was not entitled to apply any part of the estate to his own use, till he paid the legacies; he was residuary legatee and devisee: And even if the legacies had been confined, to be paid out of the profits of the estate, there being no limited time, he should have kept the estate together as the estate of Mathew Neilson till the legatees were paid. The court must be satisfied that the surplus income (above the charges imposed on it) was sufficient to pay the legacies, before they will restrict the legacies to that fund, or suppose that the testator meant to do so.

On the part of the defendant it was insisted, that an executor has a right to sell the personal estate of testator, as well as the heir has a right to sell the real estate: And if they sell, the purchaser for valuable consideration is secure, the property is absolutely vested in him, but the executor and heir are liable to account. See 1 Vesey 483. 1 Bac. 26. 2 Bla. Rep. 801. 2 Atk. 63, 468. 2 Vesey 268. It was also insisted, that the legacy was restricted to the particular funds designated by the testator; and that the general estate was not liable; and that at all

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*events, the legatees could not come on the general estate till it was ascertained that the particular funds were exhausted: More especially as the blending the estates of Mathew and Jared had made it difficult to follow that of Mathew; and the executor of Jared, from ignorance, had sold some and mortgaged others of the negroes for Jared's debts.

The only point the court said it was at present necessary to decide is, whether the bequest under the will of Mathew Neilson to Eleanor and Isabella Norwell (the nieces of testator) is strictly confined to the specific funds of the profits arising from his estate, and the lands directed to be sold towards the payment of his legacies, or whether, in case of a failure of those, it becomes a charge upon the general residuary estate. It is evident he meant to give his niece the complainant, now before the court, a beneficial interest out of his estate, and not merely a nominal one: But admit for a moment that the legacies attach themselves to the profits of the estate, then by the will Jared Neilson could not take the estate absolutely till the profits had been sufficient to pay the legacies —(see the will.) It being therefore evident he did not intend that J. Neilson should take till he had satisfied all the legacies, it is immaterial then whether one of the specific funds failed, viz. the lands; for in that case recourse ought to have been had to the labour of the negroes, until the legacies were raised: But as J. Neilson has thought proper to divert that fund to his own use, or his executors since his death have done so, we must consequently have recourse to that part of Mathew Neilson's estate, from which it was intended the legacies should have been raised, viz; the negroes; and out of the sale of which we are of opinion the legacies to the complainants must now be raised; unless, on a reference to the master it shall be found that the estate has been sufficiently productive for that purpose. It must therefore be referred to the master to state the accounts between all the parties in this suit, and report accordingly.

1 Desaus. *208

*Case LXVIII.

Present—Chancellors Rutledge, Hutson, and Mathews.

Executors of GADSDEN v. Executors of LORD.

(July, 1791.)

[*Executors and Administrators* ⟸263.]

The court made the husband of an executrix who received the monies of the estate liable for the same—And that the money received on bond debts should be considered as a bond debt, &c. even to the prejudice of other creditors.

[Ed. Note.—Cited in Mason's Ex'rs v. Man's Ex'rs, 3 Desaus. 122; Rolain v. Darby, 1 McCord, Eq. 475, 476; Stock v. Parker, 2 McCord, Eq. 384.

For other cases, see Executors and Administrators, Cent. Dig. § 985; Dec. Dig. ⟸263.]

[*Equity* ⟸92.]

[Where a court of equity has obtained jurisdiction of a cause for the purpose of discovery, and the subject-matter is proper for the consideration of a court of equity, it will dispose of the case finally, although the remedy at law is fully adequate had not a discovery been necessary.]

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 114; Dec. Dig. ⟸92.]

[*Executors and Administrators* ⟸292.]

[An executor has no right to retain for a legacy or distributive share, given him by the will, to the exclusion of other legatees or distributees.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1164; Dec. Dig. ⟸292.]

The complainants in this case charged in their bill, that they were the only children of Thomas Gadsden, deceased: That the said Thomas was possessed of a considerable estate, both real and personal, and on the 27th of February, 1770, duly executed his last will and testament, and therein provided for the maintenance and education of complainants until they arrived at the age of twenty-one; and ordered, that the estate, both real and personal, should be equally divided between complainants and their mother, and appointed complainants' mother executrix thereof, and Christopher Gadsden, James Gadsden and Andrew Rutledge executors: a copy whereof was filed with bill—That the said Thomas departed this life and their said mother proved the said will, and took upon herself the execution thereof—That some time after the death of complainants' father, their mother intermarried with Andrew Lord, who took into his possession all the goods and effects belonging to the estate of complainants' father, and managed the same until his death; during which time he received large sums from complainants' mother, and divers persons indebted to the estate, which he applied to the purchase of valuable lands and negroes.—Complainants further set forth, that on balancing accounts between the said Andrew Lord and Thomas Gadsden, there appears to be due to the estate of the said Thomas Gadsden, the sum of £4616. 10s. 10d. sterling, with interest thereon, and that the greater part thereof, to wit, the sum of £4367. 10s. 7d. sterling, was received by the said Andrew Lord for bonds and notes due to the estate of said Thomas Gadsden deceased, as appears by exhibits filed with the bill—That the said Andrew Lord departed this life on the —— day of ——, 1780, leaving his will in full force, and William and George Ancrum executors thereto, who took upon themselves the execution thereof—Complainants further shew, that they have arrived to the age of tweny-one, and that they have applied to the

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executors *of said Andrew Lord for payment of their respective shares or proportions of the money received by the said Andrew Lord for the estate of the said Thomas Gadsden, or for a part of the lands and negroes purchased as aforesaid; but they have refused to do so, pretending that the said Andrew Lord did not leave property enough to pay more than his bond debts; and that as complainants had no bond of the said Andrew Lord, they were not warranted in paying them, as complainants could only support their claim from the books of the said Andrew; whereas complainants apprehend that as the said Andrew only acted for them in nature of a trustee, and as the monies received by him were on account of bonds and other specialties due the estate of said Thomas Gadsden, deceased, and vested in valuable property as aforesaid, they are in equity entitled to all the advantages of bond creditors, of said Andrew at least, if their claims are not indeed of a superior nature to those of bond creditors: Complainants pray that they may not be placed in a worse situation than they would have been if the said monies had not been received by the said Andrew Lord; and that such monies as were paid to the said Andrew, not on account of bonds, notes, and specialties, due to the estate of said Thomas Gadsden, may be considered as that third part of the estate of said Thomas, to which said Andrew was entitled in right of his said wife; and that the remaining two thirds, which complainants are entitled to, may be considered as debts of the highest nature, and as such may be charged on the estate of said Andrew, and that part of the lands and negroes aforesaid may be allotted them—Complainants believe that executors of said Andrew wish to make such allotment, if they thought they could be safe in so doing—Complainants pray that said executors may make full answer to the premises, and that the demands of complainants may be decreed to be paid out of said Andrew's estate as a debt of the highest nature, and that complainants may have such other relief as to your honours shall seem meet.

To this bill the defendants put in the fol-

lowing answer: The defendants in their an-

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swer admit, that Thomas *Gadsden did make his will to the effect as in bill set forth, and did appoint his wife executrix, and other persons his executors; and also that the said Thomas Gadsden afterwards died, and that his wife proved the said will, and qualified thereon; that some time after the widow intermarried with Andrew Lord; but the defendants do not know (otherwise than may appear from Andrew Lord's books) that he did take into his possession the goods and effects of the said estate, and also the books, notes, and specialties belonging thereto, and manage the same for several years, until his death; nor do they know otherwise than may appear from entries in his books, that he received any sums of money from his wife, and other persons indebted to the complainants' father's estate, nor do they know whether he applied any part of the same to the purchase of valuable lands or negroes; but they think it probable that as he must have received considerable sums of money from the extensive commercial dealings in which he was concerned, he may have had funds to enable him to pay such cash as was requisite for such purchase of lands and negroes as he may have made; as will appear from the cash account extracted from his books: And they say that they have not been able to find any other entries in the books of Andrew Lord respecting the purchases of said lands and negroes, but such as appear by the extracts therefrom, from which it appears that he did not discriminate from what sources he received the cash he applied towards such purchases, and that they were partly settled by discount of debts due Andrew Lord or copartnerships in which he was concerned, or by his own bonds, some of which are yet outstanding; and Samuel Douglass, formerly a copartner of the said Andrew Lord, has lately pretended a claim as surviving copartner, to sixty negroes, as having been the joint property of that concern, and as having been carried away, during the war, by Andrew Lord, from one of the company's plantations in Georgia. The defendants also admit that on balancing accounts between Andrew Lord and the estate of Thomas Gadsden, there appeared to be due the estate £4616. 10s. 10d. sterling, besides interest, and that the great-

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er part, £4367. *10s. 7d. sterling, of said money, was received by Andrew Lord, for bonds and notes due the estate, according to the exhibits with bill filed. They also admit, that the said Andrew Lord being indebted to Thomas Gadsden's estate, died, leaving a will, whereof William Ancrum and George Ancrum were appointed executors, who qualified thereon and took upon themselves the execution thereof: And that the complainants have both arrived to the age of twenty-one, and since their attaining that age have applied to Andrew Lord's executors for the payment of their portions of the monies received by Andrew Lord, on account of the estate of Thomas Gadsden, or for a proportionate part of the lands and negroes purchased therewith as they pretend, and that they refused to comply with such request, because they conceived themselves bound by law to apply the estate and effects of the testator, in the first place, to the payment of specialty creditors, under the apprehension which they expressed and still entertain, that the said estate and effects would not be sufficient to pay the debts of the testator of every kind, as well those due and owing on specialty as by simple contract, in which latter class they conceived the complainants' demands must be ranked. The defendants further set forth, that it did not strike them, nor can they determine, that Andrew Lord acted for complainants only in the nature and capacity of a trustee and agent; nor do they know or believe that the whole of the monies so received by Andrew Lord, and taken up in bonds, notes and specialties, which were due the estate of Thomas Gadsden, were actually vested in valuable purchases as aforesaid; and submit to the court whether the complainants can have their claims for the reasons stated by them, placed in the rank of bonds or specialties: And they are not convinced of the propriety of complainants' prayer, that such part of the monies, so received by Andrew Lord, as were not paid to him in bonds, notes and specialties, due to the estate of Thomas Gadsden, might be considered and taken for a part of that third of said estate to which Andrew Lord, in right of his wife, was entitled; and that the remaining two-thirds of the said monies to which complainants are

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*entitled, might be considered as debts of the highest degree, and as such might be charged on Andrew Lord's estate, or that there might be allotted to them a proportionate part of the lands and negroes so purchased: But as there are other creditors to whom the testator was indebted to a great amount, who would be very much injured, and might make the defendants accountable for such injury, if they were to give the complainants any preference, and as the lands and negroes bought by Andrew Lord were purchased by him absolutely, and in his own name, as his property, they presume they will be justified in not complying with complainants' requisitions, as they had reason to think that the estate of the said Andrew would be insolvent, as will appear by exhibits with answer filed. They deny all manner of combination, and pray that they may be dismissed with reasonable costs and charges.

The cause came to a hearing on 14th July, 1791, and was argued by General Pinckney and Mr. E. Rutledge for complainants, and by Messrs. Pringle, Parker, and Desaussure

for defendants.—Very imperfect notes of the arguments remain.

For complainants it was insisted, that Mr. Lord, acting in his character of husband of the executrix, and receiving large sums of money of the estate, on bonds due to the estate, was chargeable for the amount as bond debts: And that having purchased largely, both lands and negroes, he shall be presumed to have purchased them with these funds; especially as the testator had directed his executors to improve his estate for his children by purchases: And that these lands and negroes should be allotted to complainants as purchased in trust for them. The will of a testator directs lands to be purchased in trust for the use of A.—The executor makes the purchase; but makes no other than a verbal declaration of the trust—The executor dies insolvent—The court of chancery directed the estate so purchased to be assigned to A. notwithstanding the statute of frauds says, that all declarations of trust should be in writing. And if a man is security for another on bond, and the security pays the debt, he may bring his action at law for

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on assumpsit, or *he may take an assignment of the bond, and come in as a specialty creditor.

The cases cited by complainants' counsel were, 4 Burn. 96. 1 Atk. 59, 135. 5 Bro. P. C. 400. 3 Atk. 754. 2 Vern. 342, 608. 2 P. Wms. 543, 644. 1 Vern. 267. 3 Atkins, Chapman v. Tanner.

For the defendants it was argued, that a court of equity cannot give relief against a positive statute. It cannot declare a trust as to lands, where there is no declaration in writing, unless in some peculiar cases of fraud. See 2 Comyn's Digest, 212. The court of chancery in marshalling assets, can do so only as to equitable assets; not as to legal. 1 Vesey, sen. 135—That it would be very unimportant in what order the debts were classed, unless there was an apprehension of insolvency—That in such an event, the legal rights of others are to be regarded: The law has said, that a breach of trust raises only a simple contract debt; and to depart from that rule, and raise the debt to the complainants up to the grade of a bond debt, would violate the order prescribed by statute, and injure real bond creditors of Mr. Lord, and even prejudice certain securities of Mr. Lord, who are entitled to the protection of the court; a specialty debt is a debt under seal, and no other is so.

The cases cited for the defendants were, 1 Comyn's Digest, 254, 269, 276—title Devastavit. 2 Atk. 119, Vernon v. Vawdry—(express that breach of trust is but a simple contract debt, and can fall only on the personal assets of trustee.) 1 Vesey 523. Talbot 109. 1 Vesey 312, 313. 2 Vesey 212. 2 Atk. 246. 3 Atk. 237. 1 Atk. 615.

The court made an order, that it be referred to the master to enquire into the specific nature of the debts which Mr. Lord received on account of the estate of Gadsden; the dates of the several receipts, and whether any of the monies so received by him were laid out in the purchase of lands or negroes, and report accordingly.

August, 1791.

Afterwards Chancellor MATHEWS delivered the opinion of the court:

In whatever light this case is viewed, whether considering Mr. Lord acting as a

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rightful executor in conse*quence of his marriage with the executrix, or as executor de son tort, as a trustee, or as a stranger, who got possession of the infants' property,—he has acted directly contrary to the will of the testator, which ordered that his estate should be improved, as his executor should think fit. He has committed a great breach of trust, for which he was punishable out of his estate if living; and his executors under the statute of Charles, and William and Mary, and our act of assembly of March, 1789, are equally answerable with himself as far as they have assets in their hands. All the cases go to prove that the court will indemnify a security for any loss he might sustain by paying debts for which he was security, by assigning over the security on judgment: And to dispose of all the testator's estate, even his wife's paraphernalia, before security should be made liable. Trustees may be guilty of a breach of trust, and are punishable for it. Where executors lay out assets of testator, in the purchase of lands, they should be restored to testator's estate. Committing a devastavit, executors are considered as trustees of the estate; and if a stranger enters and receives the profits of an infant's estate, in consideration of this conduct, he shall be looked on as a trustee for the infant. The bankrupt laws put all creditors on a footing; yet where the property can be come at that was sold and not paid for, the court uniformly decreed, that the vendor has a specific lien on it, and it should stand charged with payment of purchase money, though no specific agreement. † In the case of the Baptist Congregation v.

† See as to the following assets, 2 Vesey 265–9, Jacomb v. Harwood—In this case the court said that executors de son tort, or strangers meddling with an estate, they shall be accountable as trustees: Also, that where the property can be come at, that was sold and not paid for, the court uniformly decrees the vendor should have a specific lien; and it should stand charged with the payment of the purchase money, though no special agreement.—Sed vide decree of this court in the case of W. L. Smith, and others, representatives of W. Wragg v. the comptroller general and others, decided in May, 1807, wherein the court decreed, that the vendor who did not take a mortgage of the property sold, has no equitable lien, so as to entitle him to a preference over other creditors.

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administrator *of Leigh, decided in this court, the administrator was ordered to restore bonds to the congregation for bonds which he had received belonging to the trust —That case was not contested, but that does not vary the matter; all the foregoing cases prove, that Mr. Lord acting as executor, trustee, or a stranger, was equally answerable for his misconduct.

Defendants' counsel have insisted, that where creditors by the strictest rules of the court have got an advantage, the court will not deprive them of it; and that all creditors in equal decree must come in pari passu; and that this court aims at equality of satisfaction, as far as possible, in the administration of assets. We perfectly accord with the cases in opinion; but then it remains for the court to determine the point whether the plaintiff shall be considered as bond creditors or simple contract creditors: Having settled that point, in whatever class complainants stand, they must be paid by defendants pari passu. As to referring it to a court of law to determine whether complainants shall be considered as bond or simple contract creditors, this court we apprehend are full as competent to decide it as a court of law, and rather more so. What relief could complainants have at law, had they brought an action for money received, and how could it have been supported? Where are their proofs? They could have no discovery by the oath of defendants, but in this court, where the whole transaction could be sifted and unraveled, and the nature of the debts particularly specified; from whom received, when paid, and the amount: and having made the discovery, this court can as well order payment as a court of common law. Discovery draws after it relief. The case in 3 Atk. 333, does not attribute any exclusive jurisdiction to the court of common law; the judge only says, that bond creditors and simple contract creditors shall be considered in the same light in this court as at common law. But should this court, under the circumstances of this case, determine that complainants ought to be considered as bond creditors, they will be paid as such pari passu.

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*The case of Vernon v. Vawdry, Ventris 40, has been much relied on by defendants' counsel. It is a very extraordinary one. There is no case stated to shew upon what principles the court determined the question: There are three points settled, but it does not appear how they came before the court for determination; they are totally unconnected; the first is upon a mere point of practice relative to an original and amended bill, being considered as one; 2d, that a breach of trust is considered as a simple contract debt, and can only fall on the personal estate of the trustee; the 3d is relative to a marshalling of assets. Unless some reasons for the determination appear in the cases cited, the court will take no notice of them, nor hold itself bound to follow the determination of any foreign court as a guide for its decisions, further than as such determinations may appear to be founded in equity and good conscience. The case abovementioned, cannot be considered as the law of this country, though it may be in England; because there, lands are only liable to bond debts and specialties where the heir is bound; whereas in this state, a man's real estate is equally liable with his personal property to the payment of all his debts. It was said that complainants are not specialty creditors, having no bond from Mr. Lord. It may be asked, how it was possible for them to obtain one; they have but lately come of age, and he has been dead several years. It was contended, that Mr. Lord had a right to retain as executor in preference to complainants. But his wife, Mrs. Lord, was only a legatee, entitled to a third of the estate, under the same clause of the will that gives the rest to her children. Claiming under the same person, and under the same clause of the will, there can be no priority between them. Mr. Lord was a mere stranger, an intruder: as to Mr. Gadsden, the testator, he was no creditor; but taking from testator's bounty to his wife, he must take it upon the same terms as complainants. This is not a case between a creditor executor, and another creditor; in such case he would undoubtedly have had a right to retain against creditors of equal rank, but this is a case between the heirs

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of testator and his executor, who *has possessed himself of all the assets, and converted them to his own use. It was contended for the creditors, that Mr. Lord should be allowed his full third, and complainants receive a dividend as his simple contract creditors; but upon what principle is not discoverable, unless it may be supposed Mr. Gadsden intended to make a compliment of one third of this estate, to the creditors of any after husband his wife might marry, absolutely, and subject the remaining two thirds to a diminution, by his children coming in pari passu with such second husband's simple contract creditors, to whom probably the whole money received on account of the estate had been already paid—It does not appear how Mr. Lord disposed of the money he received: Suppose he had paid off all his simple contract creditors with it, would it not be highly unreasonable and unjust to say, although he has used the complainants' money received on bond debts, in payment of his simple contract debts, they should nevertheless be considered only as simple contract creditors, when probably he has left only assets sufficient to pay his bond creditors? Hard would be the lot of infants, if,

where the misplaced confidence of the testator in appointing executors who were unworthy of the trust, and who should waste his assets, this court had not a power to make them account for their misconduct; but peculiarly hard would be the case of children, if, by the unbounded confidence of a husband in appointing his wife executrix, and her making an improvident second marriage, she should put her children's estate in the power of such second husband, who might waste or dissipate the whole of it, and leave them destitute, if this court had not power to make him account for his malconduct. Such would be the situation of the complainants in the present case: But this court having the peculiar charge of infants, will take care of their interest, and not permit it to be wasted by an ungracious executor. If the court once allowed the doctrine contended for by defendant to be just and equitable, that executors may call in all debts due the testator by bond, and make what use they please of the money, and that the infant legatees or children of the testator shall only be considered in the light

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*of simple contract creditors of the executors, we may say as lord chancellor King did in the case of Mansel v. Mansel, that it will be making proclamation, that all the executors in this country are at liberty to destroy or convert to their own use, with impunity, the property of all the orphans committed to their care, which they are intrusted only to preserve. The case of Powell and Bell, as far as our researches have gone, is the only case that bears any analogy to the present case; where an executrix, who was entitled to a third part of the personal estate, wasted great part of it, married a second husband and died. On a bill against the husband for an account and satisfaction, it was decreed, that he should be charged in nature of a debt absolutely for so much as came to his or his wife's hands after marriage, and for what came to her hands before second marriage, to have satisfaction against husband, so far as he had any of his wife's estate—The decree was affirmed on appeal. So here,—Mr. Lord himself having wasted the assets, his executors should be answerable in like manner. It is admitted by the answer of defendants, that their testator received considerable sums of money for bond debts, and also for simple contract debts due the estate of Mr. Gadsden. As Mr. Lord in right of his wife was entitled to a third part and received it, many years ago, it would be extremely unjust and unreasonable to say he should have this whole proportion, which he undoubtedly applied to payment of his own debts, and that the complainants, the infant legatees, and children of the testator, should be considered merely as his simple contract creditors, in which case they will receive little or nothing. Mr. Gadsden having by his will ordered, that his estate should be improved as his executors should think proper, and there being no other way of improving money, than by putting it out at interest, and as Mr. Lord retained the whole in his own possession, this court, which always looks upon those things as done which ought to be done, will, under the circumstances of this case, consider Mr. Lord as a bond debtor, as to so much of the assets as he received for bond debts, and debtor on simple contract for such sums as were originally simple contract debts.

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*It was therefore decreed, that it be referred to the master to examine the accounts of defendants' testator, and ascertain what sums of money were received by him on account of Thomas Gadsden's estate for bond, and what for notes and accounts; the times when they were respectively received; how much for principal, and what for interest; and whether it be liable to any and what depreciation—That the master do also ascertain the annual income of Mr. Gadsden's estate, and deduct therefrom three fourths of such income annually, until the eldest of complainants attain the age of twenty-one years, the testator having by his will appropriated so much for the maintenance of his wife and children—That whatever balance shall appear to be then due the estate, complainants shall be considered as bond creditors, as to two thirds of what was received on the bond debts; and be ranked as simple contract creditors for what was received on the notes and accounts—That they be allowed interest on such sums from the time the eldest of complainants attained his age of twenty-one years; and that the said money be paid to them by the defendants in the same proportions as the other bond and simple contract creditors of their testator are entitled to receive their debts: And that the same be paid agreeably to the terms of the instalment act: And that the defendants do pay the costs of suit.

And in September, 1791, the master made his report conformably to the decretal order of the court, which was confirmed.

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1 Desaus. 219

Case LXVIII.

Present—Chancellors Hutson and Mathews.

WINIFRED WILSON, by Her Next Friend, v. JOHN WILSON.

(July, 1791.)

[*Contracts* ⊂⊃137; *Husband and Wife* ⊂⊃182.]

Bill to set up a bond to execute a marriage settlement—Such bond not avoided by a defeazance made at the same time by the husband; the wife being ignorant of such defeazance; though it appeared that the inducement

to his executing the bond, after the marriage, was to avoid forfeiture.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 702; Dec. Dig. ⇐137; Husband and Wife, Cent. Dig. § 719; Dec. Dig. ⇐182.]

[*Witnesses* ⇐98.]

Trustees not at liberty to give evidence to defeat the trust deed or bond.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 324; Dec. Dig. ⇐98.]

[*Husband and Wife* ⇐205.]

[Pending a suit by a wife against her husband to enforce a marriage settlement, the husband was ordered to pay her alimony for the expenses of the litigation.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 755; Dec. Dig. ⇐205.]

[*Injunction* ⇐38.]

[In proceedings by a wife to set up a bond to execute a marriage settlement, an injunction will be granted to prevent any disposition of property by the husband until a hearing can be had on the merits.]

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 89; Dec. Dig. ⇐38.]

[This case is also cited in Croft v. Arthur, 3 Desaus. 233; Threewits v. Threewits, 4 Id. 571, regarding marriage settlements.]

The complainant stated in her bill, that being about to be married to Archibald Baird, articles of agreement were entered into between them, by which it was stipulated, that in case she should survive him, and there should be no children of the marriage, she should be entitled to receive during her

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life an annuity of £700 sterling, out of *his estate; but in case there should be issue of the marriage, the annuity should be restricted to £250 sterling, which restriction should continue during the existence of such issue, and no longer—That the marriage took effect on the 20th October, 1773; and her husband Archibald Baird died in the year 1777, having previously duly executed his last will, by which he bequeathed her several specific legacies, confirmed her marriage settlement, and devised his whole real and personal estate to his son William A. Baird, (the issue of the marriage,) and in case of his death under twenty-one years of age, and without issue, then he devised all his estate to her and her heirs.—The bill further charges, that some years afterwards, being about to marry John Wilson, the defendant, he agreed to settle to her sole and separate use, all the rights and interests she had under the settlement and will of her first husband; and on the 8th of May, 1781, he executed a bond, by the condition of which he engaged, (in case the said marriage should take effect,) to convey to John Saunders and Thomas Merrett, their heirs, &c. as trustees, for the complainant, the said Winifred, all the estate, interest and property, which the said John Wilson might acquire by the marriage, in the annuity and also in all such real estate or other rights, to which the said W. Baird might be or become entitled to under the settlement, or under the will aforesaid: Upon trust to permit the said Winifred to receive the said annuity to which she was entitled under the settlement of her first husband; and to receive and take the rents and profits of the real estate she might acquire to her sole and separate use, independent of her said husband, and not subject to his debts; and that he would execute proper deeds, to give full effect to the agreement—That in part performance of the same agreement, the said John Wilson, after the intended marriage took effect, executed another agreement, on the 2d June, 1781, by which, (after reciting the said bond,) he conveyed to John Saunders and Thomas Merrett, their executors, administrators, &c. all the estate, right, title, &c. which the said John Wilson had acquired by his marriage, of, in, and to the said annuity, in trust for

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the complain*ant, to her sole and separate use, free from the control of her husband, and not subject to his debts—That her son W. A. Baird died some time in the year 1788, under age and without issue, by which event she became entitled, under the will of her first husband A. Baird, to his whole estate—That on the death or absence of the executors of her first husband Mr. Baird, administration with the will annexed was granted to the defendant John Wilson—That though it appears on the face of the bond, and of the instrument executed by the said John Wilson, that only the real estate, and the annuity secured by her marriage settlement (with Mr. Baird) are actually settled, (by said Wilson,) yet it was the intention of said J. Wilson to settle on complainant the personal, as well as the real estate, to which she might be entitled on the death of her son: but the same was omitted through error—That complainant being dissatisfied with the conduct of said John Wilson, and desirous that the estate which he acquired by marriage with her, should be vested in trustees, conformably to the agreement of the parties, she applied to her said husband for that purpose; but he has refused to comply with his stipulations, and marriage agreements; has possessed himself of the whole real and personal estate, and threatens to sell the negroes, apply the proceeds to his own use, and to quit the United States—That independently of these threats, he cannot long remain in this state, as he was banished from Pennsylvania, of which he was a native, for his adherence to the British, and he still remains under the penalty of the laws of that state. The bill prays that the said John Wilson may be decreed to come to a fair account, to pay over to complainant the arrears of annuity, and to convey the whole real and personal estate to trustees for complainant: And that in the mean time he may be restrained from selling any part of the property of the estate of Baird, claimed by complainant.

The defendant by his answer admits the complainant's marriage with Mr. Baird,—Baird's settlement on her,—his will and his death—He asserts that in the spring of 1781, he paid his addresses to his present wife, who

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*accepted of them—Denies that previous to, or at the marriage, he offered to make any settlement, or that she hinted a wish to that purpose—They lived affectionately, till his duty called him to New York, in 1782—During that time they had a daughter, who is now alive, and at school at his expense—He admits the execution of the bond, and the assignment of the annuity; but he denies that they were executed on the 8th of May, when they bear date; on the contrary, he positively asserts that they were executed at New York, about 28th August, 1782—That in consequence of letters from her, in which she represents, "that the whole of the estate to which he was entitled in her right, was under confiscation, and advertised for sale," and requesting he would send her the bond and antidate it, he signed the papers, which are set forth in the bill—That he had then the precaution to get from the trustees a defeazance to the bond, which mentions the occasion of its having been given—He asserts that the property was not within the reach of the confiscation act—That it was a trick in her to obtain a settlement—That not having time or opportunity to enquire into the business, he took the defeazance—That she availed herself of his unquestionable affection, at a time when she knew that there was nothing in his power which he would not have done to make her quiet and happy—That he knew at the time, that the bond would be of little service—He admits the death of young Baird, under age and without issue, in 1788; and claims the personal estate as devolving on him:—He also claims the lands during life as tenant by the courtesy—Admits his having obtained letters of administration on A. Baird's estate—Denies having ever proposed or intended to settle the personal estate of A. Baird on the complainant—Asserts that the whole affair was a contrivance on her part to get every thing out of his power, that she might throw him off, and act as she pleased. Denies that he ever intended to sell the negroes, or to quit the country; on the contrary, he is taking measures to become a citizen of the United States.

He then inserts extracts of her letters to prove that the settlement was made after

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marriage, and at her re*quest, to avoid the confiscation or rather the effects of the acts of confiscation.

Upon the answer coming in, the complainant's counsel moved for an injunction to restrain the defendant from selling or removing the property in dispute; and also to obtain a conveyance of the property to trustees subject to the final decree: And that the defendant should in the mean time account before the master for the neat proceeds of the crop, and pay over the same to Messrs. Norris and White, to be subject to the future order of the court.

This motion was fully argued on the 16th and 17th March, 1789, by Messrs. Drayton, Bee, C. C. Pinckney, Pringle and E. Rutledge for complainants—And by Mr. Smith, Bay, Read and Desaussure for defendant.

For the complainant it was insisted, that the act of confiscation took in all the right of the defendant to Baird's estate—That the deed of trust was good against Wilson himself, notwithstanding the defeazance—That the defeazance was fraudulent as to his wife; and was so against the state, the object of the deeds being to elude forfeiture—And that the deed meant to include real as well as personal estate; the one being of little value in this country without the other,—presumption that both were intended to be included—That such charges as are made in the bill, and not answered, are to be taken pro confesso—That his banishment from Pennsylvania was charged and not answered, and as an alien he had no right to administer, nor to an estate by courtesy—That the deed, though voluntary, was good against himself, though not against creditors or subsequent purchasers—That no man shall avail himself of his own fraud—That the defeazance was a fraud on the complainant: But it could not avail defendant, for a defeazance must be made or agreed to by the person interested in the estate; this defeazance was neither agreed to nor signed by Mrs. Wilson, for whose benefit the deed was made—That the trustees, giving the defeazance, was a breach of trust, they having no power from Mrs. Wilson, the cestui que trust, to do so—That the circumstance of Mrs. Baird's inter-

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est in Mr. Baird's estate being chiefly *contingent, was of no importance, as soon as it vested the agreement to settle attached upon it: That the court will carry into execution an agreement to settle an estate, though a mere possibility. The counsel cited Shepherd's Touchstone, 237. 2 Bla. 317. 2 P. Wms. 467. Ventr. 417, and Cro. James, 270.

For the defendant it was contended, that a person applying for an injunction, must first shew an actual or probable right to the estate. Viner, title injunction, p. 426. 1 Harr. 193, 594. Com. Digest, 153—That this right has not been shewn by the complainant, for upon her marriage with defendant all her rights vested in him—That a bill praying for an injunction must be sworn to, by the positive provision of our law—That this bill is not sworn to, which defendant had a right to require; nor could the complainant safely swear to it: But the answer is sworn to, and must be taken for true, and must have more weight—That an alien coming to this coun-

try, and marrying a person possessing real estate, and having issue by her, is entitled to the courtesy in the land. The counsel cited 1 Bla. 372. 2 Bla. 327, 342. 2 Bac. 375, 376. 2 Vesey, 627.

The court on the 18th March, 1789, stated that it would not give any opinion on the merits of the case—that whether the bond could be supported, or whether it should be defeated by the defeazance, must remain to be decided when the whole merits should be gone into: But that there did appear upon the face of the bond from Wilson, a right in the complainant, and that to give an opportunity to go into the whole merits, it was necessary to grant an injunction to prevent in the mean time any disposition of the property.—The court therefore, made the following order: That an injunction do issue to restrain the defendant from selling, removing, or in any other manner disposing of any part of the estate in bill mentioned: And that he do account before the master for all the profits of the said estate, which have or may come into his hands, and deposit the same with the master, to be subject to the future order of this court; except so much as may be necessary for the maintenance of the

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said defendant, Mr. *Wilson, his wife Mrs. Wilson, and their child, and the customary expenses of the plantation; until a final decree shall be made in this cause: And that it be referred to the master to report what will be a reasonable allowance for the maintenance of Mr. and Mrs. Wilson and the child.

Afterwards various orders were made by the court; particularly some for the payment of money by defendant to complainant to support her during the litigation, and for enlargement of publication. Meanwhile a number of witnesses were examined. The complainant endeavoured to prove that Frazer, the British town-major, (who was a subscribing witness to one of the deeds, executed by John Wilson in favour of his wife,) had not left Charleston in the summer of 1782: and thus to discredit that part of the defendant's answer, in which he states that the deeds were not executed at the time and place the bill charged, but long after the marriage, and in New York. Three witnesses of credit swore they were in Charleston, and did not know or believe that Frazer went from Charleston at all in the summer of 1782—three others swore they understood and believed that he did go to New York in that summer. John Saunders and Thomas Merritt, the persons named in the deed as trustees for Mrs. W. Wilson, were examined for defendant, but without prejudice to the complainant's right to object to the competency of the witnesses. Saunders swore, that being in New York, captain Wilson, some time in May or June, 1782, informed him, that he had received a letter from his wife in Carolina, in which she was apprehensive that the state (of South Carolina) would seize the estate of her late husband Baird, and therefore requested him to make it over to her, to secure it from confiscation: And he believes the bond and assignment were executed for that purpose only; and that they were executed at the same time and place, viz. New York or Long Island, in the summer of 1782—That a defeazance was also executed there, and that the paper produced to the witness is the defeazance, and bears date the 28th July, 1782, and Frazer is not a witness to that—He did not recollect if more than one defeazance was executed; if there was, it

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must have *been executed at the same time and place—That the complainant Mrs. Wilson was not present at the execution of the bond or defeazance, nor does he know whether she ever consented to it—He did not understand that any of her former husband's estate was to be settled on her. Thomas Merrett swore, that the defendant gave him the information stated by Saunders, at New York, in the summer of 1782—That the bond, assignment and defeazance were executed at the same time—That Frazer, M'Leod, Campbell and Gamble were all present—That the assignment was made to prevent confiscation, and the defeazance to disclaim any right or title in the trustees to the estate—That he was the confidential friend of Wilson,—Mrs. Wilson was then in Carolina—Thinks there were other defeazances at same time—There was no intention of making a real settlement. Two other witnesses, Hardy and Gamble, were also examined.

At the sitting of the court, on the 18th July, 1791, present Chancellors Hutson and Mathews, Mr. Pringle moved, that the testimony of Hardy, Gamble, Merrett and Saunders, witnesses who had been examined in this case, should not be read in the cause. This question was argued by Messrs. Pringle, Holmes and Pinckney for complainant, and by Messrs. Desaussure, Parker and Read for defendant.

For the complainant it was contended, that the evidence of Saunders and Merrett cannot be received, because they are trustees; and that of Hardy and Gamble cannot be received, because it is only hearsay, as to the intentions of the parties; the trustees ought to have been complainants with Mrs. Wilson to support the deeds, and not witnesses to defeat them. Confidential persons cannot be coerced to give evidence to betray the confidence reposed in them, such is the case of counsel. Raym. 733. 1 Domat. 429. Trustees are admitted to benefit the cestui que trust, not to injure him. 1 P. Wms. 290. 2 Vesey, 296. The bill charges a fraud,—the witnesses are not produced to prove the fraud, but to defeat the whole deed, which is not meant by the case in 2 Atk. 229 and 243. In the case under consideration, if the deeds

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are set aside, the trustees *run no risk of a suit for breach of trust and damages: They are therefore interested in defeating the deed. The deed imports to be in consideration of love and affection; but the defendant wants by parol evidence to prove, that it was to elude a forfeiture, which is a consideration different from that expressed in the deed. This would be contrary to the statute of frauds, which is a remedial law. Where parol evidence has been admitted, it is where it is consistent with the deed, used only to rebut a resulting trust, which is not comprehended within the statute of frauds. 1 P. Wms. 113. An agreement in part executed, takes a case out of the statute of frauds. Mrs. Wilson, by her letter to her husband, requested only the settlement of her annuity, but he settled also the real estate: This was voluntary on his part, and valid against him; for at all events, she used no fraudulent means to obtain that. The cases have decided, that trustees joining to destroy a remainder, it is a breach of trust. Executors are not allowed to be witnesses, because liable to pay costs. This is the case of trustees, who are also liable to suits for breaches of trust. The rule is, that parol evidence may explain but never contradict a deed. The trustees were not set up for the benefit of Mr. Wilson, but of Mrs. Wilson. There are three defeazances in this case,—some bear different dates,—in others there are erazures —no confidence can be placed in them. A man cannot aver any thing against his own deed; consequently he cannot produce evidence for that purpose. 2 Bla. 295. Plowden, 434. 1 Rep. 176, 8 Rep. 158. Fraudulent deeds are good against the parties themselves. A defeazance supposes the deed properly executed—but a defeazance repugnant to the deed is void. Co. Litt. 236, 7. Wood's Conveyancing, 46, 321, 645, 785. There is no condition in the defeazance, which is essential to a defeazance. A fraud was intended against the state,—but Mr. Wilson is not the person to take advantage of it. It is true, that on a suggestion of fraud, parol evidence may be admitted; but the admission of it depends upon circumstances: In admitting parol evidence here, it would to be sure go to prove a fraud in the first instance; but it

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would also prove *another fraud, and that by themselves as trustees. In matters of account both parties are actors, as if there had been cross bills. 1 Atk. 410. The highest evidence that can be produced, ought to be had; the defeazance would be the highest evidence, and whilst that is to be had, the parol evidence is inadmissible. Wilson in all probability knew that he was included in the confiscation law—That act was passed in February, 1782—A commissioner of forfeited estates visited the plantation early in 1782,—Wilson remained in Charleston till May, 1782: Yet Wilson says in his answer, he knew the estate was not a subject of confiscation—Defeazance bears a different date from the bond,—the subscribing witnesses to the bond are not produced,—others are brought to prove what they ought to have done; this is contrary to every rule of evidence. Wilson says it was a good-natured act of his to let her have her jointure: If he had the defeazance then, how had he given her the jointure? If he had the defeazance originally, why ask her (as he did in his letters) to raise money on the jointure for him? He admitted himself an alien in his supplementary answer. If a man is under attainder, and an estate accrues to his wife, she shall be considered a feme sole as to such estate. 3 P. Wms. 37. The cases relative to trustees may all be reconciled on this principle, that trustees, having no interest, have been admitted to support the trust, but never to betray it. Buller, 284. 1 Raym. 733. Trustees liable for breach of trust. 1 Atk. 243. The assignee of a trustee must be a party to the suit, as the decree must first be against him, and the original trustee to stand as a security. 2 Bro. ch. cas. Burt v. Denhurst. Cestui que trust entitled to have the benefit of the privileges of the trustee in this court. 1 Atk. 450. Parol evidence, even to rebut an equity, is admitted now with caution, even in articles of agreement; and not at all in solemn deeds. 1 Bro. 92. Never to explain away the intent of a deed. 2 Bla. Rep. 1249. Evidence of testator's intent never admitted. 1 Bro. ch. cas. 84, 7 Bro. P. C. 18.

For the defendant it was argued, that the trustee may be a witness against the trust.

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2 Trials per pais, 388—*The bond and defeazance are one entire deed, and ought to be taken together—The trustees have been cross examined, which admits their testimony. The legal estates were in Wilson when he executed the deeds—He could therefore annex what conditions he pleased—the defeazance is entitled to its effect, as well as the deed. Defendant offers to settle £250 per annum on the complainant, or he will take home a disobedient wife. Wilson is administrator of Baird with the will annexed—he had the possession: Wilson is called upon to answer if the bond, and the deed confirming it, were not duly executed, and when, and upon what consideration—He answers that they were executed together with the defeazance, all at the same time; not when they bear date, but at a subsequent day—antedated, and for the purpose of eluding confiscation. This was the object pointed out by the wife, and he accedes to it. The trustees are called in to support his answer in all this, though that stands on oath, uncontradicted; for her bill is not sworn to. They are competent to state the real truth of the facts—They have not done any act in

breach of trust—They have neither sold nor wasted the trust estate: How can the disclosure of the truth, amount to a breach of trust? They state the object of the deeds, and that the defeazance accompanied the deed, to give effect to the real object; which was not to make a real settlement, but to elude a forfeiture: If that was wrong, she shared in the blame, as she suggested the plan—and she is now complainant; and she is not more entitled to the protection of the court than defendant.

For defendant were cited the following cases, 2 Atk. 288, 9, Man v. Ward, where Lord Hardwicke expressly lays it down, that though in general the rules of evidence are the same in equity as at law, the court of equity will admit trustees to be sworn, (though not admitted at law,) in order to come at fraud, or to know the true and real intention of a trust, or use, declared under deeds. Also, 1 Vesey, 61, 2. 2 Vesey, 446. 2 Atk. 98, 9, 283, 524. 1 Vesey, 323. 2 Atk. 254. 3 Atk. 388. 1 Bro. C. C. 599. Cowper's Rep. 340. 1 P. Wms. 300. 2 Atk. 40. 2 Vesey, 629. 17 Viner, Pl. 8. 2 Bla. 327. Cro. James, 469.

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*After the argument of counsel, the court proceeded to deliver its opinion on the point of the admissibility of the trustees as witnesses, on the part of the complainant. The reasons of the judgment of the court are not put on record: But I possess a manuscript in the hand-writing of Chancellor MATHEWS, corrected in the hand-writing of Chancellor HUTSON, which is endorsed as follows: "The opinion given by the court, on the point of law, whether the trustees could be admitted as evidence to defeat the trust deed;" which paper was found among a few of the papers of the Wilson cause. The following is a copy of that opinion:

"The court said, there was not a single case of the number cited by the counsel, which came up to the point now contended for, viz. that the trustees to a deed have been admitted to give parol evidence to defeat, or destroy the trust deed. The court has never gone further than admission of parol evidence, to explain, for the purpose of correcting errors, unravelling doubts, or apparent contradictions; and in some very special instances, to discover fraud. But no case has been produced to shew that the trustees have been admitted to prove the deed, to which they were parties, to be fraudulent ab initio. No such case is to be found, as it would be repugnant to law and equity. The case of Man and Ward, in 2 Atk. 229, (relied on by the defendant's counsel,) is the only instance where the grantor was admitted to prove the grant fraudulent: But in that case the grantor never had any estate in the thing granted; but it was a mere deception, to defraud the rightful owner—and it was well enough, under such circumstances. But that is not the case here—The defendant Wilson does not grant to the trustees the rights of others—There is no apparent fraud on the face of the deed, quoad Mrs. Wilson. But it is said there was a defeazance to the bond or deed to prove which the trustees are to be examined; and to shew that it was intended originally to prevent the trust deed taking effect, and were both executed at the same time. But the deed of defeazance itself is the best evidence of its existence; and it would be straining the rules too much to ad-

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mit evidence *to prove that a defeazance was executed at the same time with the trust deed, although it bears date fifteen months after. A witness who has been guilty of fraud himself, shall not be permitted, by acknowledging the fraud, to injure a third person, who appears to be by the first deed an unimpeached cestui que trust; and thereby to exonerate himself from all the ill consequences that might arise to him, if the first deed should be established. He cannot be considered a disinterested witness. In Man and Ward the trustee was admitted as a witness to defeat a fraud, by giving evidence of the true statement of facts, and thus restoring the estate to the real owner. But to permit it in this case, would be to sanctify a fraud, and to defeat the interest of a third person, who has a fair interest in a bona fide deed of trust.—Upon the whole, the court is of opinion, that the authorities reject the admission of trustees to defeat the trust deed; and shew that trustees are punishable for breach of trust: And where lord Hardwicke says that parol evidence is admissible in equity to prove the merits or intentions of a deed, he could not have meant to go further than to say, that such evidence might be received to explain a deed—surely never to defeat it, unless there was some gross fraud; and certainly never where the trustee, called upon to give evidence, was himself particeps criminis, and swearing to exonerate himself, and to injure another. No deeds or settlements would be safe, if the trustees were admitted to come in, and by their evidence to defeat the trust estate. It would open such a door to fraud and perjury, and produce evils of such magnitude, that this court could not tolerate it. It was suggested in the answer that the complainant used fraud and misrepresentation to defendant, to induce the execution of the trust deed; but the court is of opinion there has been no evidence of such fraud. The evidence shews that previous to any letter being written by the complainant Mrs. Wilson to her husband, on the subject of the estate being confiscated, the commissioners of forfeited estates had actually taken hold of the estate; whether as Baird's or Wilson's is immaterial, for it justified the suggestion on the part of

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the complainant. The court *was therefore

of opinion, that no parol evidence is admissible in this cause, which goes to defeat the trust deed: Therefore the testimony of the witnesses who had been examined to that point should not be read."

The entry in the register book is as follows: Wilson v. Wilson—"The court ruled that no evidence which tends to defeat the validity of the trust deed in bill mentioned is admissible."

The cause was then brought to a hearing on the merits, and was fully argued for several days by Mr. Pringle, Mr. Holmes, General Pinckney, and Mr. E. Rutledge for complainant,—and by Mr. Desaussure, Mr. Parker, and Mr. Read for defendant.

On the part of complainant it was insisted, that this was not an unconscionable bargain, on the part of Mrs. Wilson. It was obtaining a settlement merely of the annuity which she had by her former husband for a valuable consideration, to wit, marriage. The expression in Mrs. Wilson's letter to her husband, "I will make use of the settlement if I can; if not, I will say I have no claim," ought not to defeat the deed. It is not evidence of her not relying on the settlement; but of her apprehensions at a moment of embarrassment and distress. During the whole of Mrs. Wilson's correspondence with her husband, her son by her first husband, Baird, was living—On his death (in 1788) a great accession of fortune accrued to Mrs. Wilson. If a settlement had then been demanded by her, the court would have ordered it: But this is not done,—and will the court deprive her of the settlement originally obtained? The endeavour of the parties to evade the confiscation law, was not an immoral act. It is not a general law of the land; but a penal and strict law, against a few offending individuals, named in the act itself. Although the confiscation act declares all deeds and acts done contrary to it to be void, the state is not a party here. And whatever effect the claim of the state might have produced, it is not for Wilson, the defendant, to avail himself of the act. To give effect to the act, it was necessary to have made the state, or the commissioner of confiscation, a party to

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the suit. Wilson's possession of *the negroes, was in his character of administrator, and not by virtue of his marital rights; and a husband possessing himself of an estate as administrator in right of his wife, is only a trustee for her. Wilson is an alien, and cannot hold the land under any pretence—The wife's rights in the land are not forfeited by her marrying an alien. If the defeazance had said that on condition, the estate was not confiscated, then the settlement was to be void, and the estate restored fully to the husband, that might have been good. But there was no condition to the defeazance, which was directly repugnant to the deed of settlement, and Mrs. Wilson was not a party to it, nor conusant of it. The trustees do no more in the defeazance than renounce their trust; but their doing so does not defeat the deed of trust. Their declaration that they would re-convey to Mr. Wilson, is of no validity without the consent of Mrs. Wilson. It would be to admit, that trustees erected to support trust deeds, may destroy them without knowledge or consent of the cestui que use, which is contrary to every principle or rule of the court. The several papers called defeazances have different witnesses, and bear different dates, and the witnesses speak of different places of execution. This throws discredit on them all. The court has refused to admit the testimony of the trustees, on oath: It will not receive their evidence of the intent of the transaction, in the shape of a defeazance, not on oath. If the defeazance had really been fair and valid, Wilson's subsequent declaration that it was a good-natured act in him to give up her jointure, was a confirmation of the bond; and shews that he did then intend such a settlement as is contained in the bond. If the defeazance had been incorporated in the body of the deed of settlement, it would have been rejected as repugnant—for the rule is, that the latter clause of a deed contradicting a former, is void.

The following cases were cited for complainant, 3 Atk. 21, 655. Talbot, 65. 2 Bla. 387, 327. Shephard, 381. 5 Bac. 396, 403. 1 Vesey, 539, Jewson v. Moulson, 2 Atk. 520, 97. Douglas, 672, 697. 1 Bla. 44. 1 Ventr.

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32. 2 *Vesey, 375. 1 Atk. 271. 1 Stra. 503. 1 Eq. Cas. abr. 67. 2 Eq. Cas. abr. 481. 3 P. Wms. 37.

For the defendant it was argued, that it was contrary to the authority of the decided cases, that a party shall be allowed to set up a deed for a contrary purpose than that for which it was intended. The defeazance was strictly conformable to Mrs. Wilson's own proposition by her letters, which was that such a settlement should be made as would secure the estate from forfeiture; and that when that purpose was effected by the deed, the defeazance was to prevent its having any other effect. The discredit attempted to be thrown upon the defeazance, is not warranted by the evidence. It is common for parties to multiply copies or duplicates of an important paper, especially in time of war and peril. The defeazances are not dissimilar in substance or object: And the witnesses may very well, after the lapse of some years, forget at first, that they had seen two or more papers executed to the same purpose. Marriage settlements are not to be extended beyond their import: They are deviations from the fixed laws of the land, and should not be carried to extremes. They will become dangerous instruments of domestic unhappiness, by setting up imperium in impe-

rio. The separation of interests between husband and wife, produced by marriage settlements, is calculated to produce many mischiefs, discords, loose morals and other ill effects. It relaxes the great bond of family union, and should not be favoured. The defendant executed the deeds under an impression made on him by Mrs. Wilson's communications, that the estate would be taken from him by confiscation. This was not perfectly correct or certain, and his act, under a false or doubtful impression, is not binding. It is a mistake which the court will rectify, or relieve against. A defeazance without a condition is good, where the deeds are merely executory, as in this case. It is obvious, for Mrs. Wilson's letters shew the fact, that these deeds were obtained by her solicitation, after marriage, expressly to avoid confiscation—That was the intention and the object of all the parties—The complainant, one of those

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parties, cannot then be permitted *to avail herself of the deeds now, or induce the court to lend its aid to give them a literal execution, to work a different purpose. When two parties enter into a deed contrary to law, or to evade the law, this court will not support it—it will not assist to give it effect. Mrs. Wilson cannot execute any deed, under coverture, to defeat the rights of her infant daughter, in the inheritance: Yet such would be the effect of supporting these deeds made by the husband, after the marriage, if they are supported by the court, as to the land. The annuity ceased on the death of young Baird, the son—it was merged in the inheritance. The expression used by Mrs. Wilson in her letter, shews that she considered the deeds as raised up for a special purpose, to elude confiscation, and for no other purpose: For she says, "If they will admit of marriage settlements, I will shew mine under the deed"—"if not, I will say I have no claim."

The cases cited for defendant were, 1 Bla. 442. 3 Bla. 429. 1 Bac. 286. 1 Vern. 261, 227, 233, 203. 2 Vern. 270, 307, 518, 186. 1 P. Wms. 108, 378. 2 P. Wms. 641. 1 Atk. 295, 547, sir F. Head's case. 2 Atk. 98, 160, 257, 330, 447. 3 Atk. 72. Brown, C. C. 151. 2 Vesey, 54. 2 Bla. 498, 433, 327, 342. Shephard, 182, 69, 382. Douglas, 253, 450, 468, 695. 2 Eq. Cas. abr. 481, case 15.

The court, consisting of Chancellors Hutson and Mathews, (for Mr. Hugh Rutledge, then recently appointed chancellor, not having heard the arguments in the first stages of the case, did not sit at this hearing,) delivered their decree on the 4th August.

Chancellor HUTSON delivered the judgment of the court.

After greatly commending the learning, industry and ingenuity of the counsel, he stated that the first question for consideration was, whether the bond given by the defendant to the trustees, for the benefit of the complainant, is such as this court will support?

2d. What is the extent of the bond, or of the property meant to be conveyed by it?

The defendant's counsel made the following objections to the bond:

1st. That the bond was obtained by fraud or misrepresentation.

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*2d. That the wife was particeps criminis, and not to be favoured.

3d. That being a contract to defeat or evade a law, (the confiscation act) it is ipso facto null and void.

4th. That it was given for a particular purpose, and ought not to be applied to another.

5th. That there was a defeazance executed at the same time, which defeats it.

To these objections the court gave the following answers—To the four first, that there did not appear to be any fraud or misrepresentation. The commissioners of confiscated estates had taken possession of the estate—the wife, to save it, implored her husband to execute the bond, and protect the property for her and her child. This was a laudable motive; there was no crime in it. That it did not appear that the bond was given merely to cover the property from confiscation in evasion of the law; it was also to make provision for the wife and child. That with respect to the defeazance, there were three papers with different witnesses from those to the bond,—this is a mark of fraud. The bond itself is unobjectionable, as to the consideration, which was marriage; or as to the subject of it, the property; or the execution. But the defeazance has no force: It was not between the same parties,—the wife is no party to it,—the trustees had no right or authority to do any act to avoid the trusts, without the concurrence of the cestui que trust—nor is there certain proof whether it was executed and delivered by the trustees to Mr. Wilson at the same time when he executed the bond. The defeazance therefore not standing in the way of the bond, it is good and valid, and entitled to its full effect from the court. With respect to the extent of the property covered by the bond, and its effects, the court said it covers the annuity; and as to the land, the defendant never had any legal rights in the real estate. He was attainted in Pennsylvania for adhering to the enemy, and holding a commission. His pardon from that state extended only to his person—he was an alien, and could not hold land. —[The court said nothing as to the personal estate claimed by complainant, as omitted by mistake.]

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*It was therefore decreed, that the master do dispose, on a credit of one, two and three years, of as many of the negroes as will be sufficient to raise the annual sum of £250. for the payment of Mrs. Wilson's annuity, during her life, to commence from the death

of W. A. Baird: That he take an account of all sums received by Mrs. Wilson, from that time, the amount of which is to be carried to the credit of Mr. Wilson, against the annuity: That he do also inquire what will be a proper allowance to Mrs. Wilson, for the use of the land by Mr. Wilson, from the death of W. A. Baird, (the son,) and report accordingly: That in the meantime the injunction to stay waste be continued, and that each party pay their own costs.

General Pinckney, Mr. E. Rutledge, Mr. Pringle, and Mr. Holmes for complainant,—Desaussure, Parker and Read for defendant.

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Case LXIX.

Present—Chancellors Hutson, Mathews and Rutledge.

JOSEPH DILL and ELIZABETH SMITH, Next of Kin to John Dill v. SARAH DILL, Executrix of John Dill.

(September, 1791.)

[*Wills* ⟸450.]

Question on the construction of the residuary clause of a will. Such construction to be made as will give effect to all parts of the will.

[Ed. Note.—Cited in Logan v. Cassidy, 71 S. C. 175, 201, 203, 50 S. E. 794.

For other cases, see Wills, Cent. Dig. § 966; Dec. Dig. ⟸450.]

[*Wills* ⟸614.]

[A testator by his will, after giving a portion of his estate to his wife absolutely, and making various devises and bequests, devised as follows, viz.: "All the rest," etc., "of my estate, which I am possessed of at the time of the decease of my said wife, and not before, and which I have hereinbefore given and bequeathed to her, shall be equally divided" among persons named, "my said wife having, as before mentioned, the profits of my said lands and negroes during her life." *Held*, that this was a devise of the residue of the estate not before disposed of, to the wife for life, with remainder to the devisees named.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1398; Dec. Dig. ⟸614.]

The complainants bill stated, that John Dill died seized and possessed of a considerable real and personal estate, and that he duly executed his last will and testament on the 25th of October, 1780, in and by which he made the following dispositions:—"I give and bequeath unto my wife Sarah Dill, several negro slaves, [by name,] with the future issue of the female slaves, to hold, to her and her heirs for ever. Item, I give and bequeath unto my said wife, the use and profits of all that my plantation, situated on Stono river; also, all that my other plantation, commonly called Dill's Bluff; also, the undivided half part of the plantation situate on Dickson's Island, to hold, to her for and during the term of her natural life, and no longer: And at the decease of my said wife, I give the above plantation called Dill's Bluff unto my nephew John Dill and his heirs for ever. Item, I give and bequeath, at the decease of my said wife, unto my son

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in *law Thomas Taylor and his heirs for ever, all that undivided half part of the plantation situate on Dickson's Island; and all the plantation at Stono river, commonly called Turkett's, to hold, to him and his heirs for ever. Item, I will and direct that the other undivided part of the tract of land at Wappoo, shall be sold as soon as possible after my decease, and the monies arising from the sale thereof shall be equally divided between Jane Elizabeth Taylor and Thomas Taylor, share and share alike. Item, I give and bequeath unto my nephew John Dill, all those my negro slaves, to wit, [naming eight slaves] with the future issue of the female slaves, to him and his heirs for ever: My said wife nevertheless having the use of the said negroes during her life. And all the rest, residue and remainder of my estate, real and personal, whatsoever and wheresoever, which I am possessed of at the time of the decease of my said wife, and not before, and which I have hereinbefore given and bequeathed to her, shall be equally divided between Jane Elizabeth Taylor and Thomas Taylor, share and share alike, my said wife having as beforementioned the profits of my said lands and negroes during her life. And lastly, I do hereby nominate and appoint my said wife executrix, and two other persons, [whom he names,] executors of this my said will, hereby revoking all other wills by me heretofore made."—The bill sets forth, that the said John Dill at the time of his death, was possessed of other considerable personal property, besides that particularly mentioned in his said last will and testament: That the Taylors mentioned therein are the children of Mrs. Sarah Dill by a former husband. It further sets forth, that the said Sarah Dill is the only person who has acted under the will of the said deceased: That she has possessed herself of the whole of his personal property, as well that to which she is entitled, as that to which complainants are entitled, under and by virtue of the statute of 22d and 23d Car. II. and that she refuses to give to complainants their part or share of the undisposed personal property of testator. The bill further sets forth, that complainants are the brother and sister, and

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next of kin of testa*tor; prays for a discovery of the personal property not disposed of by the said last will and testament; and also for distribution thereof agreeably to the above mentioned statute.

To which bill the defendant put in the following answer: She admits that the said John Dill did duly make and publish such will as in the bill mentioned; that the testator departed this life without issue then living, leaving the said will unrevoked and

unaltered; that the complainants are the brother and sister and next of kin of the said John Dill; that she has taken upon herself the sole execution of the said last will and testament, and has also taken possession of the whole of the personal property which testator died possessed of, as well that particularly mentioned in the will, as that not particularly mentioned therein: That the Taylors, Jane Elizabeth and Thomas are her children by a former husband.—The defendant refuses to give up to complainants any part of the personal property of the said John Dill; the whole of it being, she alleges, disposed of by the said last will and testament; and further answering sets forth a former will, made by the said John Dill, in which it appears that the Taylors were at the time of the making thereof the objects of his bounty.

The cause came on to a hearing in September, 1791, and was argued by Mr. Gaillard, Mr. E. Rutledge, Mr. Pringle and General Pinckney for complainants,—and by Mr. Read, Mr. Ford, and Mr. Desaussure for defendant.

The great point in contest depended on the construction of the residuary claim. For complainants it was contended, that the residuary clause was so vague and uncertain, that it must be declared void; and if the court declared the residuary clause void for uncertainty, then the complainants would be entitled under the statute of distributions as next of kin, which was a clear title; otherwise it would be to prefer a doubtful title to a clear one. That if an estate is given to one for life, remainder to another, and it does not say for what term, the person in remainder takes a fee. If a person devises to a stranger, after the death of his wife, he

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gives no estate to her by *implication; secus if he devises to his heir at law. With regard to the devise of the rest and residue of the testator's real estate, it meant nothing; for he had devised all his real estate specifically. Subsequent restrictive words are to control prior general words: There are restrictive words in the residuary clause in this bill, which limit the bequests of that clause to the two Taylors, to the property previously bequeathed to their mother; and prevent the general words of the residuary clause from carrying every thing, otherwise undisposed of, to them. No general introductory words are in this will, whence to infer that the testator intended not to die intestate with regard to any part of the estate. The heir is not to be disinherited but by plain words. The personal estate, not properly or clearly disposed of, goes to the next of kin by the act of law, as the real estate does to the heir at law.

The cases cited for complainants were, 2 Stra. 844. 3 Atk. 8, 231–4. 1 Atk. 496, 231. 3 Burr. 1634. 1 Eq. Cas. abr. 178, 207. Talbot 52, 44. 1 P. Wms. 550–5. 4 Burn's Eccl. Law, 103. 5 Bac. 522–9. 2 Stra. 1261. 3 Bro. P. C. 257. 7 Bro. P. C. 18.

For defendant it was argued, that a will is to be so construed as to give effect to all its parts. If the construction in favour of defendant is made, it gives full effect to every provision of the will; if not, then a part of the will is made a nullity. The court will not suppose the testator had no meaning in the residuary clause under discussion: It will rather seek a meaning with astuteness. It seems manifest the testator meant to dispose of the whole estate; yet the complainant's construction would defeat such intention; and the bulk of the personal estate would go as undisposed property.

The cases cited for defendant were, 3 Burr. 1541. 3 Atk. 257, 283, 409–62–5. Talb. 157. Cowper, 271, 356. 2 Burr. 767, (as to supplying words;) 2 P. Wms. 194, &c. 1 Burr. 38, 50. 5 Burr. 2638–9. 1 Atk. 524, 411. 1 Ves. 225, 107–8. 3 Burr. 1618. 2 Bac. 81.

Chancellor H. RUTLEDGE delivered the following judgment of the court:

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*This case must be determined according to the rules laid down for the construction of wills, and which have uniformly prevailed. Among others it is a rule, that the construction must be of what appears on the face of the will; that no technical form is necessary to convey the testator's meaning, which must be collected by attending to the several parts of it, and considering and comparing them together; not by an arbitrary construction, but by a violent and strong presumption arising from the several parts of it compared and taken together. A paper was produced and permitted to be read by consent of parties purporting to be a former will of the testator, but the court have taken no notice of it; it was totally revoked by the subsequent will, and therefore ought not to be at all considered. It was objected, that in the will before us there are no introductory words to shew an intention in the testator to dispose of his whole estate; but we do not think it at all necessary to have such words introduced. It is to be presumed, when a person sits down to make his will, that he intends to dispose of his whole estate. Introductory words cannot vary the construction of a devise so as to enlarge the estate of a devisee, unless there are words in the devise itself sufficient to carry the degree of interest contended for; but wherever they assist to shew the intention of testator, the courts have laid hold of them, as they do of every other circumstance in a will, which may help to guide their judgment to the right and true construction of it. The point before the court, is upon the construction of the residuary clause in the will. It is contended by the complainants, that the residuary clause is so ambiguously expressed that it cannot, but

by implication, be construed to dispose of the residue of the personal estate; that the words, "which I have hereinbefore given and bequeathed to my wife," are restrictive words, and must have reference to the lands and negroes given to defendant the widow in the former part of the will, wherein the testator had given her an express estate for life. The residuary clause must have some operation; the court cannot reject it altogether, in order to determine that the testator has not disposed of his residuary per-

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*sonal estate. If it stands, and the construction contended for is allowed, it would have the effect totally to defeat the devises to J. Dill and J. Taylor, to whom the lands and negroes are given absolutely after the death of defendant; and it cannot be presumed that the testator, by a general sweeping clause at the end of his will, intended at one blow to destroy all the former devises and bequests of his will. Implication is of two kinds, a necessary and a possible one; and if it be necessary to supply or reject words to make testator's intent take effect, so as it is consistent with law, the court will make that necessary implication; as the court of king's bench did in the case of Robinson and Robinson, in which it was determined, that on the true construction of a will, by necessary implication to effectuate the manifest general intent of the testator's will a devisee should take an estate in fee, notwithstanding the express estate be for life, and no longer; the latter words were rejected to create an estate tail. And in Coryton and Helier, lord Hardwicke by a construction taken from all parts of the will considered together, to imply the usual qualification, if he should so long live, in the disposition of the estate, supplied these words, which had been omitted, as he said, by the negligence and ignorance of the writer. This will is most ignorantly drawn, but it is not so dark as that the testator's meaning from the whole will taken together may not be discovered. It is observed that the complainant Smith is not taken notice of by testator in any part of his will; and complainant Dill not otherwise than as an executor: From which it may fairly be inferred, that the testator thought he had provided sufficiently for the family by giving complainant's son a plantation and negroes on the death of defendant. She and her children appear to have been the principal objects of his bounty; the children had lived with him from early infancy, and he seems to have adopted them, having no children of his own. In order to come at the testator's intention, his whole will must be attended to: He first gives his wife sundry negroes absolutely; and the penner of the will, out of abundant caution, and to secure them, as he

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thought, most effectually, gave *them to her and her heirs for ever. In the following clauses he gives her several tracts of land for life, he then gives other tracts to other persons absolutely, reserving however to her an estate for life in them; and also some negroes, which he had bequeathed to his nephew J. Dill absolutely: Then comes the residuary clause, which is very inaccurately penned; but the court must put such construction on it as will best answer the testator's intent; for agreeable to the rule in Com. 45, such construction should be made that all the words of the will should stand if possible. The court is not confined to the order of placing the words in the will, for to make the sense plainer they should be sometimes transposed. From the ambiguity of the expressions, it would seem as if the testator intended to restrain the bequest to the lands and negroes given in the former part of the will. It is absurd to call the lands and negroes in the foregoing clauses of the will his residuary estate, because they are bequests of particuar parts of his estate; and it would be repugnant and contradictory to those devises, inasmuch as he had before parted with the absolute property by those bequests: And by the construction contended for this intent would be entirely defeated, and the first parts of his will overturned. A question is asked, will you reject those words in the residuary bequest? No; but the court will so construe and expound them that they may have effect. As the testator from the preceding clauses in his will, has given his whole real estate to his wife for life, and some of his personal, although he had previousy disposed of the fee simple to other persons; and as he has by the last clause given the rest, residue and remainder of his real and personal estate to J. E. Taylor and T. Taylor after the death of his wife, manifestly under the idea that he had given it her for life, and by subsequent words says she shall have those lands and negroes for life,—the court are therefore of opinion, that according to the rules of construction, comparing and taking together all the clauses of this will, and by attending to the several parts of it, by necessary implication, a very violent and strong presumption arises, that testator did

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not intend to leave *any part of his estate undisposed of: That as the Court ought not to strike out entirely any of the words of the will, yet they should so construe and expound them, that they may have effect. Therefore we think, upon the whole of the will taken and collected together, the intent of the testator in the residuary clause is sufficiently apparent, and clear to decree that the residue of the testator's real and personal estate is well bequeathed to his wife the defendant for life, and after her death to J. E. Taylor and Thomas Taylor.—It was therefore decreed, that the bill be dismissed with costs.

1 Desaus. 244

Case LXX.

Present—Chancellors J. Rutledge, Hutson and Mathews.

Administrators of JOHN HARLESTON v. Executors of THOMAS LYNCH, and HAMILTON and Wife.

(December, 1784.)

[*Husband and Wife* ⇐11.]

A brother devises to his sisters the residue of his estate. One of them is married, and her husband dies before the will is proved or any division made of her brother's estate. The husband not having reduced this estate to possession, his representatives cannot take it, but it survives to the wife.

[Ed. Note.—Cited in Cape v. Adams, 1 Desaus. 569.

For other cases, see Husband and Wife, Cent. Dig. § 49; Dec. Dig. ⇐11.]

[*Wills* ⇐869.]

[A will directed a sale of all the testator's property, for the benefit of his sisters, one of whom was married; but the will was not proved, and nothing was done thereunder, until after the death of such sister's husband. *Held*, that such sister was entitled to her share of the estate, discharged from the debts of her husband.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2213; Dec. Dig. ⇐869.]

(This case was omitted by accident in its proper place.)

The complainants by their bill charge, that Thomas Lynch, of the state of South Carolina, being seized and possessed of a considerable real and personal estate, did by his will, dated the eleventh day of May, 1779, direct that in case he should have no child, all his estate, both real and personal, should be sold by his executors, or a majority of them, and the money arising therefrom be disposed of one-third to his wife during her widowhood, with liberty to her to dispose of the same by will whilst she remained his widow; but if she died intestate, or married again, that part should sink into the residue of his estate, and go therewith; and then gives and bequeaths all the rest and residue of his estate whatever, to his sisters Sabina, Esther and Elizabeth, the said Elizabeth being then the wife of John Harleston, who on his marriage with her had settled £20,000 of the then currency of this state; and by a codicil to the said will, bearing date the 27th July, 1779, after some alterations respecting the legacy to his wife, he ratified and confirmed the will, and appointed the defendants and

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Joseph Allston, since de*ceased, executors—That Thomas Lynch shortly after the execution of the codicil, being in a bad state of health, and having no child, embarked on board the Fair American, and sailed in her for St. Eustatius, in company with several other vessels, from which she was parted in a storm, and has never since been heard of—That John Harleston being sent to congress on public business before the will was proved, never returned to this state during the British usurpation, but died about the month of April, 1781, having first made his will; in which, after sundry legacies, he gives the residue of his estate to his cousin Nicholas Harleston, and appointed his wife executrix, and Isaac Motte, Esq. executor, who refusing to qualify, the complainants obtained administration, collected the personal estate of the deceased, and finding it insufficient to discharge his debts, applied to the Rev. Mr. Smith, the only qualified executor on Mr. Lynch's will, to render an account, and deliver over to the complainants that part of the residuary estate which was left to Elizabeth the wife of the said John Harleston, and which the complainants were advised by operation of law vested in the said John: But the defendants refused to comply with the requests, alleging that the same was the absolute property of the said Elizabeth, she having survived her husband, who had never reduced the property in question to possession. The bill therefore prays that the defendants should be compelled to account with the complainants, and to deliver over to them what was bequeathed by Thomas Lynch to his sister Elizabeth.

The defendant Robert Smith, who is the only qualified executor on the will of the said Thomas Lynch, by answer admits, that Thomas Lynch, his testator, did by his will convey to his executors the whole of his estate, as well real as personal, with directions to sell the same and divide the money which might arise therefrom among his sisters, in such manner as is set forth in the complainants' bill; one of which sisters was Elizabeth, then the wife of John Harleston, Esq. and now of major James Hamilton: That Thomas Lynch sailed from this state for St. Eustatius, in July or August, 1779, and was then in ill

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health; *and that the vessel in which he sailed has never been satisfactorily accounted for, but whether or when she was captured or perished at sea is unknown—That the will of Mr. Lynch was never proved till after the evacuation of this state by the British: That Mr. Harleston made such will and died at such time as is set forth in the bill; but that he the said Harleston was never possessed of any part of the testator Thomas Lynch's estate: That it having been directed to be sold and the money paid to Elizabeth the wife of the said John, it was a mere chose in action, and consequently survived to her, even if Mr. Harleston had outlived Mr. Lynch, which defendant does not admit to have been the case: That although Mr. Harleston did settle £20,000. of the then currency on his wife at their marriage, and which he considered to have been about a moiety of her then fortune, yet it is evident from his will that he never considered himself as en-

titled to the estate in question, because, although in the event of her marrying or claiming her settlement, he gave from her every the most minute articles of his own property, yet he scrupulously secured to her the fortune which he had acquired by her, even to her waiting-maid and her children. Wherefore, as no proof has been or can be offered to shew that Mr. Harleston outlived Mr. Lynch,—as even if it had, the estate in question being a chose in action survived to Mr. Hamilton, and as the testator has given proofs that he did not consider the estate as his,—the defendant prays that the bill might be dismissed with costs.

The case came on to be argued in September, 1784, Mr. Bee for complainant, and Mr. T. Pinckney for defendant.

For complainant it was argued, that the property in question is a personal chattel, and not a chose in action. 1 Bac. 286, 290. A husband and wife being separated, a legacy left to wife, vests in the husband. 1 Vern. 261. 1 Eq. Cas. abr. 58, 69. 1 P. Wms. 125. Harleston was never in possession of the estate, owing to the possession of the country by the enemy. 2 Eq. Cas. abr. 144. There was a marriage settlement by Harles-

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ton on his wife, *therefore the husband was a purchaser of all the wife's estate. 2 Vern. 501. 3 P. Wms. 199. The husband settles out of his own estate. 2 Eq. Cas. abr. 143.

Mr. T. Pinckney contended,—A chose in action is a thing that cannot be obtained without suit. Co. Lit. A chose in action must be reduced to possession by the husband, or it survives to the wife. 1 Bac. 289. 1 Eq. Cas. 68, 3 Atk. 20, Bond v. Simons, 726.

On the back of Chancellor MATHEWS'S brief, are the following remarks, made by the court in giving its judgment on the case.

The property of the testator Lynch being directed to be sold for the benefit of his three sisters; although the will was not proved till after the war, owing to the calamitous situation of this country, and consequently could not be carried into execution, and that not through any laches of the executors; and Mr. Harleston, husband of one of the legatees in Mr. Lynch's will, having died, prior to any thing having been done by the executors, and this court considering that to be done which was intended to be done, we must therefore consider the property which Mrs. Harleston was entitled to under her brother's will, in the nature of a chose in action, and never having been reduced into possession by her husband, it survives to her, and she cannot be legally deprived of it: And although there are creditors in the case, we cannot divest her of her right for their benefit.—Therefore the bill must be dismissed with costs.

1 Desaus. 247

Case LXXI.

ROGER SMITH, Esq., Administrator of Major Charles Motte, Deceased, v. JOHN HUGER, Esq., Surviving Acting Executor of Jacob Motte, Sen., Esq., Deceased.

(March, 1791.)

[*Executors and Administrators* ⟸294, 301.]

Executor advances money, and becomes bound for a legatee for sundry debts—the legatee dies insolvent—the executor is allowed to deduct the amount for which he is liable for the legatee, before he shall be compelled to pay the legacy to the administrator of legatee; and the executor who is so liable dying, his co-executor may retain for the benefit of his estate.

[Ed. Note.—Cited in Williams v. McCardell, 14 S. C. 222.

For other cases, see Executors and Administrators, Cent. Dig. §§ 1177, 1223; Dec. Dig. ⟸294, 301.]

[*Executors and Administrators* ⟸301.]

[Where an executor had made advances, and had become security in considerable sums for a legatee, who afterwards died insolvent, the executor was allowed to retain such sums from the amount of the legacy, though there was no express understanding to that effect at the time of making the advances.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1223; Dec. Dig. ⟸301.]

The complainant Roger Smith, administrator of the goods and chattels, rights and credits, which were of Charles Motte, deceased, shews, that Jacob Motte, the father of the said Charles Motte, being seized and

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possess*ed of a real and personal estate, made his last will and testament in writing, bearing date the 2d day of October, 1767, wherein, after several specific and pecuniary legacies, he directed that his executors should sell and dispose of all his estate not specifically devised and bequeathed, and divide the monies which should arise therefrom, as well as the monies due to him on bond, note, or account, into eleven shares, one eleventh share of which monies he gave and bequeathed to his said son Charles Motte, his executors, administrators, and assigns; and of his said will nominated John Huger, Jacob Motte, and several other persons executors—That the said testator died in 1770, leaving his said will of full force—That after the death of the said testator, Jacob Motte and John Huger duly proved the said will, qualified as executors on the same, and took on themselves the execution and burden thereof—That the said Jacob Motte, the executor, from time to time became security for the said Charles Motte, and occasionally paid money to and for him, but he never came to a final settlement with the said Charles, nor had he any express authority from the said Charles to charge the money which he paid to him and for him, and the securityships which he entered into for him, (some of which he has been obliged to pay, and some of which he will be eventual-

ly obliged to pay,) to the particular account of the legacy which the said Charles was entitled to under the will of his said father. Your orator further shews, that the said Charles Motte was killed before the lines of Savannah, in the month of October, 1779, and that your said orator has administered on the estate—That Jacob Motte, one of the executors of the said Charles Motte's father, departed this life in the year 1780, and that the final settlement of the affairs of the said estate have devolved on John Huger, the only acting executor of the said Jacob Motte the elder—That in consequence thereof, your orator, as the administrator of the said Charles Motte, has requested him to come to a settlement of all the accounts of the estate of the said Jacob Motte, and to pay over to him what on a fair settlement shall appear to be

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due—That the said John Huger is very *willing to comply with his request in part, but insists (as he is directed by the representatives of Jacob Motte, the brother of the said Charles,) that the monies which the said Jacob Motte has paid to and for the said Charles, and the monies which he was liable, and his representatives are liable to pay on the account of the said Charles Motte, should be deducted, alleging that the said Jacob Motte paid the said monies and became such security on the credit of the funds which were in his hands and under his control, and of which the court would not have divested him had he been living, until those respective claims now set up as discount, were allowed. But your orator conceives as the said Charles Motte's estate is not sufficient to discharge his debts, the said discount should not be allowed unless by the direction of this honorable court. To the end therefore that the said John Huger may be compelled to come to a settlement with your orator and pay over to him or otherwise satisfy him for any balance which may be due, your complainant prays your honors to grant him such relief as he may be justly entitled to.

The defendant in his answer admits the facts charged, and that he has been called upon as executor of Jacob Motte, Sen. to come to a settlement of the affairs of the said estate and to pay over or otherwise satisfactorily satisfy him for such balance as may be due to him as the administrator of the said Charles Motte; but it was in his opinion impossible to do it without the intervention and opinion of this honorable court inasmuch as he well knows that the late Jacob Motte the brother of the said Charles Motte did pay to and for him and became his security to divers people to a considerable amount; all which sums the representatives of the said Jacob Motte insist should be deducted out of the share to which the said Charles was entitled; the more especially as they allege and so this defendant believes the truth to be, that the said Charles Motte's estate will not be sufficient to discharge his debts, and without they are allowed to retain they will be considerable loosers. This defendant therefore submits the cause to the consideration of this

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*honorable court, being ready and willing to do whatever to them shall appear to be right and just.

This case coming on to be heard, the court decreed that the defendant has a right to retain in his hands as much as will be sufficient to indemnify his co-executor Jacob Motte for all sums he stood engaged for on account of Charles Motte, out of the legacy left him by his father; and that he be also allowed such sums as he has actually paid on account of said legacy.

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1 Desaus. 250

Case LXXII.

Present—Chancellors Hutson, Mathews and Rutledge.

CLITHERALL v. JOHN A. OGILVIE.

(March, 1792.)

[*Specific Performance* ⟸25, 53.]

The court refused to decree the specific performance of a contract, for the sale of land, where the inadequacy of price was very great: though no direct fraud or imposition in the buyer. But the seller was a young man just of age, and ignorant of the real value of the land: and acted a little precipitately on being urged.

[Ed. Note.—Cited in Bunch v. Hurst, 3 Desaus. 293, 294, 5 Am. Dec. 551; Butler v. Haskell, 4 Desaus. 696; Gasque v. Small, 2 Strob. Eq. 80.

For other cases, see Specific Performance, Cent. Dig. §§ 56, 167; Dec. Dig. ⟸25, 53.]

The complainant's bill is filed to compel the defendant to a specific performance of a contract in writing for the sale of a tract of land on Santee to the complainant. The bill sets forth that the complainant being desirous of obtaining a body of land to plant, he applied to Mr. Ogilvie the defendant for a lease of his lands on Santee. In the conversation held with him by the complainant Clitherall, Mr. Ogilvie discovered an inclination to sell the land, which he valued at £3500 sterling. Afterwards and on the 4th September, 1789, complainant Clitherall on behalf of himself and Mr. Deas offered to become the purchasers, at the price he had mentioned, payable in four years, by annual instalments. Mr. Ogilvie said as it was a matter of importance he would consult his friends. On the 12th September, the complainant Clitherall wrote to Mr. Ogilvie, and enquired if he would complete the contract. Mr. Ogilvie immediately called on complainant and brought a plat of the land, and asked complainant if he would give £4000 for it, to which he answered he would not. He then asked for complainant's proposals in writing which were given to him, and he went away. A few days after they

met in the street, and agreed to proceed to Mr. Deas's; on their way Mr. Ogilvie delivered the complainant Clitherall, a letter, in an-

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swer to the pro*positions which he had received. On perusing the letter (a copy of which is filed) the complainant observed that the sum of £4000 was to be paid in specie; but agreed to pay £3500 in London, with the interest of seven per cent. When they arrived at Mr. Deas's some discussion took place, and the parties drew up a written agreement, which was satisfactory, by which the complainant agreed to pay £3500 by four equal annual instalments, with interest at seven per cent. the whole payable in England, to Mr. Ogilvie for his half of Acheson's Island on Santee describing the same: he on his part agreeing to convey the said lands to the said Clitherall and Deas. At the same time a memorandum was drawn up of the deed of conveyance, bonds and mortgage proper to be prepared for execution, and the same was left with the privity and assent of Mr. Ogilvie with Mr. Henry Deas, (then a student of law) to draw the papers; the said J. A. Ogilvie saying there was no particular lawyer whom he wished to draw them. It was noted that Mr. Bee was to join in the titles as trustee. The papers were accordingly drawn, and on the 17th September, the complainant Clitherall called on Mr. Ogilvie with them. He took them, in order (as he said) to have them examined by his lawyer; and appointed said Clitherall to call on him the next morning. He accordingly did so, and found that Mr. Ogilvie had gone out; but he wrote him a note the same day saying he would call on him the following Monday. He accordingly did so, accompanied by a friend, and they had a conversation the result of which was that Mr. Ogilvie declined to complete the bargain by executing titles to the complainant—complainant has since understood that Mr. Ogilvie employed counsel, as early as the 17th September, in order to evade the said agreement, under pretence that he was unwarily drawn into the agreement, by artifices used by complainant,—and that the price was greatly inadequate; and that he had no right to sell the land, the legal title being in a trustee—though complainant alleges that the business was conducted with great openness and fairness on his part, and with great apparent deliberation on the part of the defendant, who

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asked *and obtained time to consult his friends, before he entered into the said agreement. The complainant charges that the true intent of the said parties was that the said Ogilvie should convey said land in fee simple to complainant for the said price. The complainant insists that if the inadequacy of price were ever so great, (which however he denies) yet being attended with no fraud or deception, it ought not to vitiate so solemn and deliberate an agreement entered into by a person of competent years—and the complainant disavows any endeavours to depreciate the land, or to keep Mr. Ogilvie from the knowledge of the real value thereof—and though Mr. Deas did request Mr. Ogilvie to keep the sale a secret from Dr. Lynah, it was solely with a view that the surrender of his lease might be more easily obtained by Mr. Ogilvie, to whom he had once offered it—and this request was made after the agreement was signed.

The bill prayed that the defendant or such other person as may have the same, may bring into court the defendant's mother's marriage settlement, and all other deeds relative to his right or title to the said land, which are or may be in his power; and that he may be compelled to make a specific performance of his said contract and agreement, according to the true intent and meaning thereof, and to execute proper deeds for conveying the same to the complainant; and that the complainant may have possession of the said estate and premises as soon as the said lease to Dr. Lynah shall be surrendered or expired, and that the complainant may have such further relief as he is entitled to.

The defendant John A. Ogilvie in his answer, states, that his mother inherited together with other estates a large body of lands on Acheson's Island in Santee;—and on the intermarriage of his mother with his father, the said estates were settled on them, with limitations over to their issue. That after the death of his mother in the year 1785, the defendant's father sent him from England to this country, and appointed Mr. Bee, and two other gentlemen his guardians. These guardians (having a power also from defendant's

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brother Charles) leased, to Dr. Ly*nah on the 19th May, 1787, four hundred acres of their half of said Island, for five years, commencing on the 1st January, 1788.

That the defendant arrived at the age of twenty-one years, some time in the year 1789, and he assumed the management of his property; soon after which to wit, in September, 1789, Dr. Clitherall, and the late J. Deas, jun. called on him, and requested a lease of the land on Acheson's Island. He answered that he could not, as it was already leased. They then asked him if he would sell the land, and what he considered the value; to which he answered that he could not, as he owned only half (his brother owning the other moiety) and that it had never been divided—that he had never seen the lands, and did not know the value of them; except from the opinion of his father, who considered them worth £3500; but that his cousin Mr. Ogilvie, he believed knew its value, and he would write to him on the subject if they wished to know it: To which one of the parties answered that would not answer their purpose as they wanted lands immediately. They then parted; but within

three days after the complainant Dr. Clitherall, returned to the defendant, and said that he with Mr. Deas would give him £3500 for the purchase of the said land: to be paid by them in four equal annual instalments, and the payments to be secured by mortgage; but a stranger coming in put an end to the conversation. On the same day the defendant asked Mr. James Gairdner, who lived in the same house with him, what he thought of the offer. He answered that he did not know the value of the land and advised him to write to his cousin on the subject. On the 12th September, the defendant received a letter from Dr. Clitherall requesting to know if he really would sell the land. The defendant immediately called on Dr. Clitherall at his house; and requested him to put his proposition in writing which he accordingly did. Defendant asked Dr. Clitherall if he would give £4000 for the land but he refused it. Defendant took home the proposals to reflect, and to consult his friends. He did consult Mr. Bee, his former guardian,

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who finding that the defendant's father *had estimated the value of the land (in 1785) at £3500 advised the defendant to accept that price; and agreed (as the defendant then understood him) that he would join in the sale of the land, as the attorney of the defendant's brother Charles. Under the influence of these circumstances, the defendant says he determined to sell the lands; and wrote to Dr. Clitherall to that effect, as stated in the bill. That meeting the Doctor in the street, he informed him of his determination, and they proceeded to Mr. Deas's, where he entered into the contract for the sale of the land, containing 1,538 acres of swamp and marsh land, and defendant bound himself in a penalty of £3500 to make titles to the land—The other parties were not bound by any penalty. The complainant did ask the defendant if he had any desire that any particular gentleman of the bar should draw the papers and title deeds; but Mr. Deas expressing a wish that his brother might draw them, the defendant acquiesced. The contract was drawn up, and the memorandum stated in the bill, was left with Mr. Henry Deas to draw the conveyances, mortgage, &c. On the following Friday, Dr. Clitherall called on the defendant with the titles, and requested that they might be then executed; but the defendant objected to the immediate execution as he wished them examined by a gentleman of the bar. The Doctor endeavored to remove the objection by assuring him that they had been already examined by a gentleman of the profession;—but finding that the defendant persisted he left the papers. Early the next day an intimate friend of defendant called on him and enquired of him if he had sold Acheson's Island to complainant, and at what price. Defendant disclosed to him all that had passed. His friend then told him that the land consisting of 600 acres of prime tide land, was worth three times as much as the price offered for it, and that defendant had no right to sell more than his own moiety. But defendant informed him that Mr. Bee was to join in the titles;—on examining the conveyances brought by Dr. Clitherall, it was found that Mr. Bee's name was not inserted in them. Reflecting on these things, the defendant resolved not to proceed till he

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*had made further enquiries; and he wrote to Dr. Clitherall that he would call on him on Monday. In the mean time he set on foot enquiries by which he learnt that the land was worth at least £15,000—and knowing that his title alone would not be a good one for all the land, and conceiving that Mr. Bee when he learnt the real value of the land would not execute the titles, and believing that the complainant would not endeavor to bind him to a contract founded entirely in mistake, he went with a friend to Dr. Clitherall and Mr. Deas, and he explained to them how he had acted in ignorance, and pressed to be released from his contract:—But finding that they insisted on his executing the titles, he withdrew.

The defendant denies that he had any idea of selling the land until the offer was made to him by the complainant—That he consulted no friend at first but Mr. Gardiner, who accidentally lived in the house with him, and who was quite ignorant of the land as above stated; and he afterwards consulted no other person but Mr. Bee. The defendant admits that counsel were retained for him on Friday, with a view to get rid of the agreement, but it was done by a friend without the defendant's knowledge. The defendant, did state to complainant, that Mr. Bee would join him in the execution of the conveyances, and it was expressly agreed between them that Mr. Bee was to be a party to the titles, as the trustee of Charles Ogilvie; yet Mr. Bee's name was omitted in the deeds prepared under the complainant's directions. That the complainant Dr. Clitherall some days before the signing, and Mr. Deas at the time of signing the agreement, requested defendant not to mention any thing of the matter to Dr. Lynah; which the defendant promised,—and he kept his word. The defendant claims the land under his mother's marriage settlement; and he does not know of any other papers relative to said land. Defendant prays to be released from his said contract, and that the complainant's bill may be dismissed.

The cause came to a hearing, and it was fully proved that the land was worth more than three times the stipulated price.

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*The case was argued by Mr. Pringle for the complainant, and by Mr. E. Rutledge and Gen. Pinckney for defendant.

For the complainant it was insisted that this was a fair contract. The defendant was of full age and competent to act. There was no surprize, no circumvention, no importunity, no unfairness of any kind; and there is no case where the court has gone so far, as to refuse to carry the contract into execution, on the ground of inadequacy of price alone. See 2 Powell, p. 1. This court is not the guardian to watch over and control the contracts of adults. Nor does this court possess an arbitrary discretion to set aside, or to refuse to enforce contracts; there must be strong and reasonable grounds. See 3 Atk. 187. If an agreement is certain and fair, this court will enforce it. See 1 Powell, 139. 2 Powell, 263. 2 Atk. 587. 2 P. Wms. 191. 3 P. Wms. 290. Bacon, Title Trust.

For the defendant it was argued that Mr. Bee was to have been a party to the deeds according to the agreement; but in the deeds prepared by complainant his name was not mentioned. See 1 Eq. Cas. abr. 16, 17. 3 Atk. 386. 2 Atk. 18. Talbot's Cases, 236. It is discretionary with this court to enforce the execution of agreements or not. Where the consideration is grossly inadequate the court will not enforce agreement. 1. Vesey, 279. In this case the price agreed to be given was three or four times less than the value of the land. There is a distinction between contracts executed and executory. 1 Levins, Mosely, 364. 2 Vesey, 17, 566. 3 P. Wms. 129. The penalty was all on one side. The complainant was not bound by any penalty. The estate in question was a trust estate; the legal title was in the trustees of the marriage settlement; consequently Mr. Ogilvie's titles would not have been good. 1 P. Wms. 121, 496. To induce the court to carry an agreement into execution, it must be fair, certain and just in all its parts. 3 Atk. 386. Watching for an heir as soon as he comes of age, to get a bargain out of him, is a catching bargain and will be discountenanced by the court. See Pope & Roots. 7 Bro. P. C. 148. 1 P. Wms. 277. 2 Powell on

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Contracts, 36, *77, 8, 9. Young heirs even when of age, are under the care and protection of the court. 1 P. Wms. 310, 318. 3 P. Wms. 131. See 2 Eq. Cas. abr. 18. It is the constant rule of the court not to enforce hard bargains, but to leave the party to his remedy at law. 2 Atk. 134. This was a hard bargain obtained by an experienced man, from a young man just of age, ignorant of the value of the estate, and rather too much urged. It would be against conscience to compel the defendant to take £3500 for property worth more than £10,000.

After briefly stating the case, the court delivered the following decree:

There is no appearance of fraud on the part of complainant: if there was, that alone would be sufficient to induce the court to withhold its aid in compelling a specific performance of this agreement. The case being then wholly divested of fraud, imposition or misrepresentation, and defendant although a young man, yet not being in necessitous circumstances or his estate in expectancy, few of the cases that have been cited are immediately applicable: for on one or other of the grounds above mentioned, most of the cases have been determined; as in the case of Barnardiston v. Lingood, where B. was in distressed circumstances, and his estate in expectancy, he was relieved against his bargain as being an inconsiderate one, and made without proper consideration.—So in the case of Chesterfield v. Janson;—How v. Weldon was a transaction of fraud. The question for the consideration of the court is whether under all the circumstances of this case, the court will interfere and decree a specific execution of the agreement, or leave party to his remedy at law. The power of the court to carry articles into execution is not doubted, and though discretionary, yet is not an arbitrary discretion; but must be governed by rules of equity. Now though there is no actual fraud charged on complainant, yet in order to entitle him to a specific performance of the agreement, it ought to be fair, certain, just, equal in all its parts, and for adequate consideration. If any of these ingredients are wanting the court will not

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decree a specific performance. That *being a settled rule of this court, we are to see whether this case comes within it. As to the certainty of the thing sold, that will not admit a doubt. The land is partly described in the agreement. Though there is more contained in the agreement than the defendant had a right to dispose of, and which from his answer he was apprised of, and which he certainly never could have intended to sell, his letter on that subject mentions his half of Acheson's Island. Whether this agreement was fair, just and equal in all its parts, is next to be considered. It cannot be doubted we think, that the complainant must have known something of the value of the lands before his application to the defendant. The situation and fertility of soil in that part of the country is pretty well known to persons who have been resident any time in this country; and the pressing importunity of the complainant to conclude the bargain; his repeated visits to the defendant, at a time too when the land was under lease, and he could not get immediate possession, all plainly and strongly indicate that he knew very well what he was about. On the other hand the reluctance of defendant (a young man but just of age, ignorant of the land and its value) to determine the matter hastily; his wishing to consult with a friend whom he thought well acquainted with the value of land, shew

plainly he was not desirous of selling immediately: and that he was not sufficiently competent to determine on the value, (which has been clearly proved by the evidence of maj. Pinckney:) all these circumstances shew that though no fraud or imposition on complainant's part, yet there was such an eagerness, such an anxiety in him to conclude the bargain, such an astuteness of conduct, as do not give it all the marks of fairness, justice and equality. The next point is, whether there be an adequate consideration for the land? Though an inadequate consideration may not alone be sufficient ground to set aside a contract, yet it is a material ingredient, and will go a great way where the property has been sold for a sum grossly inadequate to its real value.† The court al-

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*though it may not go so far as to set aside the agreement, will not however lend its aid in compelling a specific performance, but leave the party to his remedy at law, to recover damages for the performance. That the consideration is enormously inadequate, we need only refer to the testimony of major Pinckney, from whence it appears that the land at the lowest valuation, must be worth four times as much as was agreed to be given for it. Is not this then such a case as the lord chancellor mentions, where the inadequacy, is so strong, gross and manifest, that a man of common sense must exclaim at the inequality of it? Had the deficiency been a

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few hundred pounds *only, the court would not have hesitated to decree a specific performance.

Powel thinks the better opinion to be, that the mere fact of a bargain being unreasonable is not a sufficient ground to set it aside in equity, if the parties are of age, perfectly acquainted with their rights, each aware of what is done, free from deception, and speak what they respectively mean. He may be right but will it be said that all those circumstances concur in this case? They certainly do not, for the defendant has contracted to sell the whole of the land when he was only entitled to half. Was he aware of the land being worth four times as much as he sold it for? Most undoubtedly not. But there is a distinction to be made between the court's setting aside an unreasonable contract, after it is executed, and compelling a specific performance of such an one. In the latter case they will use their discretion with greater liberality, than in the former. In-

†This is a question which calls for the exercise of the highest legal discretion—For as on the one hand courts of justice are cautious of

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*disturbing the contracts of individuals, adult, acting sui juris, not disqualified by idiocy or insanity, nor compelled by necessity; so on the other hand, it would be a great mischief to the community, and a reproach to the justice of the country, if contracts of very great inequality, obtained by fraud, or surprise, or the skilful management of intelligent men, from weakness, or inexperience, or necessity could not be examined into, and set aside. To steer the middle course has been found to be the difficulty.

The reluctance of the court to interfere has been manifested by many decided cases, in which it refused to set aside contracts. See Wood v. Fenwick, Prec. Ch. 206. Willis v. Terrigan, 2 Atk. 251. Nicholas v. Gold, 2 Vesey, 422. Motte v. Atwood, 5 Vesey, 845.—And see the case of White v. Damon, 7 Vesey, 30, 4, 5,—In which lord Rosslyn dismissed a bill for the performance of a contract on the ground of inadequacy merely: But on a re-hearing lord Eldon said that inadequacy alone, did not warrant such a decree without other circumstances. The necessity the court has been under of overcoming its reluctance to interfere in contracts to prevent great injustice is apparent from the following cases: Twistleton v. Griffith, 1 P. Wms. 310. Clarkson v. Hanway, 2 P. Wms. 203. Barnardiston v. Lingood, 2 Atk. 133, Ibid. 324. How v. Weldin, 2 Vesey, sen. 518; also, 2 Ver. 627. Evans v. Lewellin, 2 Bro. C. C. 150 & 326; 2 Bro. P. C. 396; 3 Atk. 383, 5; 1 Ves. 12.

On the ground of inadequacy of price, the court appears to have had great difficulty to lay down any general rule. By the civil law a rule was prescribed, That in the sale of immovables, if the price be less than half of the real value, at the time of the sale, the seller may get the sale to be declared void; and that independent of the honesty or knavery of the buyer or of his ignorance or knowledge of the value of the thing purchased. If there was no fault in the buyer, he should be bound to restore the fruits, only from the time of the demand: but if there were other vices in the sale, such as usury, fraud, or violence, the purchaser will be bound to make restitution of the fruits from the time of his possession of the thing, deducting the interest of the price he paid.††

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*Our laws, however jealous of protecting men in their property even against their own indiscretion, have never gone so far. And the rule seems to be that mere inadequacy of price, in a contract deliberately made between two persons, consusant of their rights, and competent to manage their own affairs, shall not be a ground purely of itself, to vitiate the contract. But the decided cases express a qualification which in reality is a material variation of the rule itself: for it is added, that the inadequacy of price shall not vitiate the contract, unless it be so gross, that every good man would at once exclaim against it, and as would furnish violent presumptive evidence of fraud, imposition, or oppression in the buyer; or weakness, ignorance, or deep necessity in the seller. See Underhill v. Howard, 11 Vesey, 209.—7 Bro. P. C. 70. Coles v. Trecothick, 9 Vesey, 246—4 Bro. P. C. 557. Emery v. Wade, 8 Vesey, 517.—5 Ves. 846.

It is agreed on all hands that the court is not bound to decree a specific performance in every case, where it will not set aside the contract; nor bound to set aside every contract, of which it will not decree the specific performance. In a case of great inadequacy, arising from the gross negligence of the agent, and a want of due authority, the bill for specific performance was dismissed, although there was no impeachment of the plaintiff; but without prejudice to his remedy at law. The court will not decree specific performance where there is any surprise, making it not fair and honest to proceed and call for specific performance. 10 Vesey, 305, 314, Mortlock v. Buller.

†† 1 Domat. 74. Book 1, § 9. Cooper's Justinian, p.

deed if this contract had been executed in all its parts, without the circumstance of defendant's being a young man just come of

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age and he had *applied to have it set aside, probably the court might have refused to do it:—But being altogether an executory contract, and the complainant coming here for a specific execution, this court will not depart from the constant rule in the case of a hard bargain, where it is not absolutely executed, but executory only; of refusing to carry it into execution.

It was objected that the defendant was of full age: this is true; but he was just come of age; only a few months. When under age the law took care of him. Young heirs even when of age are under the care of this court, and then want it most; the law taking care of them till that time.

If the parties at the time of entering into an agreement respecting a claim capable of being precisely ascertained, be at the time of the contract ignorant of the precise value of it, but stipulates under an idea that what he is to receive will be equal in value to what he claims, this will be a sufficient ground for equity to set aside the agreement, if the thing received be not adequate to the value when precisely ascertained. It is pretty evident that the defendant was ignorant of the value of the property he was about to sell, and that he parted with it under an idea that what he was to receive was equal to the value of it, or he would most undoubtedly not have made the agreement he did: and from the testimony of major Pinckney it is evident, that the sum stipulated for, was extremely inadequate to the value of the land, even when not in a state of cultivation. The value was at least four times as much as was to be given for it; and this court will not decree a specific execution of articles, when extremely unreasonable or unconscionable, though no direct fraud proved; but will leave the party to his remedy at law.

It has been contended for complainant that the whole land should be conveyed, though it is evident from the deed of settlement, defendant is entitled only to a moiety. To decree according to complainant's wish, we must deprive defendant's brother of his right, which cannot be done consistently with any principle of equity. This court has certainly no right to order the brother to join in the conveyance. Lord Hardwicke has declared

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there *is no instance of decreeing a partial performance of articles, but it must decree all or none; and where some parts have appeared very unreasonable the court have said we will not do that, and therefore as we must decree all or none, the bill must be dismissed.

In the case of Corking v. Pratt there the agreement was relative to the distribution of intestate's estate and it was set aside because the value of the distributive share was greater than was known at the time of the agreement. Underwood v. Hitchcox, lord chancellor declared that the court is not obliged to decree every agreement entered into, though for valuable consideration. Agreements of which there should be specific performance should be for adequate consideration; and there not being adequate consideration in this case the court would not decree specific execution. And in the case of Gwynne v. Heaton, the lord chancellor Thurlow, said, where the property sold is for a sum grossly inadequate, the court have never suffered it to stand. The real proportion of value has been stated in the case to shew that it was grossly inadequate. This is a very strong case; the most so of any cited and amongst the latest determinations. The cases of Young v. Clarke, in Precedents in Chancery, 538; and Kein v. Stukely, in 2nd Brown; are cases that have not been cited, where the court refused to decree specific execution of an unreasonable agreement. In one of those cases, the defendant had never seen the land, knew nothing of the nature or value of it, desired time to consider of it before he came to any agreement. It appeared and was proved that the lands were worth and plaintiff received one hundred pounds per annum more than he was to pay defendant: That defendant had no judgment of the value of land: By the importunity of plaintiff he was prevailed on to agree to make the leap: He afterwards discovered the imposition and refused to execute the agreement. The court is not bound to decree specific execution, where articles appear unreasonable or unjust, though there is no direct fraud; yet from the great under value of land it appeared to be an unreasonable and shameful contract, yet it was good and the court left

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plaintiff to his *legal remedy to recover what damages he could by nonperformance of the articles, and dismissed bill as to the specific execution.

The court on full consideration of the case under discussion and all the circumstances attending it, and from the evidence on the part of the defendant (although there is no proof of fraud or imposition on part of complainant) are of opinion that the sum for which the land was agreed to be sold is grossly inadequate to its real value: That being an unreasonable contract and a very hard bargain, it would be both unreasonable and unjustifiable to decree a specific performance of the agreement. They will therefore leave th complainant to his remedy at law to recover his damages for the non-performance of the agreement, and dismiss his bill with costs.

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Case LXXIII.

Present—Chancellors Hutson, Mathews and Rutledge.

Ex parte ANN BERESFORD, by Her Next Friend.

(March, 1792.)

[*Husband and Wife* ⟸12, 31.]

The court will order new settlement in favor of the wife, on a new accession of fortune; though opposed by the creditors of the husband and wife, who are in danger of not being fully paid.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 60, 63, 182; Dec. Dig. ⟸12, 31.]

The petition states, that under the will of Thomas Law Elliot, and on the death of his son and daughter without issue, the petitioner's former husband Charles Elliot, became entitled together with his sister Mary Rowand to all his real and personal estate; which Bernard Elliot, having intermarried with the daughter, retained (notwithstanding her death) under pretence that the limitation over to Charles Elliot and Mary Rowand was void.

That Bernard Elliot at length relinquished all the real estate to Charles Elliot and Robert Rowand the husband of Mary, but retained the personal till his death, in 1778; on which it came into the hands of his executors.

That Charles Elliot died in 1781, on which his wife the petitioner, became entitled under his will to one half of all his personal estate, after payment of debts and legacies; the other half he bequeathed to his daughter Jane Riley Elliot, now the wife of Col. Washington.

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*That some after his death the petitioner intermarried with the Hon. Richard Beresford, Esq.—but before the marriage executed indentures of lease and release between herself on the one part, Thomas Ferguson and Roger Parker Saunders on the other, and her intended husband on the third part, by which in order to secure to herself, and to her sole and separate use, all her estate real and personal, notwithstanding the marriage, she conveyed to Thomas Ferguson and Roger Parker Saunders their heirs, executors, administrators and assigns, all her property of which she was possessed or to which she was in any manner entitled in trust for her till the solemnization of the marriage, and immediately after for the use of her intended husband, during his and her joint lives, and then to the use of herself or to such persons as she should appoint.

That sometime after the marriage was solemnized Charles Elliot's executors being dead or having renounced, the above mentioned Richard Beresford and William Washington obtained administration of his goods with the will annexed, and together with Robert and Mary Rowand, brought their bill against the surviving executors, and son of Bernard Elliot, for an account and delivery over of all Thomas Law Elliot's real and personal estate. On which it was decreed that the master should report, what personal property of Thomas Law Elliot came into Bernard Elliot's possession, together with the profits that had accrued, and what was the value of such as had been lost, and that the defendants should deliver over and account to the complainants in manner as in their bill they prayed, which hath not yet been done.

That the said Richard Beresford the petitioner's present husband, having contracted sundry debts, both before and after the marriage, some of his creditors brought their bill alleging that the petitioner's interest in the above mentioned estate was liable to their respective demands; on hearing which bill and the answer of your petitioner and her husband, it was decreed, that her interest was not liable to their demands, but after the determination of the joint lives of her

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and her husband, should remain to her *entire or her appointees; and that during the joint lives she should receive a maintenance out of the profits of the estate, (which were appropriated to pay the creditors during her husband's life.)

That should the above mentioned account and delivery over from the executors of Bernard Elliot to Richard Beresford, Col. Washington and Robert Rowand take place, that part of the property to be delivered over, which the petitioner is entitled to by the will of her former husband Charles Elliot, might, being personal property, be supposed to vest in her present husband, by his creditors, and therefore to be subject to his debts, which is contrary to the will, marriage settlement, and several other decrees above mentioned, and to the rights of your petitioner. That the maintenance out of the profits of the estate, amounting to only 300*l.* per annum, and the use of a country house and house servants, is very inadequate to her suitable support, and inconsiderable when compared with the large estate which she possessed at her marriage, and which with prudent management is capable of producing from two to three thousand pounds a year. She therefore prays, that the said part be settled to her sole and separate use in such manner as the court may think most effectual and most conducive to her advantage.

This application by Mrs. Beresford was opposed by the creditors of her husband, and by those who held his bonds in which she had united with him.

The cause was argued by Mr. Harper, Gen. Pinckney, and Mr. Parker for the petitioner, and by Mr. Pringle, and Messrs. Desaussure and Ford for the creditors.

For the petitioner it was contended that on the accession of fortune to a wife, she is entitled to an increase of the provision made for her by settlement. That it was peculiarly proper in this case, where already a large income arising from the wife's fortune was carried away to creditors, and a small annual allowance reserved for her maintenance. That the accession of fortune in this case was peculiarly within the reach of the court, as it

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*arose out of a decree of the court itself, and the property still completely under its control. That it could not be said to be reduced to possession by the husband, so as to give him the real ownership by virtue of his marital rights, and therefore could not be subjected by the creditors of Mr. Beresford to the payment of their demands. The counsel cited for the petitioner 1 Eq. Cas. 64. 2 Eq. Cas. 146. 1 Strange 238. 2 Vesey, sen. 79, 91, 561. 2 Atk. 419, 420—Jewson and Moulson—Also, a case decided in this court of Harleston v. Hamilton and wife.

On the part of the creditor it was contended that when the marriage between Mrs. Beresford and her husband took place, a settlement was made of all the estate she then possessed. That this is so secured that the creditors of her husband can get no part of the capital, only the income; and out of that the court has reserved 300*l.* per annum for a maintenance: on the death of the husband the rights of the creditors to be paid out of that estate would cease according to the decree, and they would go unpaid. That here is an accession of fortune, of personal estate since the marriage, not included in the settlement, and to which the marital rights attach. That it would be harsh to creditors for this court to interfere, and by ordering a new settlement, to take from them the only chance of payment which they have. The creditors are legally entitled to be paid out of this property, as soon as the husband reduces it to possession. Will the court interfere and deprive them of the benefit of their legal rights, in a case where the wife already has an ample settlement which protects a large estate, from their claims; the income only, during the husband's life, being liable to their demands. See 1 Vesey, 539. 1 P. Wms. 382, 458. The court in allowing Mrs. B. 300*l.* per annum for her maintenance, out of the income of the estate, which was wholly the husband's according to the terms of the settlement, went very far indeed in taking from creditors what they were entitled to. It would be too much to deduct still more from the funds from which the creditors have a chance of being paid. Even where there are no debts the court never goes so far as to

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settle the *whole of the wife's fortune, unless the husband abandons the wife, or uses her cruelly and neglects her. See 2 Atk. 511, 207. See 2 Vern. 270. 1 P. Wms. 458. 3 P. Wms. 12. 2 P. Wms. 639.†

The court after deliberation delivered the following decree:

This court ever has regarded the claims of creditors with the most favourable eye, and in no instance more so, than the present, for at the time we decreed the estate in question, to be the right of those who claimed under the limitation in the wills of T. L. Elliot, and of Charles Elliot, and were about referring the matter to the master to report a settlement in behalf of Mrs. Beresford, upon its being suggested by some of the gentlemen at the bar that they would wish to be heard on the part of the creditors of Mr. Beresford, against such appropriation of the property; the court without the least hesitation complied with the request, and have patiently waited upwards of nine months, for the question to be brought forward; it has now been fully argued and we are called on to decide: It has been contended on the part of petitioners, that the property in question is included in the settlement made prior to Mrs. Beresford's marriage with Mr. Beresford, and therefore has been already decided on by this court, in the case of Bethune and others v. Beresford and others, and Saunders, and that that settlement has been fully established by this court.

The counsel on the other side, insists that it is not included in that settlement, but that it is altogether a new case, totally unconnected with the other, and must stand on its own bottom—But at the same time admits, that a possibility might in equity be assigned. We are of the latter opinion, and at the time we made the decree in the former cause, we were governed by the intrinsic merits of that case, at the same time we did not lose sight of the present case, and whether determined for, or against the interest of Mrs. Beresford, would at a future day be governed accordingly—that is, to make Mrs. Beresford an additional allowance out of this

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property if the cause *went in her favor; or if otherwise, on a petition for that purpose, to make her some reasonable additional allowance out of the trust estate. We will therefore consider the present case, as we did the former, on its own merits. The cases in general, that have been quoted on the present occasion, were also brought under our review in the former cause, but with the addition of those which now apply to the point of accession of fortune—We think it unnecessary to go over the same ground again with regard to the impeachment of marriage settlements, for the relief of creditors, as we went so fully into that doctrine before—But with regard to those respecting

† See the later cases, Mitford v. Mitford, 9 Vesey, 87. Carr v. Taylor, 10 Vesey, 574.

accession of fortune, and which the husband could not come at without coming into this court, and where we ought or ought not to impose terms on him, or where there are creditors in the case, how far the court ought to consider it as their duty to relieve them at the expense of the wife, is the question which first presents itself for our consideration. In all cases where the court refuses to make a settlement on the wife out of an accession of property acquired since marriage, and where there are creditors, it has been governed by this principle that an adequate one had already been made or ordered by the court, which would take from creditors their common law rights. The term adequate, is a relative term, and must here have reference to the quantity of the estate brought by the wife. It has been reiterated by the counsel on the part of the creditors, that this court has already given Mrs. Beresford such an adequate settlement, and that it would be unreasonable for us now to add to it, at the expense of the creditors. This court has done no such thing; all we did, was to make her some provision out of a settlement made prior to her marriage with Mr. Beresford, the whole of which Mr. Beresford's creditors wanted to possess themselves of; and we were well warranted in what we did, from the invariable run of authorities, that where creditors came here to seek equity against the husband, their debtor, whose whole possessions were acquired by the marriage, this court has always taken care that they should do equity, by making the wife a reasonable allowance out of her own for-

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tune, as *they cannot be placed on a better footing, than the husband would have been. And what was this allowance? £300. a year, out of an estate, that was said to be capable of producing between £2000. and £3000. per annum. But we will suppose its probable produce not to be more than £1200. or £1500. per annum; surely then the allowance by this court was a very moderate one, especially too when it is considered, that it was for the support of both Mr. and Mrs. Beresford, which is but £150. per annum for Mrs. Beresford out of so large an estate as she brought her husband on her marriage with him. Under these circumstances, we must next consider how far the claims of the creditors to the property now contended for, is such as this court ought to support, and extend to them that relief they pray for. It is first necessary to examine into the nature of this estate, what it originally was, and what it now is. It is said that it was a reversionary estate in Mrs. Beresford, and when reduced to a certainty, as it now is, being a personalty, is liable to the husband's debts, and this court ought not to interpose its authority to prevent their availing themselves of the right over it which the law gives them. It never was a reversionary estate in Mrs. Beresford, but rather a contingent limitation in Charles Elliot, but which never had been by him reduced into possession; on the contrary his right was contested in this court, and as we believe, that point of law, on which the limitation in the will of T. L. Elliott was founded, never had been judicially decided in this country, there were two opinions on it, and each supported by some of the most eminent counsel of that, as well as of the present day, and until this court had decided that question, it could only be called as we have already mentioned a contingent limitation to Charles Elliot—So that Mrs. Beresford can be no otherwise considered than as a legatee, claiming under the will of her former husband Charles Elliot. Then without dispute, this court has a right on the husband coming here for his wife's legacy to impose terms on him, and as the creditors can only stand in his place, the same authority reaches them. The principal question then is, whether, if this is not

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a *property to be considered as included in Mrs. Beresford's marriage settlement—But as an accession of fortune since the execution of that deed, the court having already made her a provision out of the trust estate, this accession ought not now to be left for the benefit of the creditors of Mr. Beresford? We have already said, we did not think it is included in the marriage settlement, because although a reversion is assignable, yet this not being such an estate in Mrs. Beresford, was not by the words of that deed vested in the trustees, for to admit that it was, would be rendering that clause by far too comprehensive, as it would sweep into its vortex, every descent, devise, bequest or gift, that would have fallen or have been made to Mrs. Beresford, by her numerous relations and friends. This would be going beyond every allowance that the law admits of. Further, if it is to be considered as included in that deed, the court would take no notice of the present application, as it ought to have been for an increased allowance out of the trust estate.—But the court not considering it as included in that deed, they have turned their thoughts to the merits of the present petition. It might here be asked, whether there was any probability that the present creditors could have trusted Mr. Beresford on this contingent, litigated interest, that he might possibly become entitled to at some future day—We can by no means suppose so, when they saw him already in possession of a very large estate, and on which the credit must certainly have been given. It has been further contended on the part of the creditors, that this court ought not to countenance the present application, as the parties had their remedy at law. Why was not this objection made at the hearing of the cause? It would then have been proper, but it certainly is now out of season; the cause has

been fully argued, the court has decreed, the objection is therefore inadmissible in this stage of the business; Mr. Beresford is before the court and properly so, we shall therefore decide on what we think is the true equity of the case; and as we do not consider the former provision made for Mrs. Beresford by this court, to be such an adequate provision proportioned to the estate,

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she has *altogether brought her husband, and which must always govern the decisions on this point, and as this accession of fortune will produce an income of no more than £100. per annum, we think it is to be considered, to be so far from an extravagant, that it is so very moderate an addition to be made to what was formerly allowed her, that the prayer of her petition ought to be granted. Let it therefore be referred to the master to report a proper settlement accordingly.

1 Desaus. 271

Case LXXIV.

Present—Chancellors Hutson, Mathews and Rutledge.

LOGAN v. The Executor of ABRAHAM LADSON.

(June, 1792.)

[*Perpetuities* ⟸4.]

A bequest to a person and if he should die without issue living at his death, then a limitation over to another person, the limitation over is good.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. § 30; Dec. Dig. ⟸4.]

[*Remainders* ⟸12.]

[A limitation in remainder of personal property is good, if it is to take effect during, or at the expiration of, a life or lives in being.]

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 3; Dec. Dig. ⟸12.]

The question in this case arose on a clause of the will of Mrs. Rachel Ladson, the mother of Abraham Ladson, the defendant's testator. She bequeathed to her son Abraham Ladson, certain personal estate, with a limitation over to Miss Perry if he should die without issue living at the time of his death. Abraham died without leaving issue living at his death; and the complainant who had married the lady to whom the limitation over was made, filed a bill for recovery of the property. The defendant admitted the will, but insisted that the limitation over was too remote, and therefore void as tending to a perpetuity.

The court said that the only question then for its determination was, whether the limitation over being of personal estate is warranted by the rules of law, or whether it is too remote. If this was a new question it would be proper and necessary to enter into a minute discussion of the principles on which it is to be determined and to assign the particular reasons and grounds of the decree in this case, but the numerous adjudications already had on the same point in this court and the court of chancery in England, renders such a discussion altogether needless. Suffice it to say, that although a limitation over of a personal chattel after

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a dying without issue generally will *not be admitted, yet if it is confined within a life or lives in being, or within ten months, or the birth of a child, or in case of the death of such child before the age of twenty-one years, the limitation over is good, for then the danger of the perpetuity, which is said to be so much abhorred by the law is avoided; all the candles are lighted and are consuming together, and the last remainder is in reality only to the remainder man who happens to survive the rest. The cases of Atkinson and Hutchinson, in 3 P. Wms. 258, and of Sheffield and Lord Orrery, in 3 Atk. 282, and Read and Snell, 2 Atk. 642, determined in England, and those of Sams and Mathews [1 Desaus. 127] and Beresford v. Elliott [1 Desaus. 183] in this court, are strong in point. Those authorities must not now be shaken, and future cases of a similar kind must be decided agreeable to those determinations.

The court is of opinion therefore that the limitation over to Rachael Perry, on the contingency of A. Ladson dying without lawful issue living at the time of his death, was good—and decree that the property bequeathed by the will of Rachael Ladson to Rachael Perry on such contingency, be delivered up to the complainants: That the defendants do account before the master for the value of such of the property as was sold by their testator, and also for the profits and income of the property from the time of his death; and that the costs of this suit be paid by defendants out of the estate of their testator.

1 Desaus. 272

Case LXXV.

Present—Chancellors Hutson, Mathews and Rutledge.

Executors of WILLINGHAM v. Executors of SIMONS.

(June, 1792.)

[*Husband and Wife* ⟸23½.]

Payment to a creditor's wife is void but may be made good by the husband's confirmation.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 147; Dec. Dig. ⟸23½.]

On a full view of this case, there appears to us, but a single point on which the decision of the case must ultimately rest: That is, whether, the last payment by Willingham to Mrs. Simons, although illegal in the first instance, is by any subsequent act of Colonel Simons, her husband, so far sanctioned, as to render it a good and valid payment. If

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it is to be so considered, this deter*mines all other points that have been brought into contest: We are of opinion, it must be taken by the rules of law, to be a sufficient payment and final discharge of the original contract. Neither the defendant nor Mrs. Simons deny that the money was paid over to Col. Simons her husband, but rather acquiesce in the charge that it was paid to him: Nor is there the least evidence, to shew the contrary. Nor is there any evidence offered to shew that Colonel Simons ever made any attempts to return the money to Willingham, and to insist on his right to the negroes, only that as the defendant says several years after he heard him once upbraid Willingham for the manner in which he had paid the money. From whence we must conclude, that there was such a consent and acquiescence on the part of Colonel Simons in the receipt of the money, as will be binding on him: Consequently the whole original contract has been fully completed on the part of Willingham. One thing however we would wish to be particularly attended to, which is, that we are decidedly of opinion the payment to Mrs. Simons was to all intents illegal:—Nor can any payments to a wife, of money owing to the husband, ever be made legal but by some subsequent act, or some very strong presumptive consent of the husband, which is so in the present case. As to the bill of sale from Willingham to Simons, it appears to be absolute, but when contrasted with other evidence, particularly the letter from Simons, which is subsequent to the bill of sale to Willingham, it is clearly shewn to have been intended as conditional. It is however made so by Simons himself, because he demands either the negroes or money: Then either the delivery of the negroes or payment of the money would have been a satisfaction of the debt. The latter was what Willingham chose, and we have already said must be taken as a satisfaction and full discharge of the original contract.

It is therefore decreed, That the heir at law of Col. Simons do forthwith execute titles to the person entitled to the same as representative of Willingham: That the bill of sale by Willingham to Simons for the four

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negroes *be delivered up to be cancelled, and the injunction be made perpetual, and the costs of this suit be paid out of the estate of the defendant's testator.

1 Desaus. 274

Case LXXVI.

Present—Chancellors Hutson, Mathews and Rutledge.

PARKER, TOPHAM, SOWDEN and Others v. JOHN M'IVER, JAMES SHOOLBRED and Others.

(June, 1792.)

Bill filed by attaching creditors against the captain and agents of the consignors of wines. [*Sales* ⟸296.]

Vender has a right to stop goods in transitu, where there has not been an actual delivery to the bankrupt.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 845; Dec. Dig. ⟸296.]

[*Attachment* ⟸180.]

The Captain has a right to claim as creditor in possession of the property which was actually the bankrupt's.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 550; Dec. Dig. ⟸180.]

[*Shipping* ⟸69.]

The Captain is not entitled to commissions on drawing the bills, having funds in his hands to save him harmless.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 296; Dec. Dig. ⟸69.]

[*Shipping* ⟸69.]

The Captain is not entitled to the £1000 claimed; he not having shewn how he was entitled.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 201, 293, 307, 312, 313, 315, 317, 318; Dec. Dig. ⟸69.]

[*Sales* ⟸296.]

[A constructive delivery of goods to an agent of the vendee, for the purpose of being transmitted to the vendee, though vesting the property in the vendee for all other purposes, will not destroy the vendor's right to stop in transitu.]

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 837; Dec. Dig. ⟸296.]

This case was briefly as follows:—G. Howell, a merchant of London, fitted out the brig Favorite, placed a cargo on board, and put Capt. John M'Iver in command of her, with instructions to pursue a particular voyage. Capt. M'Iver accordingly went to Madeira, where he obtained a cargo of wine from certain merchants—He delivered them portions of his outward cargo in part payment for the wines, and bills were drawn on Howell for the balances. He then sailed for Africa, procured some slaves, and sailed for America. On arriving off the bar of Charleston, his brig was boarded by Mr. Shoolbred, who informed him that Howell had become bankrupt, and that the shippers of the wines had sent orders to him and other agents, to stop the wines, in transitu, as the bills of exchange drawn for payment of the wines had all been returned protested: He accordingly delivered to Mr. Shoolbred as agent of some of the shippers of the wine, the invoices, bills of lading, &c. relative to the said wines. He then came into port with his vessel and cargo, except the negroes, whom he sent by

a lighter to Georgia. Attachments at law were served on Capt. M'Iver at the suit of the present complainants who were general creditors of G. Howell. The Captain made returns to the attachments stating the facts, and claiming the vessel, the slaves, and a small part of the wine, (which had not been delivered to Mr. Shoolbred and the other agents of the shippers of the wine) as creditor in possession, for what was due to him by Mr. Howell.

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*By an order of the Court of Common Pleas, a sale was made of the vessel and that part of the wine not delivered up, and the money directed to abide the future order of the court.

The attaching creditors filed their bill in this court against Capt. M'Iver, and Mr. Shoolbred, and Tummos, to discover all the facts in the case, and to obtain a general decision upon the conflicting rights of the attaching creditors, the shippers of the wine, the captain, and any other persons who set up claims against Howell.

The Captain in his answer to the bill, stated, that he had been appointed captain of the brig Favorite and sent on a voyage by G. Howell, the reputed owner, with a cargo of about the value of £1500 sterling, with which he sailed to Madeira, with instructions to deliver the cargo in different proportions to certain commercial houses, and to take on board a cargo of wines on account of Howell, from those houses, for which they were to draw bills on him. This was accordingly done, and those houses furnished a cargo of wine in different proportions, and drew bills for part of the amount of the wine, on G. Howell;—But they required defendant to draw bills for the balance due for the wines, or they would not permit the wines to be carried away; which the defendant at first refused to do, but afterwards acquiesced in, and drew bills on Mr. Howell to the amount of about £4200.—All which bills have been returned protested, and sent after this defendant for settlement: though G. Howell never expected or directed that this defendant should draw bills for the wine, as his agent: That he proceeded to Africa as he was directed, and getting a few slaves sailed for America: That defendant believing the slaves were not obtained with the sole funds of Howell, but with the property of Messrs. Wilsons of London, who have required an account of defendant: That he was boarded off the bar of Charleston by Mr. Shoolbred, who informed him of the bankruptcy of Mr. Howell; and with the authority which he had from one of the Madeira mercantile houses who had furnished the wine, to apply to him for the stoppage in transitu and the restoration of their property; which

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Mr. Shoolbred *considered the wines to be, and demanded from him their account: That on reflection he resolved to comply with Mr. Shoolbred's demand, on his agreeing to save him harmless on account of the bills he had drawn, reserving to himself a right to keep so much of the wine which had been paid for by the funds of said Howell, as would together with the brigantine, be sufficient to discharge defendant's private demands against said Howell. Accordingly whilst he was at sea he delivered to Mr. Shoolbred, all the original invoices that he had of the said wines, from said commercial house at Madeira, and all the original bills of lading except one, which he could not then find, but delivered him a copy thereof, and gave him an assignment of all the said wines, and a written engagement to make it more full and ample when required: That he afterwards found the missing bill of lading, and delivered it to Mr. Shoolbred: That with respect to forty pipes of wine shipped by another house at Madeira, he did at sea deliver them with the bills of lading and manifest to Messrs. Tunno as the agent of that house, they expressly agreeing to indemnify him from the bills he had drawn for the same; That with respect to the other wines, he claimed the same as creditor in possession; they having been paid for with the effects of the said Howell, and they have been sold by order of the Court of Common Pleas, and the money remains subject to the order of the Court: That being assured by legal men whom he sent up to consult, that he would have a lien on the goods to the amount of his demands, he sent the negroes to Georgia, and came with the vessel and cargo of wine into the port of Charleston, whereupon the complainants served him with copies of attachments. Mr. Shoolbred's and Messrs. Tunno's answers corroborated Capt. M'Iver's as far as the facts came within their knowledge, and they set up claims for their respective principals on the ground that they had a right to stop the goods in transitu, at least as far as they were not paid for.

The cause came to a hearing in the month of June, 1792, and many points were made in the case; but the only questions necessary to be noticed, are the following:

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*1st. Were these wines so vested in Howell, that the shippers could not stop them in transitu?

2d. Had Capt. M'Iver the right to retain as creditor in possession, such of the property as had been absolutely paid for with the funds of Howell?

3d. Had Capt. M'Iver a right to charge commissions on drawing the bills of exchange?

4th. Whether the Captain was entitled to £1000 on a special contract with the bankrupt Howell, for certain specific services?

For complainants it was contended that the right arising from the attachments laid by Howell's creditors, was superior to that

of the shippers of the wines, or of M'Iver as creditor in possession: That the payment of part of the price of the wines, and the delivery of them, vested the property so completely in Howell, that the shippers or former owners had no right to stop them in transitu, but his general creditors might attach them as Howell's property: their attachments had their full effect from the service of copies citing the persons in possession to make return, though no actual seizure should be made. That M'Iver was the agent of Howell, and his possession was Howell's. That if the consignee puts his mark on the goods, it is such an act of possession and ownership as will not allow him to be divested of them by the seller, in case of the bankruptcy of the person to whom consigned; especially where consignee is really a purchaser. A bill of lading can convey no property, unless it is endorsed to the person so in possession. See 1 Stra. 165. 2 Durnf. 65, 70. 3 Durnf. 470. 1 Durnf. 216, 748. M'Iver had no right to deliver or dispose of the goods as he did to Tunno and Shoolbred. His act could not divest the property out of Howell, and revest it in the former owners of the wine; and Tunno had no power from one of the houses in Madeira till after the attachments had been served;—His act therefore is a mere nullity. The cases of stopping in transitu, are where the consignors reserved the power in their own hands of endorsing the bills of lading to whom they pleased; and where they were endorsed to a different person from him to

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whom they were originally *shipped. Such is the case of Hill and others v. Miller. There was no actual delivery of the wines at sea, to Mr. Shoolbred or Tunno, but simply of the bills of lading and invoices, which M'Iver improperly considered sufficient to authorize him to make out his manifest, as he did of the two parcels of wine as consigned to Shoolbred and Tunno, which was contrary to the fact. The Captain had no right to endorse the bills of lading, under the circumstances of the case. If M'Iver was the agent of Howell, then his possession was Howell's, and the property was in Howell; and it was too late to stop it in transitu. If he was not Howell's agent, then he had no right to act as he did, and change the relative situation of the parties; and his delivery to Shoolbred was a nullity, and the attachments must operate. If the property was not vested in Howell, how can M'Iver claim as creditor in possession? Whose creditor does he pretend to be? Howell's. And can Howell be owner for part, and not owner for the remainder of the wines shipped under the same circumstances, and in the same undivided parcels. Without denying the doctrine of the power of consignor to stop goods in transitu, it must be the case of a mere consignor to a mere consignee—not where the property has been paid for by goods in part, and bills in part, and the right actually vested, and the property delivered to the agent of the purchaser. And as to M'Iver's claim as creditor in possession, he is indemnified by the agents of the shippers, and in no danger; consequently he ought not to be allowed to set up that claim to the prejudice of others.

For the defendant it was contended that to the extent of what is justly due to M'Iver he is creditor in possession under the express provisions of the attachment act, and he cannot be deprived of it. Indeed as far as he made himself liable for the wines, by drawing the bills, the property was in M'Iver. See 2 Vern. 203, 564. 1 Atk. 245, 162, 190, 228, 233. The court would have protected M'Iver even against Howell's demand of the wine till the bills were paid—a fortiori against his attaching creditors. Besides his demand as creditor in possession is on the vessel, and such articles as were not deliv-

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ered to the agents *of the shippers of the wine, for other debts due him, independent of his liability on the bills drawn on Howell and protested. See 2 Vesey, 674. Lichbarrow and Mason. It is a settled doctrine that the consignor of goods may stop them in transitu, if not paid for. The present complainants stand on weak ground. They never had possession of the bills of lading; they never paid a cent for these goods; they are mere general creditors with no sort of equity to induce the court to favor them against the owners of the wines, who have been paid but a small proportion of what is due for them. For this court to interfere, it would be to take money out of one man's pocket to put in anothers, with less of equity in his claim. The consignors ask to be paid out of their own effects. If M'Iver was not the agent of Howell, and had no power to draw the bills, then there was no delivery to Howell or any person on his behalf, and the property in the wines remained in the shippers, or in M'Iver who had made himself responsible on the bills drawn for payment; consequently the attachments could not affect the property as Howell's. If M'Iver was the agent of Howell, then he had a right to do any acts in relation to the property which justice and fairness required; and justice required that the goods should on the bankruptcy of Howell be restored to the original owners, who were unpaid, and who could not otherwise be paid; rather than suffer it to go to pay general creditors. Nor could the bankruptcy of Howell prevent the agent doing so; because the effects of the bankrupt laws do not extend out of Great Britain. The bankrupt laws cannot affect property at sea, and which never comes within the jurisdiction of the English courts. See 3 D. and East 466. Cooper 636. See also 1 D. and E. 645. Dougl. 659. Stra.

533. The partial payment was earnest money, and that only binds the bargain; but you cannot take the goods till the whole price is paid, at common law. Hobart 41.

The vendee cannot even bring suit for goods till payment is made, unless a future day of payment is given. It is as clear law as it is justice, that if the vendor can get his goods again from the carrier, or master of

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the ship, *by fair means, he has a right to keep them; so here the agents and friends of the Madeira merchants got possession of the wines with the consent of the captain or carrier, given deliberately, on the purest principles of justice and equity, to render to every one his own. See 3 P. Wms. 186. It is immaterial whether goods are sent by a common or special carrier, the right to stop them in transitu is the same. See Henry Blackstone 364, expressly to that point. The case of Lichbarrow and Mason reported in D. and East, has been reversed in the exchequer chamber, as stated by Henry Blackstone. There is no assignment in this case of the bills of lading by Howell, and the distinction is between actions between the vender and vendee, and actions between the vendor and the assignee of the vendee, who has innocently advanced money without notice on assignment of the bills of lading. In the first, the vender has a right to repossess himself of the goods in transitu. In the second not, and a statutable assignment by the bankrupt laws, does not produce the same effect with the actual assignment to a third person for valuable consideration. For the innocent assignee for valuable consideration has a right to be repaid what he advanced on the credit of the bill of lading. But the assignment under the statute is not for any new consideration.

As to Capt. M'Iver's demands for commissions on the bills drawn at Madeira on Howell, he was obliged to draw to procure the wines, and he ran great risk by thus making himself liable. Mercantile men are in the habit of charging commissions in such cases, and the witnesses think that the usage is established. If so, Capt. M'Iver is entitled to the benefit of it.

The questions of the Captain's right to charge commissions on the amount of the bills drawn at Madeira, and his claim to 1000*l.* on a special contract with Howell, were briefly argued and submitted to the court.

September, 1792.

Chancellor RUTLEDGE delivered the judgment of the Court as follows: The first point is whether the Captain is an agent for the consignee, and delivery to him such an actual delivery to the consignee as divests

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the consignor *of all property in the goods, and of the right to stop them in transitu, on the bankruptcy of the consignee, and thereby making the goods liable to the attachments issued by the general creditors of the bankrupt? In the opinion of the court, the Captain can by no means be considered as the agent of the consignee, and delivery to him actual delivery to the consignee. If he was there never could a case happen, where the consignor could retake the property in transitu. The Captain like a common carrier undertakes for the safe keeping and transporting of goods committed to his custody, and to deliver them to the order of the consignor, or such person as may be named in the bill of lading. He acquires a special property, to support his possession and to enable him to perform his contract to deliver. But as to the allegation that the Captain (M'Iver) was in this case the special agent of Howell, there is no foundation for it. The bills of lading are in the usual form; to deliver one parcel of wine to the agent of Howell in Charleston, and another parcel to himself in London. M'Iver being appointed to the command of the vessel by Howell does not vary the case. He stands on the same ground as a carrier, with any other commander of a vessel, unless some written authority be shewn proving him to have been a special agent of Howell.

In all the cases decided, the court of law has made a very proper distinction between an actual and a constructive delivery to the vendee in order to support the right of the consignor to stop the goods in transitu.

In the case of Stokes v. La Riviere, 3 Durnf. & E. 466, in 1784, a person living at Lisle, sent an order to the plaintiff for goods to be consigned to him. They were sent by the particular conveyance mentioned in the instructions, by way of Ostend; at which place and before they got into the possession of the consignee, they were attached by the defendant for a debt due him by the consignee, but not until after the plaintiff had heard of the insolvency of the consignee, and had countermanded the delivery. Lord Mansfield held that the constructive possession of the consignee, to whose special agent the

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goods had been delivered for the purpose *of being transmitted to him, was not to be regarded, but that there must be an actual delivery to the consignee himself. So here the goods being stopped while they were in transitu, and before the vendee had actually taken possession, the vendors were competent to countermand the delivery in the event which had happened; and certainly the goods must be considered in transitu, until they arrive at the ultimate place of delivery, which did not happen here. This case is exactly similar to that before us.

The case of the lessee of Blanchard v. Beal, 3 Durnf. & E., in 1785, is still stronger to shew the necessity of an actual possession by the bankrupt, in contradistinction to a constructive possession, by the intervention of

an agent. Per lord Mansfield. "Though goods may be considered as delivered to the vendee for many purposes, yet as for this purpose there must be an absolute and actual possession by the bankrupt, otherwise they may be stopped in transitu. A delivery to a third person to convey is not sufficient." These authorities have been cited in subsequent cases, and recognized in the court of King's Bench by the present judges of that court.

In Ellis v. Hunt and others, assignees of Moore, 3 Durnf. & E. 469, in 1789, which was an action of trover for a quantity of files, the case was as follows: The goods had been carried to the place of destination, and the consignee being a bankrupt, his assignees had put their mark upon them, but had not removed them. The consignor some days after countermanded the delivery; and the question was, whether there was such an actual delivery and possession by the consignee or his assignees, as would debar the consignor of his right to stop the goods in transitu, and it was determined that he had lost the right. I quote this case principally on account of the following circumstance in it: The goods were brought to the Falcon Inn on the 22d November: Immediately on their arrival in town they were attached by the creditors of the bankrupt: On the 15th a docket was struck, and on the 18th a commission of bankruptcy issued against him: On the 24th a provisional assignment was executed by the

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commissioners to John *Wills, who demanded the goods, and on the same day put his mark on the cask, but did not remove it. The attachment was withdrawn, but the case does not mention on what principle. I suppose it must have been because he had been declared a bankrupt on the 18th, four days before, and all his right had been assigned to the commissioners previous thereto. Buller J.

In all the cases that have been decided on this subject, the line has been precisely drawn; and they all turn on the question, whether there has been an actual delivery to the bankrupt. It is of the utmost importance to adhere to the line for if we break through it, we shall endanger the authority of the cases already decided. There may be cases where as between buyer and seller, if no bankruptcy happen, the goods are considered as in the possession of the buyer, the instant they go out of the possession of the vendor. As if A. order goods to be sent by a particular carrier at his own risk; delivery to the carrier is delivery to A. to every other purpose. But if he becomes insolvent or bankrupt, before the carrier actually delivers them to him, the vendor might seize them; because it is only a constructive delivery to the vendee. An actual delivery is necessary to divest the vendor's right to stop the goods in transitu. It is a right founded on equitable principles, originally established by the courts of equity, and since adopted by the courts of law. But to avail himself of it, the vendor must stop the goods before they get into the actual possession of the vendee.

Solomons v. ———, 2 D. & E. 674, in 1788. One Hague bought a quantity of lead from the defendant at Liverpool, and ordered it to be shipped to Rouen in France. It was accordingly shipped from Chester by the defendant, and bills of lading were endorsed and sent to Hague. The plaintiff afterwards gave Hague acceptances for £700 and Hague delivered him the bills of lading as a security. The vessel sailed, but was forced back by stress of weather to Chester. Hague having become bankrupt, and the defendant not having received the price of his goods, stopped them, while they were on board of the ship in England, and took them away. The

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plaintiff demanded the *lead, which was refused to be delivered, and an action was thereupon brought. The acceptances had not been paid.

Lord Kenyon. This is a harsh demand against the defendant, who it is confessed has not received the value of the goods in question. The first case on this subject is Tollet's assignees v. Prescott. That has never been impeached in the smallest degree; on the contrary it has always been mentioned by the court with approbation. As between vendor and vendee, where the price is not paid the former has a right to stop the goods in transitu in case of bankruptcy of the latter.

In Lichbarrow v. Mason, 2 D. & E. 70 (1787), in the Court of King's Bench, Ashurst said; where the delivery is to be at a distant place, as between vendor and vendee, the contract is ambulatory until delivery; and therefore in case of the insolvency of the vendee in the mean time, the vendor may stop the goods in transitu.

The same case was afterwards removed by writ of error into the Exchequer Chamber (1790), where lord Loughborough in delivering the opinion of the court said, that the sale is not executed before delivery, and in the simplicity of former times, a delivery into the actual possession of the vendee or his servant was always supposed. In the variety and extent of dealing, the delivery may be presumed from circumstances, so as to vest a property in the vendee. A destination of goods by the vendor to the use of the vendee, marking them, removing them for the purpose of being delivered, may all entitle the vendee to act as owner to assign, and to bring an action against a third person, to whose hands they may have come. But the title of the vendor is never entirely divested, until the goods have come into the possession of the vendee. He has therefore a complete right for just cause to retract the intended delivery, and to stop the goods in transitu.

The cases determined in the courts of law have confirmed this doctrine.

The case of Bowering v. Veruler, called the Dutch case, proves, that the consignor does not part with all his right on shipping goods. For in this case the consignor hearing of the insolvency of the consignee, after

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the goods *had been shipped, but before the ship had sailed, summoned the ship master before the court at Amsterdam, who ordered him to sign other bills of lading to the order of Veruler, notwithstanding he had signed bills to deliver to Bowering or order. H. Blackstone 364.

The case of the assignees of Tollet v. Prescott, 1 Atk. 245, is the first that was determined on this subject; all subsequent determinations have been bottomed on the authority of that case; and they all uniformly agree, as between the consignor and consignee, in supporting the right of the owner unpaid, to stop the goods in transitu. And in the case last mentioned lord Hardwicke went further, and decreed in favor of the consignor in the first instance, against the indorsee of the bill of lading without notice; and said he could not see the reason, why the principal should not have his goods again, unless it was because his being in possession of the bills of lading might have gained the bankrupt a credit.

I take no notice of the cases relative to principal and factors, because, they do not immediately apply; and the case of Wiseman v. Vandeput is no otherwise applicable than to shew, that it is allowable in equity for the consignor to take any means short of force or violence to regain possession of the goods, before they come to the hands of the bankrupt or his assignees.

It is observable that from the determination in the case of the assignees of Tollet v. Prescott, to that of Mason v. Lichbarrow in the Exchequer Chamber, there is but one similar to this; that is the case of Stokes v. La Riviere.

The cases are all between either consignor and consignee, assignees of the bankrupt and consignor, or indorsees of consignee and consignor. This is a case between the creditors of a bankrupt attaching goods not paid for, which were consigned to the bankrupt subsequent to his becoming so; the consignor in a foreign country, ignorant of the situation of his consignee; which goods were never actually delivered to, or in the possession of the bankrupt, who indeed had absconded, and his bankruptcy been docketted previous to the signing of the bills of lading.

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*The whole train of adjudications concur in the following points: That nothing short of actual delivery and possession of goods by the consignee, will divest the consignor of his legal right to stop them in transitu: That the contract is ambulatory as between the vendor and vendee, where the goods are to be delivered at a distant place, until delivery; and that in case of the vendee's insolvency in the meantime, they may be stopped by the vendor in transitu; and lastly that they must be considered in transitu until they arrive at the ultimate place of delivery.

It is not contended that Howell ever assigned the bills of lading, or that he ever had possession of them, or of the invoices; indeed it was impossible that he could have them, as he had absconded, and his bankruptcy was docketted before the bills were signed.

It is a leading maxim in courts of equity that he who seeks equity must first do equity; and it is certainly much more consonant to equity and justice, that the consignor of the goods, which were unpaid for, should be allowed to retain them, if he can by any means get possession before they are delivered; than that old creditors who never trusted on the faith of those goods, should get an undue preference, and have their whole debts paid in the first place, and leave the consignor to come in as a creditor for a shilling in the pound, notwithstanding he has the goods in his own custody, and a specific lien on them. Where the equity is equal between the parties, the legal title must prevail. Now according to the foregoing cases, Shoolbred and others, (acting for the owners of the wine) having never been entirely divested of their legal title, the goods not having been actually delivered, nor in the possession of Howell, and having a right to stop them in transitu, obtained the bills of lading and invoice and possession of the goods by their agent as far as was practicable, previous to their coming within the state. This court will lay hold on any circumstances to secure to them the advantage they have gained. Though we incline to favor creditors as much as we can, yet they must shew that they have a superior

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right to other persons. *This being a case between old creditors of a bankrupt, and the consignors of the goods never paid for or delivered, the defendants have most unquestionably a far superior equity to the complainants, and we will not deprive them of the possession they have obtained. If Howell or his assignees were before the court, they could not get the goods from Searle & Co. without paying for them, and the complainants claiming under him cannot be in a better situation. Upon the whole of this point therefore we are clearly of opinion, that the goods having never been actually delivered to, or in the possession of Howell, the attachment would not lie on them; for the act requires that the goods attached should be the property of the absent debtor. I do not think Calvalhall's case materially different. For though M'Iver was not the agent by regular power of attorney, yet on the principle that the goods were never actually delivered to, or in the possession of Howell,

they must be considered as in transitu, and no more liable to the attachment, not being the property of Howell. Indeed the case of Stokes v. La Riviere strongly favours this opinion; for the property being attached prevented them from being carried to the consignee, by which means they were given up to the consignor. And the case of Hill v. Miller determined by this court, will also warrant a decree in favor of the defendant M'Iver.

The second point is whether the defendant M'Iver has a right to retain as creditor in possession to satisfy his demand against Howell? It cannot be doubted that M'Iver has a preferable lien on such property as was actually Howell's, as creditor in possession, to satisfy his demand; but to no part of that which belonged to the Madeira merchants, except so far as they may have property of Howell's in their possession, yet unaccounted for. The attachment act gives him the preference as creditor in possession.

The third point is respecting commissions. As to the seventy-nine pipes shipped by Searle & Co.—It appears from their account current, that M'Iver was considered by them as the shipper. They have made him debtor

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*for them, and have taken his bills on Howell for the whole amount. The goods seem to be shipped on his credit alone, for he swears that Searle & Co. positively threatened to take the wines back and prevent his sailing, unless he would draw bills. Standing in that point of view, we consider him as the real shipper of forty pipes of wine, and therefore not entitled to commissions, being himself personally responsible: nor ought he to be allowed a commission on Calvalhall's wines. Several merchants were examined, who declared it to be the custom, that where persons endorsed bills, they were entitled to commissions, whether there was a deposit or not, because of the risque which they run in making themselves personally responsible. In the present case there was little or no risk, for M'Iver was full handed, having not only all the wines for which he had drawn bills in his own custody, and they too fully insured, but those likewise which belonged to Howell, that had already been paid for.

The fourth point. Is M'Iver entitled to the 1000*l.* (which he claimed under a special agreement.) We think he is not entitled, because he has not shewn what were the objects he was to perform, or whether he has performed them. It would be very extraordinary to decree him that sum without knowing what were the services to be done, or if he had performed them in whole or in part. This is a matter resting altogether in his own knowledge; and as he has not thought proper to discover by his answer whether he has done his part, nor brought any evidence to prove it, we must conclude from his silence on the subject, that he has not accomplished the several important objects, and therefore is not entitled to the reward. The wages and other allowances made him may be reasonably presumed a sufficient compensation for his services, merely as Captain of the vessel. The bill of complainants was therefore dismissed.†

Mr. Pringle, Mr. Ford, Mr. Read for complainants, Mr. Rutledge, Gen. Pinckney for defendants.

†See the cases on the right of stopping goods in transitu, collected in Cooper's Justinian in the notes, pages 461 to 466. The principal cases are Wiseman v. Vandeput, 2 Vern. 203. 1 Atk. 245. Cowper 296. 1 Henry Blackstone 357. 364. 2 H. Blackstone 211. 2 Term Rep. 63. 674. 3 Do. 119. 464. 5 Do. 683. 6 Do. 20. 7 Do. 65. 441. 8 Do. 330. 1 East Rep. 4. 515. 3 Do. 93. 583. 5 Do. 175. 6 Do. 20. 9 Do. 506. 3 Caine's New York Rep. 182. 1 Johnson's N. Y. Rep. 1. in error.

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*Case LXXVII.

Present—Chancellors Linson, Mathews and Rutledge.

JAMES DENTON v. ALEXANDER M'KENZIE.

(June, 1792.)

[*Trusts* ⟸20, 100.]

A person agreeing verbally to bid in land for another at Sheriff's sale shall be bound and decreed to hold in trust, though he took the titles in his own name, and pleaded the statute of frauds in bar: but the agent had tendered an account in which he charged his friend with the amount of the purchase money.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 25, 151; Dec. Dig. ⟸20, 100.]

[*Equity* ⟸345.]

[The answer of defendant, so far as responsive to the bill, must be taken as true unless it be overturned by two witnesses, or one with strong corroborative circumstances.]

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 722; Dec. Dig. ⟸345.]

The complainant's bill charged, That on the 21st July, 1787, he purchased from the corporation of Charleston the lease of the Fish Market and of the premises adjoining thereto with the right of collecting toll on fish, and with liberty to erect buildings on the premises for fourteen years, at £42. sterling per annum: That he laid out on the said premises in repairs and buildings £770. sterling, particularly in erecting a house and kitchen on the same: That the said buildings being nearly finished he was applied to by defendant for a lease of the whole of the said premises, which the complainant accordingly let to defendant for three years at £200. per annum, payable quarterly: That it was then agreed that defendant should pay down to complainant, at the expiration of the first quarter £50. in cash, which complainant wanted to pay a judgment obtained against

him for £40. 8s. 9d. and costs, and that the rent thereafter to grow due should be applied towards finishing the dwelling house and kitchen, or to reimburse defendant on that account, till the whole was paid, and afterwards to be paid to complainant; which agreement more fully appears by a memorandum in writing at the foot of the lease between the said parties, dated 8th August, 1788: That at the expiration of the first quarter, complainant called on defendant for his rent in order to enable him to pay the judgment and costs above mentioned, and defendant promised to procure the money: but failing in his promise, the complainant's estate in the said leased premises was sold by the Sheriff on the 18th Nov. 1788, for £505.—That the purchaser not complying with the terms of sale, the Sheriff again advertised the same for sale, and when the day of sale was near complainant again applied to defendant for his rent, in order to enable

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him to pay said judgment, inter*est and costs, which then amounted to £63. 5s. 9d.—That defendant notwithstanding his promises still failing to procure the money, promised complainant, that if a resale took place, that he would buy in the property as a friend and trustee of the complainant and for his use:—That on the day of sale, the 11th Dec. 1788, as agreed upon, the defendant did attend as trustee for the complainant and bought the premises aforesaid for £66. 6s. 9d. which was only a nominal sum, and to cover the defendant and costs: That the defendant still neglecting to raise and pay the said debt and costs (although largely in arrear to complainant as well for rent as on account) complainant on 24th Feb. 1789, advanced defendant £35. 4s. 6d. towards making payment to the Sheriff, in order to prevent any after or other resale of the premises, for which sum complainant took defendant's receipt as for cash lent, copy of which is filed with bill: That the Sheriff having executed titles to defendant for the premises, the defendant brought the same to complainant and saying he had cleared the complainant of all encumbrances on that property, asked complainant to release him from his lease, telling complainant that the rent of 200*l.* per annum was more than he could make, on which complainant expressed his unwillingness to hold defendant, whom he considered as his friend, to a bad bargain: That defendant left the premises, and complainant took possession thereof, as his own property, with defendant's consent. The complainant further charges that the defendant conscious of the trust before set forth, and that the premises were bought in by him in trust for complainant, afterwards and after the complainant had as aforesaid taken possession of the premises, to wit, on the 15th May, 1789, delivered to complainant an account signed with defendant's own hand and dated on the said 15th May, in which he hath not only charged complainant with the sum paid at the Sheriff's sale as the price of the Fish Market and premises, but also with ten shillings for punch drank at the coffee house at the sale; and complainant refers to defendant's account, a copy of which is filed, and alleges that the same plainly proves that the

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*said premises were bought in by defendant for and on account of complainant. Complainant further charges that, on or about the 1st January, 1790, he moved to Columbia, and left his said house in possession of Charles Snowden, and the market in possession of Joseph Pope, and that on Mr. Snowden's advertising the said house, the defendant to the great surprise of the complainant, demanded the keys and claimed the house as his property, and on Mr. Snowden's refusing to deliver up the keys the defendant forced the door and took possession of the said dwelling house and dispossessed Pope of the market. That defendant continued possessed until 1st March, 1790, when he rented the same to one Plunkett who gave possession to the complainant, who lately had possession of the premises. Complainant further shews that defendant is considerably indebted to him on account of the said lease which is in full force and uncancelled, and notwithstanding repeated applications refuses to come to any liquidation or settlement of accounts with complainant, or to declare the trust, or assign and set over the premises to complainant, or for his use, as in justice and equity he ought to do. Complainant prays the defendant may be compelled to release and assign to complainant, for his own use the remainder of said lease, and deliver up all sales, titles, deeds and evidences thereto relating, and account for the rents and profits thereof after deducting for finishing and repairing the premises, and that defendant may be decreed to pay costs, and that complainant may be further relieved, &c. he prays process of subpœna, and so forth.

The defendant Alexander M'Kenzie as to so much of the complainant's bill as seeks to compel defendant to release and assign to complainant the remainder of the lease of the premises in bill mentioned, and to deliver up titles, &c. relative thereto pursuant to the pretended agreement in bill mentioned, and as to any relief thereby prayed touching such agreement, pleads in bar and saith that by an act of parliament of 29 Car. 2d. and of force in this state; it is amongst other things enacted, "That from and after the

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24th June, 1677, no action shall be *brought to charge any person upon any contract of lands tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the

party to be charged therewith, or some other person thereunto by him lawfully authorised; and that from and after the said four and twentieth day of June, all declarations or creations of trust or confidences of any lands, tenements or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void, and of none effect," as by the said act may appear: And defendant avers that neither he, nor any person by him authorised, ever made or signed any contract to purchase the premises in trust for, or to the use of the complainant, and therefore pleads the said act in bar as aforesaid.

The defendant also put in an answer, and therein admitted with some qualifications, many of the facts charged by the complainant: That on the Sheriff's making sale of the premises, to satisfy a debt due by complainant, and the purchaser not complying with the terms of sale, the property was put up for sale a second time, after due advertisement, and it was knocked off to the defendant on the 11th Dec. 1788, as the highest bidder, without any fraud or collusion, and he has received sufficient titles from the said Sheriff, and denies any such conversation or agreement respecting the purchase as is pretended by complainant. He also denies that he did attend at sale in pursuance of the said pretended agreement, and as a trustee bid off the said Market and premises for the sum in bill mentioned, or that it was bid only as a nominal one, and to cover debt and costs. Defendant positively denies that complainant advanced £35 to pay said judgment, interest and costs, and to prevent a resale of the premises: That he recollects he did give complainant a receipt for £35 but it was not received in one sum on the day of the receipt, but at divers times and not to pay the judgment, but on the gen-

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eral account of *defendant against complainant, defendant having satisfied the said judgment in January, except a small balance which he paid in February; or that he was at all in arrear to complainant. Defendant denies that he ever brought the Sheriff's titles to complainant, and that thereupon such or any other conversation passed between them as in bill mentioned. Defendant in his amended answer, avers that both himself and complainant considered said lease vacated by Sheriff's sale. Defendant says that although complainant did take possession of the premises about 15th May, 1789, yet he denies that it was in right of, or under any other circumstances, or in any other manner than is by defendant set forth. Defendant admits that he delivered to complainant the account marked B. exhibited with bill; but denies it was from any consciousness or as any evidence of the trust alleged by bill; but that complainant having murmured at the low price for which the lease was sold by the Sheriff, defendant told him that if he would reimburse and pay him all the monies he owed him in a certain time, to wit; in a few months thereafter, he would convey to him the premises, to which proposition the complainant would not consent: That defendant mentioned the above to his solicitor in his instructions before he put in his answer, but his solicitor did not think it material to insert, and he delivered the account to his solicitor filed with his answer including the £72 paid to the sheriff for the premises. Defendant admits he removed from the premises, but on the 4th April and not May, and permitted complainant to take possession, but as his tenant, and under the following circumstances: That sometime after the sale complainant called on defendant and saying he was ruined by the sale of his property to defendant, the defendant let complainant have the premises as tenant at will at £150 per annum, which he in fact considered as nominal, not expecting complainant would be able to pay him: That on complainant removing to Columbia he did take upon himself to direct Mr. Snowden to let the house on his account, and did let the Market to Joseph Pope; and defendant admits that on

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Mr. Snowden's advertising the house to *let, he did claim and take possession of the same as his property, and did endeavour to dispossess the said Pope of the Market, which he conceived he was warranted to do: That defendant did exercise acts of ownership over the premises until the 1st March, 1790, when he let the same to a certain Plunkett, of whom complainant unduly procured possession. Defendant saith he is willing to come to a fair settlement of accounts with complainant as he is confident there will be a balance in his favour. He admits he claims the premises as his own by virtue of the Sheriff's titles aforesaid, and denies that he ever agreed to purchase in trust for complainant. Defendant denies combination and prays dismission with costs.

That complainant hath also repeatedly since the sale asserted and acknowledged the defendant to be the purchaser and owner of the premises, particularly on the occasion of a suit being brought against him by the city corporation: That defendant by reason of complainant's pretended trust has been prevented from deriving any advantage from the premises, while the ground rent is accumulating and the premises going out of repair and sinking in value.

The cause came on to be heard on the ——— June, 1792. The following testimony was given:—Mr. Kennedy the Sheriff swore, That at the sale of the premises he told Denton that if he could get any one to bid off the land so as to satisfy the debt and costs, he wanted no more. It was knocked off to

M'Kenzie whom he considered as the friend of Denton, and in his opinion it was bought in for Denton.

Mr. Grant swore, That M'Kenzie desired witness to go to the sale of the land, and bid for it: and he understood that if he had bought it, it was to be for Denton. He heard M'Kenzie say he owed Denton £50 on the day of sale. After the sale he heard M'Kenzie tell Denton he had got a good bargain, and if Denton would pay him back, for all the improvements he had made on the premises he would let him have the premises back again.

B. Cudworth swore, That M'Kenzie told him he had Denton's property so much at

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his command, that he *might do what he pleased with it, but he was not so great a villain as to take such an advantage of him. But that if Denton would pay him all he owed him (for improvements) he would give it up to him. That on winding up the accounts there was but a small balance due to M'Kenzie, about £12. But M'Kenzie said there was a great deal more due to him and he would avail himself of all the advantages he could under the purchase of the land.

Wall swore, That he was joined with Cudworth in adjusting the accounts between the parties, and there appeared to be a large balance due to M'Kenzie; provided, he was not to be chargeable with the rent.

Mr. Holmes stated, That on his bringing a suit against Denton, he brought M'Kenzie to prove that the property belonged absolutely to M'Kenzie, but he (Mr. Holmes) did not then believe it.

The cause was argued by Mr. Read and Gen. Pinckney for complainant, and Mr. Holmes and Mr. Pringle for defendant.

Mr. Read, said, That as to the plea in bar, the account rendered by the defendant and signed by him, in which he charges him with the money he paid for the premises in question, is such a memorandum in writing as will take the case out of the statute of frauds, and consequently defeat the plea in bar. The merits were clearly with the complainant.

Mr. Holmes for defendant, contended, That if an agreement is signed by only one of the parties, and there is nothing to bind the other party, it is not such an agreement as will take the case out of the operation of the statute. Pow. on Con. 280. It is true that where the deed is drawn by one party and signed by the other it will bind both. 1 Vern. 271. 1 P. Wms. 282, 770. 1 Eq. Cas. abr. 49. If a man agrees with another by parol to purchase his house, and pays him part of the purchase money, and the other refuses to carry the agreement into execution a specific execution cannot be compelled.—There is no other remedy but an action at law for damages. If it be admitted that this is a fraudulent trans-

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ac*tion, yet the complainant can have no remedy, being particeps fraudis; and the Sheriff's titles to M'Kenzie must be conclusive on the parties themselves, though it might have been different as to creditors.

Mr. Pringle for defendant, Overruling the plea in bar would not tend to set aside the conveyance by the Sheriff to M'Kenzie: The court will still decide on the whole merits. 1 Atk. 13. 2 Eq. Cas. abr. 47, 50. 2 Vern. 627. 2 Atk. 283. 2 Com. Digest 124. The defendant having denied every thing in his answer, the plaintiff must prove every thing charged in the bill to entitle himself to relief. 2 P. Wms. 222.

If Mr. Kennedy thought, (as he swore) That M'Kenzie purchased in the property for Denton, why did he not then mention that there ought to be some clause in the deed stating the trust for Denton. Quoted 1 Powell 429, 434, 185.

Gen. Pinckney for complainant, If one party by letter proposes terms of sale to another, and the party to whom the terms are so proposed, acts upon it, both parties are bound, the first by the letter, and the second by his act, which shews an assent on his part to the proposals. Taking possession by the proposed vendee is such an act. The statute of frauds was intended to prevent frauds, and not to cover them. 3 Atk. 388–9. It does not appear at this time that there was any intention to defraud creditors. See 2 Powell 149. 2 Ves. 281, 516. It is manifest from the facts proved in the case that the purchase was made by M'Kenzie for Denton: and if he were not to be held bound to convey to Denton, would be protecting him in a gross fraud, and violation of a private confidence, by which he would be a great gainer at the expense of the man whom he pretended to befriend. This would be an abuse of the statute, and would be intolerable. Justice is the great object of the court, and when it perceives that fraud would defeat its justice, it will not permit it to take sanctuary under a statute made expressly to prevent fraud.

July, 1792.

The court first overruled the plea in bar; and afterwards Chancellor MATHEWS deliv-

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ered the decree of the *court as follows: As this is a case of considerable importance the court would have taken longer time to consider it, had there been any difficulty in our minds with respect to the decision, we ought to give; but as we think it a very plain case, when stripped of all the extraneous matter that has been introduced, in the course of the arguments on it, we are as well prepared now as we should be at any future day to decide on it. The most important point in the case is, whether the purchase by Mr. M'Kenzie, of the land in question, and the titles from the Sheriff to him, vests in him such a right, as

he cannot now be divested of. If the purchase was a fair bona fide and unconditional one, it then could admit of no doubt, because the titles are so drawn as to vest an absolute estate in M'Kenzie, of the whole interest that was in Denton. The court must therefore proceed with great caution, when they are called on to divest a man of such a right; especially too, when the evidence offered for this purpose, is one article in an account rendered by defendant to complainant charging him with the purchase money for the land, and this is to be corroborated by parol testimony. With regard to the first point: The words of the statute of frauds are "That no action shall be brought whereby to charge any person on any contract or sale of lands, or any interest therein, unless the agreement on which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith," &c. Is the account then, signed and delivered by defendant, in which he has charged the complainant with the consideration money for the purchase of the land, such a memorandum or note in writing, signed by the party to be charged therewith, as will take this case out of the statute, and let the complainant in to a full investigation of the whole transaction relative to the purchase by defendant? We have already by overruling the plea in bar, determined that the article in the account above mentioned, ought to be considered as such a note, as is sufficient to comply with the true intent and spirit of the law, which is meant to prevent, and not to

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protect fraud. This difficulty be*ing removed, and the case standing on its intrinsic merits, we are next to consider, whether the parol evidence which has been admitted in corroboration of the written evidence amounts to such a proof of an intended trust on the part of defendant for the benefit of complainant, as this court will enforce the execution of, notwithstanding the absolute conveyance to the defendant. The complainant by his bill expressly charges that such was the intention at the time of the sale. The defendant by his answer positively denies it; recourse must then be had to the evidence to see whether it is sufficient to invalidate the answer of defendant. That such was the intention of the parties originally, is strongly evinced by the charge made by defendant in his account against complainant. If it was not so, why charge him with the money, which if the purchase was on his own account, unconnected with complainant ought to have been paid by himself, and in which the com plainant could have had no interest or concern? But it was said the defendant was ultimately obliged to pay the money; and that the part that is said to have been paid by complainant was not on account of the purchase of the land, but for a debt then owing by complainant to defendant. But Kennedy swears that he received £10. of the purchase money from complainant which is a strong circumstance that the purchase was not made by defendant on his own account. Yet he charges complainant with the whole purchase money, and even the liquor drank at the sale, or at some other time, when the land was to have been sold. That he was obliged afterwards to pay the purchase money will not alter the nature of the original purchase, because defendant had his remedy against complainant to compel him to a reimbursement; and his lien on the land was such as he could not have been ousted of, until he had been satisfied for his debt out of it. We will now take a view of the parol evidence. Mr. Kennedy who may be said to have been the vendor, swears, that he told complainant previous to the sale, that if he could get any friend to purchase the land for him, so as it was bid up to the amount of debt and costs on the execution on which it was sold he

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would *require no more. That it was accordingly bid off barely for the debt and costs by the defendant whom he considered as the confidential friend of complainant; and considered it as purchased by him for complainant. The next witness Mr. Parker, swears that he attended at the sale, as the friend of his brother, at whose suit the land was sold, and agreed also to the terms proposed by Kennedy to complainant; and that he was the next highest bidder to defendant, to whom it was knocked off; and that he considered the purchase to be on complainant's account. The next witness Mr. Grant, swears defendant desired him to purchase the land at the sale: he did not positively say for whom; but he understood that had he bought it, it was to have been on account of complainant. The next witness Mr. Cudworth, swears defendant told him he had complainant's property, meaning that in question, so much at his command, that he might do what he pleased with it, but that he was not so great a villain as to take such an advantage of him; he would give it up to him. Here is a long train of violent presumptive evidence, that the purchase was made by defendant for account and use of complainant: but that of Cudworth goes further; to him the defendant acknowledges the property to be complainant's and that he was not villain enough to defraud him of it. We do not consider the rules of evidence to go so great lengths as has been contended for; that is, that there must be two positive witnesses to contradict a fact denied by defendant in his answer: We think the rule is not so strict; but that if there is one positive witness and strong circumstantial evidence, amounting to violent presumption, especially in a case like the present, it is sufficient to destroy the testimony of defendant's answer. In one particular it is pointedly contradicted by two witnesses. He says it was at the first sale that the lease for ten years was produc-

ed by him: but Kennedy and another declared it was at the second; and we think if ever there was a case in which this court ought to be induced to give the most liberal construction to the above rule, it is in the present case, otherwise justice would become a mere ignis

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fatuus, it might be sought *after, but would never be substantially obtained. What is the conduct of the defendant on the present occasion? After every appearance of an intention of purchasing a valuable property of another person, in order to befriend that person, and the company present at the sale being impressed with such an idea, decline bidding on the ostensible friend of an unfortunate man, that he might get back his property at the easiest possible rate: That when he has so possessed himself of it, at a twelfth part of its real worth (as Neilson says he offered £600. for it and they asked £1200.) got the titles in his own name, in order to vest the property absolutely in himself, and now sets up this title to secure the same to himself and endeavour to shield himself under a statute intended to prevent such nefarious practices, is such a degree of hardiness, and such an attempt to pervert the true scope and beneficial effects of that law, as must ever receive the frowns of this court. We have been induced to admit evidence in this case, that in many others we must have rejected: And why? Because (we are sorry we are obliged to say so) there is such a badge of fraud imprinted on the very front of this transaction, as called loudly on us to give the latitude to the evidence produced on this occasion, which we now do; for if we should not, true justice could not be come at. It is an observation that has been frequently made, that the rules of evidence at law, and in this court are the same. There was a time in which this observation would have applied, but we well know that even so long ago as the time of lord Harcourt, and since him that great luminary of the law of equity lord Hardwicke, who was the first chancellor that reduced the principles of this court to a regular system, for the furtherance of justice, was obliged to declare, and so declaring to determine, that although at law fraud must be proved, yet in this court it will be presumed; and on this principle has this court ever since acted. If then fraud might be here presumed, how well warranted are we in saying, that in this case it is not only to be presumed from most part of the evidence before us, but from some parts it has also been proved. Lord Harcourt goes

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still *farther, and says either suppressio veri or suggestio falsi is each of them a good reason to set aside any deed or conveyance. In the present case both of these reasons strongly apply; for here there is a suppressio veri, in the defendant's attempting to conceal the purposes for which the purchase was made. There is also suggestio falsi, because his answer is positive that it was on his own account and no other that the purchase was made; both of which are contradicted by sufficient evidence. It is also well known to be laid down in many of the books, that this court will lay hold of almost any circumstance to prevent a fraud, so odious is every approach of such conduct viewed here.

The case of Oliphant and Singleton has been quoted, but we do not think it any ways analogous to the principal case, for in that there was not the least suggestion of fraud. The case of Dalzel v. Timrod, was where a deed of conveyance was made to Catharine M'Infuss; and parol evidence was brought to prove that the intention of the donor was to convey to Catharine M'Infuss the elder: but the donor being a minor and there not being the least appearance of overreaching or fraud attempted, the donor too being dead, we thought it too much to set aside so solemn a deed on this parol evidence: That it was intended to one person, but by mistake was made in the name of another. As to the deed of the 5th of August, 1788, purporting to be a sale of complainant's lease for ten years to defendant of the premises in question, as little or no notice has been taken of it by the counsel in argument, but the whole stress has been laid on the Sheriff's titles, it is unnecessary for us to say any more on it, than that had the creditors of the complainant been before this court, to pray relief against this deed, we should then have thought it necessary to give some opinion on it; but as things are, let it sleep till called for, if any one should think it worth while to do so. From a full view and deep consideration of the whole case, we are of opinion that the attempt now made by the defendant to reserve to himself the absolute property in the land in question, deserves no

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other epithet than that of *a gross fraud and imposition on a too credulous man; and were we to pursue the rigid rules of this court, we would make no other decree than a conveyance of the land to the complainant, and leave the defendant to his remedy at law for any demands he may have against the complainant: but as we do not consider complainant as blameless in some other parts of the transaction, we will proceed to consider the other parts of the pleadings and evidence before us. The defendant's account shews that there has been considerable dealings between him and complainant, and there appears to be a large balance due him on that account; so does his answer. The evidence of Grant and Cudworth also proves that the objection on the part of defendant to restore the complainant's property, was that he might be indemnified out of it for what complainant owed him. We will not therefore deprive him of his lien on the property; but let the accounts be referred to the master to enquire into and finally adjust and settle

the same, and report accordingly. That the defendant in the mean time hold the land as a security for what might be found due to him, but as a trustee only for complainant until the further order of this court: and to enable the master more readily to adjust the accounts, we direct him to allow complainant the rent agreed for by the lease of the 8th of August, 1788, for the time therein specified.

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1 Desaus. 302

Case LXXVIII.

Present—Chancellors Hutson, Mathews and Rutledge.

HOPKINS v. WAINWRIGHT, Executor of WAINWRIGHT.

(September, 1792.)

[*Executors and Administrators* ⇐288.]

Demurrer by an executor to a bill filed for an account of the estate by a legatee (whose legacy was not yet due) was overruled. The court said that on a charge of wasting the assets this would require an account and oblige executor to secure the legacy.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1147; Dec. Dig. ⇐288.]

After hearing argument in this case, Chancellor RUTLEDGE delivered the decree of the court as follows: The defendant has demurred because the bill does not contain matter of equity sufficient to establish any right or demand against him. What is a demurrer? It is an allegation of the defendant which (admitting the matters of fact alleged by the bill to be true as they are

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therein set *forth) insists they are insufficient for plaintiff to oblige defendant to answer—Let us see whether this demurrer can be supported. The bill charges that the defendant's testator left complainant legacies to be paid out of monies, bonds, treasury indents, &c.—which legacies should be placed at interest and paid when complainant should attain twenty-one years of age, or day of marriage. That after testator's death the defendant possessed himself of all the bonds, &c.—never returned an inventory of the estate or any schedule of money, &c.—and never rendered an account of his administration: That judgments to a considerable amount have been obtained against him: That as the greatest part of estate the defendant possessed was originally the testator's, it is but reasonable the legacies should be secured out of bonds of the testator, or by a specific lien on his estate prior to the creditors of defendant: That he has refused to render an account to complainant or to secure the legacies—The bill therefore prays a discovery of assets, how he has disposed of them, and that he may be compelled to pay the legacies, or assign over bonds for that purpose. If these alleged facts are true, which the demurrer admits—Is there any foundation for supporting the demurrer? Although the complainant may not be entitled to immediate possession of the legacies, yet it is the business of this court on application to see that the executor secures them agreeable to the testator's directions. It was never doubted that this court had authority to call executors to an account; and to require and enforce a faithful administration of the assets of the testator. It is true the probate of wills, and the return of inventories is within the peculiar jurisdiction of ecclesiastical court: and the defendant might be called on there to do it: but that court cannot enforce obedience to its decrees in so compulsory a manner, nor give such complete and effectual remedy as this court can. This court will not arbitrarily interpose its authority by obliging executors to give security, they being appointed by testator himself, and undoubtedly in his confidence: but it is suggested that he is wasting the assets, and persons interested are likely to be in-

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jured. There *can be no doubt of the power of the court to interfere: and though it might not in the present case perhaps take the property out of the executor's hands, yet it will take care that he secures the legacies so that complainant may receive them when they shall become due or payable. The demurrer was overruled; and the defendant ordered to answer.

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1 Desaus. 304

Case LXXIX.

Present—Chancellors Hutson, Mathews and Rutledge.

THOMAS SMITH and A. BONSALL v. the Executors of G. SMITH, Who was the Executor of A. Smith.

(September, 1792.)

[*Executors and Administrators* ⇐158.]

Executor's estate made liable for the value of the estate of testator sold by him without authority—and also made liable for the securities which might prove defective.

[Ed. Note.—Cited in Evans v. Evans' Ex'rs, 1 Desaus. 520; Trescot v. Trescot, 1 McCord, Eq. 432.

For other cases, see Executors and Administrators, Cent. Dig. § 646½; Dec. Dig. ⇐158.]

The bill in this case was filed to make the estate of G. Smith liable for the value of the personal estate of A. Smith, which it was alleged he had improperly sold during the revolutionary war, without authority under the will of his testator. The bill charged that the will not only gave no direct authority to sell, but on the contrary directed that the personal estate, after certain specific and pecuniary bequests to the widow of the testator, should be equally divided between the two children of the testator: That the will

also authorized the executor to lay out the monies growing out of his estate, for the advantage of testator's children: That the executor without applying to the court of chancery and without any necessity to justify it, disposed at public sale of all the personal estate: and omitted to take good security for some of the purchases: and did not take bond from some of the purchasers for two years after the sale, when the depreciation of the currency had rendered the money of little value: and omitted to sue or procure good security on the bonds of those who were known to be in bad circumstances.

There are no traces of the proofs or of the arguments in this case; but Chancellor MATHEWS made the following entry on his brief: It was "decreed that G. Smith, the executor of A. Smith having sold the estate

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of the *testator, without any authority under the will, or otherwise, do account to complainants for the amount sales, except so much thereof as was directed by the will of A. Smith to be borrowed to pay his widow's legacy; as it was immaterial whether the executor sold to pay the legacy, or borrowed for that purpose, as it must have been paid at last: and as the estate was not sufficiently productive to do so out of the profits, a sale must ultimately have been had recourse to. And if any of the securities taken for the sales should prove defective, the estate of the executor G. Smith must be accountable, he having acted illegally in the sale thereof."

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1 Desaus. 305

Case LXXX.

LENNOX and Wife v. W. H. GIBBES.

(June, 1792.)

[*Husband and Wife* ⟸29.]

The act for recording marriage settlements is so obscurely worded that the court would not enlarge its application but restricted it to the very terms used in the law, and pronounced that part of the act was unintelligible and inoperative.

[Ed. Note.—Cited in Cheney v. Lubbock, 1 Nott & McC. 451; Garner v. Garner's Ex'rs, 1 Desaus. 414; Croft v. Arthur, 3 Desaus. 233, 234.

For other cases, see Husband and Wife, Cent. Dig. §§ 158-168, 205, 882; Dec. Dig. ⟸29.]

[*Husband and Wife* ⟸29.]

[The statute of March 8, 1785, in relation to the recording of marriage settlements, applies, so far as the neglect to comply therewith is rendered penal, only to settlement subsequently entered into.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 167; Dec. Dig. ⟸29.]

Chancellor HUTSON delivered the decree of the court:

The bill prays an injunction to stay proceedings at law. The decree in this case must be grounded altogether on the construction to be given to a law of this state passed on the 8th of March, 1785; entitled "an act, to oblige all persons interested in marriage deeds and contracts to record them in the Secretary's Office of this state." The first clause of this act is merely directory or prescriptive, viz. That all marriage settlements then existing should be recorded within a limited time. The second is to the same effect, respecting such as should be thereafter entered into, within the state. The third clause is the only one which contains a penalty for neglecting or refusing to record such marriage deed, settlement, or contract as therein recited: In which clause the word such, must be considered as a relative, and by every rule of grammatical construction must be confined to that clause as its antecedent. Upon our first perusal of the act, we were led to imagine that there must have been an error in the printing of it, and that we might have all doubt on the subject removed, we thought it advisable to procure a certified copy of the original act as ratified and

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*recorded from the Secretary's Office, and we found it verbatim et literatim the same as the printed copy. Having ascertained this fact, we proceeded to consider the act by all the rules and principles, grammatical and legal, which are made use of in the construction of laws; and we find the several parts or clauses so disjointed, unconnected and independent of each other, that we cannot presume to say whether the Legislature meant to extend the penalty to the two preceding clauses or not; and to add words to give the law a different construction from what it at present admits of, would be to exercise legislative power, which we certainly have no right to do. We must therefore take the law as we find it, and our decisions are to be governed by it as it is. We observe further that the people of every free country are to be governed by the laws as they are promulgated to them. Every law therefore to enforce due obedience to its mandates, ought to be clear, precise and determinate, so as that he that reads it may understand it: But in the present case it is exactly the reverse. To enforce therefore such a law would be to entrap and ensnare not only the ignorant and unwary, but the most wise and prudent citizens in the state; and it would be infinitely preferable that every mischief intended to have been remedied by the law should ensue, rather than so dangerous a principle should be countenanced in our jurisprudence. It has been contended at the bar, that as the law was intended for the benefit of creditors, who are always favoured in this court, it ought to receive the most enlarged, liberal and beneficial construction for them. That creditors ought to be and are always favoured in this court there can be no doubt, and the construction contended for

might have been in the contemplation of the Legislature when framing the law, but as we have already observed, we cannot render that perfect and effective, which is imperfect and defective. And there is another rule equally incontrovertible which applies here, and which we must pay due regard to; that is, that penal laws are to be strictly construed in this, as well as in the courts of common law. The opinion of lord keeper

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Somers in the *case of Taylor and Wheeler in Vernon 565, on this point, is in these words: "It would be too hard to extend a penal law in a court of equity to the prejudice of the plaintiff," &c. &c. The principle here laid down is very applicable to the present case, for could the law have operated as has been contended for, it certainly would have been highly penal on the present complainants. On the whole of the case, we are of opinion that the law is so grossly defective and imperfect, that we cannot think ourselves warranted under it, to decree the penalty against the parties interested in the marriage settlement now in question, for not having recorded the same, so as to subject the property thereby intended to be secured for their benefit, to the debts contracted by the complainant James Lennox, any otherwise than as he may be entitled to the profits thereof.

It is therefore decreed, That the injunction quoad the principal† of the property contained in the said settlement be made perpetual, and that each party pay their own costs.

† As far as the husband was entitled to the profits, they were considered and made liable to his debts.

1 Desaus. 307

Case LXXXI.

Present—Chancellors Hutson, Mathews and Rutledge.

JOB COLCOCK v. PIERCE BUTLER.

(September, 1792.)

[*Specific Performance* ⇐100.]

The court will not decree the specific performance of a contract for the purchase of a house, where the seller has not complied with the terms, by having the buildings completed within the stipulated time.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 309; Dec. Dig. ⇐100.]

[*Specific Performance* ⇐95.]

[A lis pendens to foreclose a mortgage is not notice to a previous purchaser of the mortgaged premises, as between him and the mortgagor.]

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 276; Dec. Dig. ⇐95.]

This was a bill filed by the complainant to compel the specific performance of a contract whereby defendant agreed to purchase two houses in Charleston from the complainant at a valuation. The complainant states that he purchased lots in town which cost him £2200. on which he erected houses which cost him £3700.—That he afterwards, on the 20th April, 1786, contracted with major Butler for the purchase of a plantation on John's Island, at the price of £5000. sterling; now not saleable at more than £1000.—On this amount the defendant has judgment at law against the complainant. That in July, 1787,

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*the complainant was desirous to make a substantial payment to major Butler, (who had no security to the bonds) and for that purpose agreed with his attornies to convey the house and lots abovementioned to him. and the attornies Mr. Rutledge and Mr Payne, who it is charged had full powers, agreed to accept the same at a valuation to be made by indifferent men, in payment to major Butler: The unfinished house to be finished within three months in the same manner as the first house: That two persons Mr. Toomer and Mr. Eveleigh were chosen to value them; who did so at £7100.—That major Butler was advised of these transactions, and acquiesced in them, and directed Mr. Payne to sell the houses on his account, and he accordingly called on Mr. Colcock (in his character of Vendue Master) to advertise them for sale, and they were put up for sale as the property of major Butler, but were not actually sold, for defect of bidders: That the complainant exerted himself to finish the house according to the agreement, but the difficulty of getting workmen and materials prevented his completely finishing the work for about six months, though the material parts were done much earlier: That the complainant was willing to pay rent during the short delay of finishing the building—But that the defendant availing himself of that delay, refuses to comply with the contract. The bill prayed for specific performance of the agreement.

The defendant by his answer denies that the power of attorney gave his attornies such power as was charged: That it was nothing more than a common printed power with authority to receive and pay monies and institute suits: That however rather than that his acting attorney Mr. Payne should be a sufferer for exceeding his powers, he was determined to submit to a moderate loss: and expecting that Colcock would perform his part of the agreement he wrote a letter acquiescing in the agreement; though he was then aware that it was not binding on him. The defendant also afterwards offered to ratify the agreement if the appraisers would themselves become the purchasers from him at £500. less than the appraisement: That the defendant never received any of

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the rents: *That the complainant must have supposed the bargain to have been at an end, as he gave in the spring of 1789, an order to

repay out of the rents of the said houses, monies which were absolutely loaned to him by the defendant. And the building could not have been finished in six months, as Colcock borrowed £46. of defendant a year after the contract to glaze and finish it off: That defendant must have considered the bargain at an end and the property his own, for he went to the expense of a slated roof; and he advertised the house for sale as the property of the estate of Vanderhorst (from whom complainant had purchased it, and mortgaged it back) and complainant made a payment on his debt to defendant on the John's Island purchase, which was unnecessary if this contract was subsisting.

At the hearing of this case it appeared from Mr. Payne's testimony, that the power of attorney was a common power to receive and pay money; and gave no special power to purchase houses.—But that major Butler unwilling that his attorney should suffer for exceeding his powers wrote a letter acquiescing in his conduct, and gave orders to Mr. Payne to have the houses sold: That it was Colcock's own proposition to finish the houses in three months; that is, sometime in November: That on the receipt of the letter of the 28th August, 1787, from major Butler, he, Payne, called on Colcock and informed him of it. On the 19th October, 1787, the advertisement for the sale of the houses took place —But they would not bring the price they were valued at, and major Butler had desired that they should not be sold under the appraisement: The witness did receive several small payments of rent—one of £5 and two of £7. 10s. each at different times, before the arrival of major Butler. He supplied complainant with £46. in July, 1788. Major Butler at first said he would pay the £1000. penalty; afterwards he said he would avail himself of Mr. Colcock's not having complied with the agreement.—Mr. Colcock said there was another agreement in which £5575. was to be given. Witness did not understand the agreement was conditional. Both parties

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broke the verbal agreement—*Did not know that any deduction was to be made from the price of the plantation. The mortgage of the houses by Colcock to Vanderhorst's estate was foreclosed in December, 1789, and the property sold.

Mr. Rutledge testified that he was satisfied the power did not extend to give the attornies the authority they exercised.

Mr. Toomer proved the valuation.

Mr. Donaldson said he was well acquainted with the houses, they were finished in a plain manner.

Major Bocquet bought the property at the sale (under the mortgage) for £4000.

Mr. Ford for the complainant, argued that there was a fair and regular contract by which the defendant was bound, and the court ought to decree a specific execution. There was no pretence of unfairness. It was made openly, and the price fixed by indifferent third persons of unimpeached character, chosen by the parties, and well versed in such matters. Then as to the power:—If the attornies had not full authority, major Butler confirmed their contract by a letter, and even authorized one of them to sell the houses on his account. This was communicated to Colcock who rested satisfied therewith, and took no steps to obtain a purchaser for the property, which was his main object, to enable him to pay for the plantation; and upon the faith of that agreement he went on to make expensive finishings to the houses which he might not otherwise have gone into: That the attorney of major Butler actually offered the houses for sale as his property, and received part of the rents: That the only pretence on which the contract could be shaken, is that one of the houses was not entirely finished within three months as agreed upon. It was substantially finished and wanted only the ornamental finishing which was done in about six months. That this defect in point of time is not regarded in such contracts—It is not deemed material; for compensation could be made in rent for such time as it was untenantable. That if the valuation was a high one, property having fallen considerably since, the same could be

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said of the plantation purchased *by Colcock from Butler: It was bought at a price far greater than could be obtained now, (as appeared by the evidence)—That it would be most unequal and therefore inequitable that whilst the complainant Colcock should be held to his purchase, which indeed he did not contest, that the other party should be released from his contract, when both stood on the same ground, to wit: That both had agreed to give large prices for property which had since fallen greatly in price. The equity then of the parties is equal; and it would be very hard to hold one of them bound and the other absolved. The offer of the house, and the sale was expressly to meet the debt on the purchase of the land. It was alleged that the houses not being finished in time, major Butler could not sell them. But he did not wait for the time to expire. He ordered his agent to sell the houses immediately, even before the three months were elapsed. See 1 P. Wms. 61, 542. 1 Bro. C. C. 26, 440, 785. The case of Cass v. Ruddele, 2 Vern. 280, is strongly in point. See also 2 Vern. 423. When an agreement is performed in part by one party, it is too late for the other to get off. See 4 Bro. P. C. Though the vendor does not tender conveyances in the time limited in the articles the court will not regard the neglect; but will still decree a specific performance. 1 Atk. 12, Gibson v. Patterson. The insertion of a penalty in the articles of agreement will never prevent the

court from decreeing specific execution.—2 Atk. 371, Howard v. Hopkins. Letters by a man to his agent, are good evidence against him to establish an agreement. 3 Atk. 503, Welford v. Beasly. Colcock might have recovered the £1000. penalty at law from Butler, and Butler might have recovered as much damage from Colcock, as he could shew he sustained by the house not being finished in time. 1 Lord Raym. 124, 420. See 1 Vesey 258 and 444. The repairing or finishing the house was not a condition precedent. See 1 Vern. 83, 167, 222. 2 Vern. 366. Upon every principle then of contract, of equity, of equality, complainant was entitled to a decree for the specific execution of this agreement.

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*General Pinckney for defendant, contended that the power of attorney in common form, gave no authority to purchase lands; and that if, by the letter of the defendant, in which from delicacy to his attornies, who had exceeded their powers, he acquiesced in the agreement made for him by them with the complainant, he had a right to require that the terms should be strictly complied with. That by the agreement the unfinished house was to have been finished in three months—But it was not finished in six months; and indeed not fully for a twelvemonth. This was a real disadvantage to defendant. If finished he might have sold, as it was his intention to do. But he could not sell, and real estate meantime fell rapidly in price. The payment of rent by complainant would be no equivalent for the fall of price. But in fact no rent had been paid by Colcock and defendant himself never received any rent. That the court would more readily forbear to exercise its extraordinary power of decreeing the specific execution of contracts, under such circumstances of error and hardship. That the price agreed upon to be given by his attornies was excessive: and defendant offered to ratify the agreement if the appraisers would give in bonds £500. less than the appraisement; which they refused. That the complainant himself conceived the bargain was at an end, for he gave in the spring of 1789, an order to repay out of the rents of the said houses monies which were loaned him by the defendant. He also covered it with a slated roof which was far more expensive than a shingled roof. He was not bound to do this by the agreement. His doing so is an additional evidence that he considered the agreement at an end—And he also made a payment on his debt for the John's Island land, which would have been unnecessary, if he had relied on this agreement—And finally he advertised the house for sale, as belonging to the estate of Vanderhorst (from whom Colcock had bought it) which he would not have done if he had considered the agreement binding and subsisting. That specific execution of a contract is an equity—and parol evidence will be admitted to rebut an equity. It will be received to

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shew that a written agree*ment has been waived in part, or in whole or varied in the terms by a subsequent parol agreement. Powel on Contr. 427. 6 Bro. P. C. 580. Where a bargain is made and all the parties consent to dissolve it, and other conditions are proposed, the new agreement destroys the former bargain. 2 Mod. Rep. 243. For new agreement see 4 Burr. 2483. In Gorman v. Salisbury, 1 Vern. 240, a bill for specific execution was dismissed, a new and a different agreement being shewn. So in Legal and Miller, 2 Vesey 299—and in another case, by the master of the rolls. 2 Vesey, 376.

Where one party has trifled or shewn a backwardness in complying with his part of the agreement, equity will consider this a good objection to decreeing a specific execution in his favor, especially if circumstances are altered, in the mean time—2 Powell on Contr. 260. 1 Bro. P. C. 27. 5 Viner, 538. See also 2 Burr. 1012. Moses v. M'Farlane. A party seeking specific execution of a contract must shew that he has performed all that was contracted to be done on his part, to entitle him to a specific performance. 2 Powell on Contr. 19, 20, 21, 26. The rule of all agreements is, that they must be performed on all hands.

When a bill was filed by the representatives of Vanderhorst's estate to foreclose the equity of redemption in these houses and lots, the defendant Butler was not made a party, as he ought to have been, if he was interested. Hinde 151. Colcock was made defendant—he did not demur to the bill of foreclosure, and thus admitted that the equity of redemption was in him. See Hinde 158. 2 Atk. 51, Ashhurst v. Eyre, and Plunket v. Penson.

Chancellor RUTLEDGE delivered the decree of the court:

This was a bill for specific performance of a contract to accept of two houses at a valuation. The confirmation of defendant by letter legalized his attorney's contract, so far as to make it an executory contract. This court will in some cases relieve, even where there is a penalty, and decree a specific performance. In this case it appears on the face

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of the agreement, that one *of the houses which was unfinished, was to be finished by complainant within three months; whereas it appeared by the evidence that it was not finished for eleven months. The court will in some instances relieve against lapse of time, but this was immoderate; and the property rapidly depreciating. All the cases respecting compensation relate to instances where compensation can be precisely ascertained. The rent would not be complete compensation for the great decline in the value of the

property. Indeed it is impossible to ascertain it. It is a case sounding in damages and not for this court. If the house had been finished according to contract, it might have been sold before the great fall of price. Perhaps the unfinished state of it prevented offers. Besides, the complainant gave no notice to the defendant of the bill filed for the foreclosure of the mortgage on the houses, for the debt due by complainant to Vanderhorst. The lis pendens is not notice in such a case as this; he should have had actual notice.—Complainant acted as owner of the houses, received rents, &c. But the court thinks the immoderate laches of the complainant in finishing the house is alone sufficient to bar complainant from relief in this case. Defendant early after his return refused to comply with the contract; yet the complainant never filed his bill for four years after, and till the property was greatly depreciated. When sold under mortgage, the property did not bring half the sum the defendant contracted for. The complainant must be left to his remedy at law.

Desaussure and Ford for complainant—Gen. Pinckney for defendant.—Bill dismissed with costs.

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1 Desaus. 314

Case LXXXII.

Present—Chancellors Hutson, Mathews and Rutledge.

LADSON and ROSE v. WARD and BLAKE, Executors of F. Rose.

(March, 1793.)

[*Wills* ⟸714.]

A father bequeaths legacies to the children of a deceased son: This shall not be construed to be in satisfaction of a debt due by the father to the son's estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1698, 1699; Dec. Dig. ⟸714.]

[*Wills* ⟸139.]

[Cited in Beresford v. Elliott's Ex'rs, 1 Desaus. 189, to the point that in the construction of a will the court is governed by the intention of the testator.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 952, 955, 957; Dec. Dig. ⟸139.]

This was a bill filed for the recovery of certain legacies, and the settlement of an estate in the hands of the executors.

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*There were many points disputed in this case, but they were chiefly questions of fact, and of account, and involved no point of any importance but one. It was as follows: Francis Rose, the father of Thomas Rose, was indebted to the latter on a stated account, appearing on the son's books. After the son's death, the father got possession of the books and papers of his son; and at his own death he left them in the condition he found them, the charge open and subsisting. He bequeathed several legacies to his grand children, the children of his son Thomas.

It was contended for the complainants, who were interested in the father's estate, that these legacies were given in satisfaction of the debt above mentioned.

The court however stated, that it could not discover any thing like an intention in the testator to give the legacies to his grand children in satisfaction of this debt to his son; nor any design to make the legacies conditional, and to depend upon the executor of the son releasing the debt due by the father to the son's estate. That unless there had appeared an intention in the testator to do this, the court would not raise such a presumption. For the doctrine that legacies were generally supposed to be bequeathed in satisfaction of pre-existing debts (which had many limitations) could not have any application to this case. The debt due by the father was to the son's estate—the legacies were to the grand children—they were in distinct rights—creditors, and perhaps legatees of the son, might have an interest in the son's estate, so that the executors of the son could not properly release the debt. The court therefore decreed in favor of the legacies to the grand children, without considering the same to be in satisfaction of the debt.

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1 Desaus. 315

Case LXXXIII.

Present—Chancellors Hutson, Mathews and Rutledge.

The Executors of SHUBRICK v. N. RUSSELL, Executor of Livingston.

(March, 1793.)

[*Principal and Surety* ⟸109.]

A security is not released from his liability by the obligee taking collateral security, and even indulging that security.

[Ed. Note.—Cited in Green's Ex'rs v. Warrington, 1 Desaus. 433; Providence Mach. Co. v. Browning, 70 S. C. 155, 49 S. E. 325.

For other cases, see Principal and Surety, Cent. Dig. § 219; Dec. Dig. ⟸109.]

[*Equity* ⟸43.]

[Cited in Lee v. Waring, 3 Desaus. 66; Susong v. Vaiden, 10 S. C. 255, 30 Am. Rep. 50, to the point that, where one of the obligors in a joint bond died leaving the surviving obligors insolvent, a court of equity has jurisdiction of a suit against the representatives of the deceased obligor, for satisfaction of the bond, since, the bond being joint, the only remedy at law would be against the survivors.]

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 130; Dec. Dig. ⟸43.]

[*Equity* ⟸117.]

[After answer the defendant cannot object that a person jointly liable with him is not made a party. Such objection should be taken by plea or demurrer.]

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 289; Dec. Dig. ⟸117.]

[*Principal and Surety* ⟸163.]

[The obligee having given time on collateral security, the court, on decreeing payment by

the surety and a transfer of the collateral security to him, extended the time of payment in accordance with that of the collateral security.]

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 446; Dec. Dig. ⟸163.]

[*Principal and Surety* ⟸168.]

[The fact that one of the obligors in a joint bond is a surety does not affect his liability to the obligee, so as to make it incumbent upon the obligee to proceed against the principal in the first instance.]

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 471; Dec. Dig. ⟸168.]

The complainants' bill stated that Abraham Livingston, together with Stacey Hep-

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burn, now deceased, and J. *Dorsius, were jointly bound unto complainants' testator, Thomas Shubrick, by their two several bonds, bearing date the 30th July 1779, in the penal sum of £290.000 of the then currency, conditioned for the payment of £145.000 like money, on the first day of January 1780, with interest from the date. That before the said bonds became payable, to wit, in August 1779, their testator died, having first duly executed his will, whereof he appointed the complainants' executors, who qualified on the said will. That Stacey Hepburn died some years since in the state of Pennsylvania or New York insolvent; and that the said Abraham Livingston died in 1780, in affluent circumstances, and of his will appointed Nathaniel Russell executor, who has alone qualified thereon, and possessed himself of property belonging to the said Abraham Livingston more than sufficient to pay all his debts. That John Dorsius is and has been for many years past insolvent—that as the said bonds with interest thereon remain unpaid, your orators applied to the said Nathaniel Russell to discharge the same, but he having refused to do so, they applied to an attorney at law to compel the payment thereof. That the said attorney discovering that the bonds were joint bonds, and not joint and several, applied to the attorney of said N. Russell, informed him thereof, and requested to know whether he would waive the objection which in strictness of law he might insist on from the said bonds being joint, or whether he would compel complainants to seek their remedy in the court of equity; but the said N. Russell insisted that complainants should pursue their remedy in equity, alleging that it appears from indorsements on the bonds that a bond of John M'Queen was received by your orators, which if paid was to go to the exoneration of Abraham Livingston's bond, and charging moreover the complainants with having neglected to recover the amount of the said J. M'Queen's bond, and inferring from thence that the loss should fall on the estate of complainants' testator, and that Abraham Livingston's estate should be freed from the debt—whereas, the complainants insist that the bonds of the said John M'Queen was intended by the parties to be received as a collateral security, and not

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as *an absolute payment. That very shortly after the said bond was given, the said J. M'Queen withdrew to the state of Georgia, from thence he went to Europe, returned again to Georgia, and there remained until he withdrew with his property to Saint Augustine. That frequent applications were made to the said John M'Queen for payment whilst he was in Georgia, but from the disturbed state of all money transactions from the time the said bond was given until the said John M'Queen went off to East Florida, it was impracticable to enforce the payment, and the complainants insist that they used more diligence for the receipt of the money than they were bound to do.—The complainants therefore pray that the said N. Russell may true answer make to all and singular the matters and things in bill charged; that he may admit assets, and be compelled by decree of the court of equity to pay what may appear to be justly due them.

The defendant admits that his testator the said Abraham Livingston, deceased, did join with one John Dorsius as the securities of Stacey Hepburn in the bonds in bill mentioned, which said bonds were given to secure the purchase money of a certain plantation or tract of land situate on Santee river, sold by the said Thomas Shubrick, deceased, to the said Stacey Hepburn, and that the complainants are the qualified and acting executors of the said Thomas Shubrick, deceased, whom he believes to have died at the time, and made the will in bill mentioned. That this defendant is the qualified and acting executor of the said Abraham Livingston, and is possessed of the assets belonging to his testator's estate. That John Dorsius is at present generally thought to be insolvent, but the defendant positively asserts that he has been informed, and believes that Stacey Hepburn in bill mentioned, is still alive and resident in the state of Pennsylvania or New-York. Defendant admits that application was made to his attorney to permit an action to be instituted against him as executor aforesaid at common law, and that the same has been refused, founded on a conviction that complainants' demand is illegal, and that their conduct had long since discharged his testa-

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tor's estate *from all responsibility as joint obligor or security to the bonds in bill mentioned: for defendant swears that he was not only ignorant of the negotiation entered into between Mr. Hepburn and the complainants with respect to John M'Queen's bond, but never knew or heard of the existence of Livingston's bond, now attempted to be set up, until some time in the month of June last, when he received a letter from Thomas Shubrick, one of the complainants, a copy where-

of is filed with the bill. The defendant admits that he refuses to pay any part of the bond in bill mentioned, and trusts that the honourable court will discharge his testator's estate from all demands on account thereof; for that independently of complainants' neglect to use diligence to recover the debt in the first instance of Stacey Hepburn, (instead of accepting of John M'Queen's bonds, and afterwards neglecting to pursue like measures with due diligence to recover the money due by John M'Queen, by which the same is said to be lost) if application had been made to his testator in his life time after the said bonds became due, it was always in his power either to have discharged the same, or to have indemnified himself by retaining the amount: for that in March 1780, near three months after the said bonds were due, Mr. Livingston paid to Stacey Hepburn for the purchase of the very land bought by him of Mr. Shubrick £500,000 of the then currency: And that even at the time that the complainants took upon themselves to accept of John M'Queen's bond, as is in bill set forth, Mr. Hepburn was in good circumstances, and fully adequate to the payment of his debt: or had the complainant then made known to defendant the existence of the said bonds, it was in his power to have secured his testator's estate against the same, as at the time John M'Queen's bonds were received from Mr. Hepburn, the estate of Mr. Livingston was still indebted to the latter in a sum nearly, if not equal to the amount of his securityship: And which, for want of information on the subject, this defendant has since paid or assumed to pay, as will appear by the testimony of several persons: or this defendant might have prevailed on Hepburn, who was then

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competent thereto, to give more *certain and effectual means of indemnifying his testator's estate, than what John M'Queen's bonds proved. That Dorsius (although he believes he is now insolvent) had resources soon after the war, he thinks to have answered the debt, if he had been timely resorted to, or might have contributed in part. The defendant submits to the decree that may be made, but prays that the estate of Livingston may be discharged.

This cause came to a hearing. John Price was examined as a witness: He stated that he went to Georgia in the year 1788, to settle some affairs with John M'Queen, and he offered him lands and negroes in payment.

Mr. Stirk proved that he forwarded to Mr. M'Queen in East Florida a statement of debts to the amount of £20,000 without including the interest; and that was not one half of his debts. M'Queen left Georgia for Florida in February 1791. The whole of his property was not nearly sufficient to pay his debts. The tender law of Georgia expired on the 14th August 1790.

Mr. Holmes and Mr. E. Rutledge for the complainants argued, that a person signing his name as security to a bond, makes no difference in his responsibility: He is as liable as the principal. The only use of a security so distinguishing himself on the bond is, that if he should be obliged to pay the debt, he may more easily shew his real character, and recover over from the principal. This was the opinion of the court of law in the case of Rivers v. Kennedy. The court said that either principal or security might be sued as they could be got at; the holder of the bond taking a collateral security, as was done in this case by taking M'Queen's bond, does not extinguish the original debt, or diminish the liability of the security. It is not a prejudice to him, but a benefit; and the renewal of that collateral bond, or taking a new for an old one, did not diminish the value of that collateral security.

Mr. Ward for the defendant insisted, that Mr. Livingston, the security for Hepburn, was discharged by the conduct of the creditor. Livingston became largely indebted by a purchase to Hepburn, and great payments were made by him, and afterwards by his execu-

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tors down *to 1784. If the executors had been apprised of this demand, they could have protected Livingston's estate by reserving funds, instead of paying them away to Hepburn and his assignee Mr. Hazlehurst.

No resort has been had to the principal Hepburn—but the principal ought to be first resorted to. See 2 P. Wms. 542. 1 Vern. 196. 2 Vernon, 393, 688, 3 Atk. 91. Dyer, 56. 2 Bro. C. C. 579, Nisbet v. Smith and others, which is a strong case to this point.

If two persons are jointly bound in a bond, and one dies, you cannot sue the executor of the deceased obligor, but must have recourse to the surviving obligor. 2 Bacon, 697. 2 Vern. 99.

Again, a person taking a collateral security, and it fails, he cannot come on a security in the original contract, having varied the nature of the debt. 2 Atk. 341. At all events, when the collateral security was taken in 1783, it should have been strictly pursued, and the money recovered. The bond debt of M'Queen might have been recovered, and Livingston the security exonerated. Instead of which, the old bond was given up to him, a new one taken, and the time of payment extended to 1785. In May 1784, Rose sold M'Queen's negroes to the amount of £5000, sterling, and other property; land was also sold. In 1785, he had still a large estate in lands and slaves, yet no steps were taken to recover the debt on bond which had been taken as a collateral security. In 1791, Mr. Shubrick saw him at Savannah, and still took no steps against him. It was the fault therefore of the executors of Shubrick that

the debt from M'Queen was finally lost, and Livingston's estate ought to be exonerated.

Mr. Pringle for defendant argued, that joint obligors (as in this case) could not be made to pay more than their respective proportions, pari passu. 2 Ventris, 348. If three join in a bond, and one or two die, the obligation survives in the nature of joint tenants, and the surviving obligor only is liable. 2 Comyn's Digest, 318, 324. 1 Eq. Cas. abr. 93. 1 Vernon, 196. In the case of Rivers and Kennedy, (quoted on the other side) the bond was joint and several. Where a person has

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taken the bond of *another for, or as collateral to, a bond due to himself, he cannot sue the bond due him till he has shewn that he has used due diligence to recover the money from the collateral bond and has failed. See Domat. 377.

General Pinckney for complainant said, no substantial objection can be made for want of parties to the bill, because the proper mode of objection would have been by demurrer or plea. But neither demurrer or plea could have had any effect, as the bill charges that one of the parties is without the limits of the state; and the complainant has a right to have recourse to those within the jurisdiction of the court. You may also take out a joint execution against several persons; but you may order the sheriff to levy on the property of either. See 2 Comyn's 323.

It is the duty of the obligor to make payment on the day the bond is due, and not of the obligee to demand payment. 3 Bacon, 693, 713. The obligee besides, could not demand payment of the principal when the bond fell due. The state was then in the hands of the enemy, and the courts of justice were shut up. This accounts for some of the delay in pursuing Hepburn. Afterwards he went away. 2 Atk. 31. 2 Ves. 371. Mr. Shubrick was not bound to take payment from M'Queen (on the collateral bond) in lands and negroes, as it seems his other creditors were obliged to do, which shews how difficult it was to get payments from him, and how little reliance could be placed on that collateral security. †

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*In March 1793, chancellor RUTLEDGE delivered the decree of the court.

This is a suit brought by the executors of an obligee, against the executors of a deceased joint obligor, the surviving obligor being insolvent. For the defendant it was contended, that he was not liable, because the bond being joint, the survivor alone is chargeable. At law, the obligee's only remedy is against the survivor alone. In equity, the obligee has a remedy, and an equitable, though not a legal lien (claim) on the estate of the deceased obligor. It is objected that the surviving obligor (who is out of the state) should have been made a party. If the defendant would take advantage of this omission, he should have pleaded or demurred for want of parties; but the defendant having answered, he cannot now take advantage of it. It is not denied by the answer that the surviving obligors are insolvent, and that one of them is out of the state, if he is not dead. The case is reduced to a single question, whether, as there is no legal remedy for the obligee, there is an equitable one: and undoubtedly there is—for though a joint obligation, the heirs and executors are bound by the bond, and must be answerable. It was also objected that the deceased (defendant's testator) was only a security to this bond, and was not liable, because the obligee had varied the original contract by taking a new security, whereby the original security was discharged. The facts are as follows: The debt on the original bond was due on the 1st of January, 1780; it was not paid. The enemy soon after got possession of the country, and did not evacuate it till December,

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1782. In March, 1783, *the legislature interposed and prevented suits being brought for recovery of debts, but permitted the demand of security. One of the obligors was insolvent, and defendant's testator, Livingston, was dead, and he had no representative here till 1784. The obligee was also dead, and his executor could not compel payment from Hepburn, another of the obligors. They did what

†What acts an obligee may do in favour of an obligor, without releasing the liability of another obligor, especially if he be only surety in the bond, and what will amount to a release, it requires some care to ascertain. It does seem to be established, that a creditor giving further time to the principal debtor for payment, without communicating with the security, releases the surety. See Nisbett v. Smith and others, decided by lord chancellor Thurlow, 2 Bro. C. C. 579, and Rees v. Berrington, decided by lord Loughborough, 2 Vesey jr. 540: and both are grounded on the decision of lord Hardwicke, in Skip v. Huey, in 3 Atk. 91, and even on much older cases.

Lord Eldon, in the case of Wright v. Simpson, 6 Vesey, 734, expressly agrees with these cases. But he seems to doubt whether there is any obligation, as between the obligee and the surety, of active diligence against the principal. He considered the surety as guarantee; and that it was his business to see that the

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principal pays the debt, and *not that of the creditor. The holder of the security may therefore, in general, exact payment of the surety. But in late cases, it has been decided, that the surety has a right to call on the creditor to do the most he can for his benefit. And some cases have gone one step further, and required the creditor to place the surety in his situation, provided there was no risk, delay, or expense to the creditor. See Cooke's bankrupt law, 211. 3 Bro. C. C. 237. 3 Vesey, 243.

The subject however requires very critical examination. See the cases collected by Mr. Cooper, in his notes to Justinian's Institutes, 462, 3, 4, and 613. See too 6 Vesey, 805, 6, 7, ex parte Gifford. 10 Vesey, 409, 10, &c. ex parte Rushforth. See also 2 Vern. 608. 11 Vesey, 22. 14 Vesey, 160.

they deemed the next best thing, which was to demand security under the law from Hepburn. He prevailed upon Mr. M'Queen (then in possession of great property, and in high credit) to give his bond on the 30th of November, 1783, as additional collateral security for the debt; not as payment, or the original bonds would have been given up; and the receipts on them shew that they were not to be considered as discharged, until Mr. M'Queen's bond should be paid. This case is not therefore like Skip v. Huey in Atkins, for there the original bond was given up; nor like the case of Ratcliffe v. Graves, Vernon, 196, where the admon bond had been given up. The complainants in those cases did not obtain relief, the bonds having been cancelled. In the case before the court, the security is not changed nor varied; not destroyed, but strengthened.—The second bond from M'Queen was a consolidation of principal and interest, and complainant obtained a more substantial security, by taking an assignment of a mortgage of real estate. A new idea has prevailed lately, that the security is not liable for the debt, till measures are taken to recover the debt from principal. But this is erroneous. A case solemnly decided in the common pleas has recently settled that point. And moreover, that taking collateral security, will not discharge the original security to a bond. It would be a harsh doctrine to be established. There is some blame imputable to complainant for not apprising defendant of the transactions with the collateral security; but not so much as to make him lose his debt. He has done nothing to forfeit it. He pursued reasonable measures to recover from M'Queen, and could get nothing but some lands. Referred to the master to report what is due on the bonds, and it is decreed that the defendant do forthwith pay

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the amount. And that there*upon, the complainant assign to defendant the bond and mortgage taken from M'Queen as collateral security.—Defendant to pay the costs of this suit. Afterwards, the defendant petitioned the court for a re-hearing in the cause, which was granted; and after argument, chancellor Mathews delivered the following decree of the court:

The petitioner complains, that the former decree made executor of Livingston liable without a previous enquiry, whether the assets in his hands were adequate or not. No suggestion was made at the former trial of any apprehended deficiency; but as it is now brought forward, the court is disposed to open the decree to let in the executor of Livingston, to shew the extent of assets in his hands. And as it now appears that the executor of Shubrick had extended the time of the payment of the bond of M'Queen, the collateral security, the court thinks it right to extend the credit to the executor of Livingston to the same periods. But the court cannot, after the renewed argument, on the petition for rehearing, see any ground to alter the first decree, as to the debt itself; either by releasing the estate of Livingston from the payment of any part thereof, or by restricting the liability of his estate to a mere contributory share.

It was decreed that the executor should submit the accounts of his administration of the estate to the master; and that he should pay out of the assets the amount of complainant's demand at certain periods fixed by the court.

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1 Desaus. 324

Case LXXXIV.

Present—Chancellors Hutson, Mathews and Rutledge.

JOHN DRAYTON, for Himself and as Next Friend of His Sister Mary Drayton, an Infant, v. CHARLES DRAYTON and Others, Executors of John Drayton, Deceased.

(March, 1793.)

[*Wills* ⊂=551.]

A father devises and bequeaths certain estates, real and personal, to his son John, and directs that in case of the death of that son John under age, or without lawful issue, those estates should go to the testator's four surviving sons, or the survivor of them. After testator's death, one of his sons, William Henry, dies, leaving children. Then the son John dies under age, and without issue. The survivorship construed to relate to the death of the testator, and thus to let in the children of Wm. Henry, in order to give effect to the intent.

[Ed. Note.—Cited in Swinton v. Legare, 2 McCord, Eq. 442, 443; Roundtree v. Roundtree, 26 S. C. 472, 473, 2 S. E. 474.

For other cases, see Wills, Cent. Dig. § 1188; Dec. Dig. ⊂=551.]

[*Wills* ⊂=627.]

[A devise to several persons, "to be equally divided between them," constitutes a tenancy in common, unless clearly qualified by other words in the will.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1454; Dec. Dig. ⊂=627.]

[*Wills* ⊂=497.]

[Cited in Addison v. Addison, 9 Rich. Eq. 67, to the point that grandchildren cannot take under a devise to children unless no children survive testator.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1080–1086; Dec. Dig. ⊂=497.]

[*Wills* ⊂=777.]

[Cited in Swinton v. Legare, 2 McCord, Eq. 445, to the point that, where there is a limitation over in a will to "survivors" and all but one die before testator, the legacy lapses.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2003; Dec. Dig. ⊂=777.]

The bill states that John Drayton, grand father of the complainants, being seized and

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possessed of a large real *and personal estate, duly executed his last will on the 1st of May, 1779, and amongst other things devised several plantations, slaves, &c. to his

youngest son John, then an infant, and his heirs: Provided, that if his said son John should die under age, and without lawful issue, that the lands given him (named Mount Pleasant) and the house in Broad-street, also given to him (but subject to a life estate in testator's widow) should be sold, and the money equally divided among his four surviving sons, William Henry, Charles, Glen and Thomas, or the survivors of them. And also, that in case the said John Drayton, the son, should die under age, and without issue, all his real and personal estate (not otherwise disposed of by the will) should be divided equally among his surviving brothers. The testator died in the month of June, 1779, leaving a widow and five sons, William Henry, Charles, Glen, Thomas and John, and two daughters, Ann and Susannah. That the eldest son William Henry died in the month of October, 1779, intestate, leaving two children, John and Mary, the complainants. That soon after William Henry's death, his youngest brother, John, died under age and without issue. The surviving brothers purchased for a valuable consideration all the rights of the widow of the testator in the estate of the testator.—That Charles, Glen, and Thomas Drayton, have sold the estates, devised to the younger brother, John, and have refused to allow complainants any part of the proceeds, alleging that they are not entitled to any part thereof, as their father, William Henry, died before the younger brother John. Complainants insist upon their right, and pray that defendants may be obliged to account to them for one fourth of the said estate, and for such other relief as they are entitled to. To this bill the defendants demurred, on the ground that the complainants were not entitled to any part of the said estates, as their father William Henry had died before the said son John; and the surviving brothers were entitled to the whole. So that there being no equity in the bill, they pray the bill may be dismissed.

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*The defendants also filed an answer to the bill, in which they admitted all the facts alleged by the complainants. The defendants admitting all the facts charged in the complainants' bill, insist, that upon the death of their elder brother William Henry, and subsequently of their younger brother John, they were entitled under their father's will, as survivors, to all the estates devised and bequeathed to John. The defendants admit that they purchased all the widow's rights in the estate for about £3570. That believing themselves the owners of the estate of John, they advertised the same for sale, and attempted a sale thereof in February, 1786; but no real bidders appearing, different tracts of land were knocked down to the defendants severally, at large prices, they really bidding to promote the sale, and not with any view to become purchasers: and not at that time having any idea that complainants had any interest in the said property, they considered it quite immaterial, how they arranged the business among themselves. But if they had anticipated such a claim, they would either have not put up the property for sale, or would not have bid off the same at high nominal prices: And they insist that it would be very hard on them to hold them to those purchases, made under such circumstances. That defendants sold the house in Broad-street, believing it to be their property. That they divided the negroes of their brother John's estate, on the supposition that they belonged to them, and worked them indiscriminately with their own. The defendants answer other points made by the bill, and conclude in the usual manner. The cause came to a hearing, and was argued by Mr. Ford and Mr. Read for complainants, and by Mr. E. Rutledge and general Pinckney and Mr. Pringle for defendants.

Mr. Ford contended that the words in the will gave a tenancy in common, and not a joint tenancy. The words "equally to be divided" have been uniformly decided to make a tenancy in common, both in wills and deeds. See 1 Vesey, 165. 1 P. Wms. 14, 196. 341. 1 Atk. 493, 4. 2 Atk. 122, 3 Atk. 525. 2 Ves. 252, 7. There was therefore no jus accrescendi in this case. The son John died

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*under age, and without issue. This was the contingency expressly provided for by the will, which directs in case of the death of his son John in his minority, and without issue, that the lands devised to him should be sold, and the money arising from the sale should be equally divided amongst his four surviving sons, William, Charles, Glen and Thomas, or the survivors of them. And that all the rest of the real and personal property bequeathed to John, should (on his decease as aforesaid) be equally divided amongst his surviving brothers. And so of the house in Broad-street, after the death or marriage of Mrs. R. Drayton, the widow. The word "surviving" in these clauses, does not appear to have had reference to the fact of the brothers surviving John, but of their being surviving or living at the testator's death. A different construction would be to suppose that the testator meant to make a tontine among his sons, and that if all but one of them had died before John, that one surviving should take all, though the other sons might have left children. This would be an unreasonable construction, and therefore not maintainable; and the property would not be equally divided among his four sons, as the will expresses it. The equality manifestly intended by the testator among his sons, would be defeated. There is no death fixed or referred to in this part of the clause, and none in the testator's contemplation apparently but his own death, which must be the event to which the word surviving relates. The words to

be paid or equally divided among my four sons above mentioned, to wit: William Henry, Charles, Glen and Thomas, amount to a descriptio personæ, of those who are to take. The testator did not mean to cut off the issue of his children—this is manifest through all the provisions of the will; yet the construction contended for would cut off William Henry's children, who were alive when testator made his will. Every view of the case shews that the testator had reference to his own death when he spoke of his surviving sons. This view makes all consistent and reasonable; and would let in the children of any of his four named sons, who survived him, but died before the son John. Many

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cases have been de*cided where to give effect to the intent, the words of survivorship have been construed to relate to the death of the testator himself. See Bindon v. Suffolk, 1 P. Wms. 96, decreed by lord ch. Cowper. And though that decision was reversed by the house of lords, it has been adhered to by the best judges. Lord Hardwicke, in Hawes v. Hawes, reported in 1 Vesey, sen. 14, and also in 3 Atkins, 525, approved of the above decision, and agrees with lord ch. Cowper, that the testator's death was the proper time to fix on in such cases. See Stringer v. Phillips, 1 Eq. Cas. abr. 292, which was recognised by lord Mansfield in Vere and Al v. Hill. See too the reasoning in Stones v. Heurtly. 1 Vesey. 165.

Mr. Read for complainants enforced the reasoning of Mr. Ford, and quoted 1 Bro. C. C. 240, 1. The interest given to the son John, vested immediately on the death of testator.

Mr. Pringle, Mr. E. Rutledge, and general Pinckney for defendants contended, that with regard to part of the property devised to the son John, to wit, the house, it did not vest in him till his mother's death; therefore, the survivorship cannot relate to the death of the testator. They quoted 1 P. Wms. 274. 3 Burr, 1541, 1885. 1 Bro. C. C. 215. Freeman 301, 2. They insisted that the defendants were not bound by the purchase they had made at the sale of the lands of John, for as the executors sold without authority, the sales were void. The will directed a sale, but did not say by whom; yet the executors sold, before the law of 1787 authorised sales in such cases. They could not give good titles. If the purchasers had been strangers, and bought in the lands at a low price, the complainants could have prevented the sale taking effect (if their claims are established.) The sale therefore ought not to be binding on the defendants.

The court delivered the following decree:

The case before us is upon the construction of the following clauses, in the will of J. Drayton, grand-father of complainants, and father of defendants: "Provided nevertheless, that if my said son J. Drayton should die during his minority, or without lawful

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issue, I do then in *that case give, &c. &c. the five last mentioned tracts as above described under the name of Mount Pleasant, or Drayton's Cowpen, I hereby order and provide that the same shall be sold, and the money arising from the sales thereof shall be equally divided in equal shares among my four surviving sons, William Henry, Charles, Glen, and Thomas, or the survivors of them; as also the house in Broad-street, in Charleston aforesaid, in the event of my son John Drayton's death, under age or without lawful issue; and on the death or marriage of my wife, I hereby provide, order and direct, that the same shall be sold, and the money arising from the sale to be paid in equal proportions to my four surviving sons abovementioned, or the survivors of them." In the subsequent clause are these words: "But in case my said son John should die without lawful issue, or during his minority, I hereby order, will and direct, that all his estate real and personal, shall be divided equally in just and equal shares, amongst his surviving brothers, that is to say, such part of his estate as is not otherwise appropriated and disposed of according to the tenor of this will." The testator died soon after making his will, and all his sons were then living. William Henry died some months afterwards, and the youngest son John is since dead under age, and without issue. The law is now so settled as not to be disputed, that the words equally to be divided in equal shares in a will, make a tenancy in common, though they may be controlled by subsequent restrictive words, more plainly indicative of testator's intention. The only question then in this case is, what construction is to be given to the restrictive words, or the survivors of them, in the first clause, and the words surviving brothers in the second; that is, to what time the survivorship shall be limited, whether the testator's death, or the death of his son John. In the case of wills, the governing rule of construction is the intent of testator, and that intent must be collected from the whole complexion of the will, ex visceribus testamenti, so as to leave the mind quite satisfied about what the testator meant, and to construe conformably thereto, so far as it is possible, consistent with the rules of

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law; and where *sentences are doubtful or ambiguous, the exposition ought to be made according to the testator's intent, which lord Coke calls the pole star to guide judges in their determination. In some cases equity will construe a will against express words, to make it take effect according to testator's intent, and reject inconsistent or contradictory words. On these principles then we shall proceed to consider the will of testator. We must previously observe, however, that

on the careful reading of it, it appears to be very unskilfully drawn, by one no way accustomed to technical expressions. Some of the bequests are so awkwardly introduced and blended with others, as leave no room to doubt of his want of professional assistance, and that it was done when he was in extremis, inops concilii; for in the devise to his son John, after enumerating the lands given to his wife, which he thereby gave to his son on a certain contingency, he introduces a bequest to his wife of the house in Broad-street for life, provided she continue his widow so long. That the testator did not intend to make an equal distribution of his estate, cannot be denied, because it is evident on a perusal of his will, that he gave more to his youngest son than to any of his other children; and to the youngest sons of his first and second marriages, more than the eldest sons of those marriages respectively; and there can be no doubt that a testator may make such a capricious disposition of his estate as he shall think proper—there is no law to control him. In this will it is to be remarked that the testator in his bequests to the four eldest sons, has given them the absolute property in the estate without any limitation over; but in the devises to John, he has limited over the whole property, particular parts of it to his sons Charles and Thomas, and the rest of his four surviving sons by name, or the survivors; and in the second clause to his surviving brothers; which evidently shews that the testator had an idea it was probable they would survive his son John. It was certainly his intention that his four sons should have equally the money to arise from the sale of Mount Pleasant plantation, or the house in town, or why be so particular as to name them? and though testator has made use of the words his sur-

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viving *brothers in the last bequest, we think that ought not to vary the construction, but that it should be the same, the intention appearing to be precisely the same. As the testator has fixed no time when the survivorship is to take place, we are of opinion from the authority of former adjudications, that it must be confined to the time of his death; for, supposing it had so happened that three of the four sons had died before John, what would have become of the estate? The survivor could not have taken, because it is limited to the survivors: One only then having survived, he could not be entitled within the words; and certainly not the intention of the testator. It must then have been considered as a lapsed legacy, and been distributed as a part of his estate, undisposed of by his will, which he never intended. The case of Stones and Heurtly, 1 Vesey, 165, comes nearest to this. That indeed respected lands; this is to be considered only as personal estate, as the testator leaves orders, that to be converted into money: In that case however, the court determined that it was a tenancy in common, and the three children having survived the testator, the representatives of the one who died afterwards should take the share of the mother, and restrained the words survivors or survivor to the death of testator. Rose on demise of Vere v. Hill, 3 Burr, 1841, is grounded on the above case, and that of Stranger v. Phillips. So in the case of executors of Elliott v. executors of Smith, determined in this court, the grand children were let in for a share of the residuary estate, although the will expressly directed that if any or either of the children died before the time appointed for the delivery of the portions, it should go to the surviving children, share and share alike; thereby confining the survivorship to the testator's death. And the case of Sealy v. Laurens [1 Desaus. 137] was afterwards determined on the same principles. With regard to the house in Broad-street, the construction must be the same as on the other parts of the estate bequeathed to John; but testator's wife not having married, and being still living, the decree cannot have any effect till that event. Overrule the demurrer, and defendants ordered to answer.

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*Case LXXXV.

Present—Chancellors Hutson, Mathews and Rutledge.

JOHN MURRELL, Administrator of George Simmons, Jun., Deceased, v. G. GREENLAND and JOHN and GEORGE PARKER.

(June, 1793.)

[*Bonds* ⇐27.]

Bond given by a son for his father's debt, voluntarily, and without any fraud practised on him, is good.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 30; Dec. Dig. ⇐27.]

[*Account* ⇐25.]

Court corrected one error in the account, but refused to open the account generally.

[Ed. Note.—For other cases, see Account, Cent. Dig. § 148; Dec. Dig. ⇐25.]

The bill was filed to obtain a perpetual injunction on a bond alleged to have been obtained by the fraud and importunity of Greenland from a young man, on his coming of age, for a debt said to be due by his father's estate on account, but which was not justly due to Greenland. The defendant Greenland swore that the bond was obtained from G. Simmons the younger, fairly and without importunity, for a debt due by his father (whose estate he inherited) on an account which he knew and admitted to be justly due to him.

The defendant G. Parker swore that the bond was assigned to him for a valuable consideration: and that on applying to Mr. G.

Simmons the obligor, for payment, he promised payment, and made no objection to the justice of the debt, though he complained of the indelicacy of Mr. Greenland in assigning the bond without his knowledge.

The court said that the only question was whether the bond should be set aside as obtained by fraud or imposition, and the account of Greenland opened and unravelled. The court said that this ought not to be done in the present case, because it appeared from the testimony that the bond had been given voluntarily, and without imposition. That (though the son had given his own bond for his father's debt) there was no law which declares that a bond given voluntarily, and under no restraint, should be void. To be sure, if it were merely voluntary, it would be postponed to real debts, even simple contract debts. As, however, there was an ascertained error of £45 in the account on which the bond had been given, the court ordered that sum to be deducted from the principal of the bond, but refused to open the account generally, there being no proof of fraud or surprise in obtaining it. The balance of the bond and interest was ordered to be paid. Read for complainant—Ward for defendants.

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1 Desaus. *333

*Case LXXXVI.

Present—Chancellors Hutson, Mathews and Rutledge.

LLOYD and MOTTE, Trustees of Inglis, for the Children of Mrs. Inglis, v. Executors of ALEXANDER INGLIS.

(June, 1793.)

[*Trusts* ⇐43.]

A wife joins her husband in conveying her real estate in fee to a third person; and he conveys it back to the husband: the husband afterwards conveyed certain lands and slaves to trustees, for his children and then dies insolvent; his creditors insist on being paid out of the lands. The trustees insisted that the husband and wife intended to convey the land originally in trust for their children, but the trusts were omitted by mistake. Parol evidence was offered to prove this, which was ultimately rejected, as contrary to the statute of frauds. The land was decreed to be liable to the husband's debts.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 65; Dec. Dig. ⇐43.]

The bill states that Alexander Inglis, by intermarrying with Mary Deas, became entitled to a considerable personal estate, and also seized in right of said wife of a considerable real estate. That said Alexander Inglis being desirous of having said real estate of said wife vested in himself, in order that he might thereby divide the same, or an equivalent thereto, amongst the children of the said Inglis and wife in such manner as he might think proper, (some of their children being already partially provided for) said Inglis applied to his wife, requesting her to execute conveyances to vest said estate in himself, for the purpose aforesaid. That said Mary Inglis assenting, did accordingly send to Lambert Lance, attorney at law, to draw the aforesaid conveyances, and in giving instructions for the same, informed him that she intended vesting said real estate so far only in her said husband as to enable him to dispose thereof in such manner and to such children as he should think proper; but not to enable him to convey the same to a stranger, nor to be liable to his debts, unless he would settle an equivalent thereto upon said children; to which said Inglis, present, assented. That the said Lance did accordingly draw certain conveyances from the said Inglis and wife to John Lloyd of said state, and from him back again to said Inglis, for vesting said real estate of said wife in him; but by some mistake, owing to the great haste with which said conveyances were drawn, in consequence of Mrs. Inglis' situation, omitted inserting the necessary trusts, whereby said real estate became absolutely vested in said Inglis at law. That some very short time after the execution of the said conveyances, said Mary Inglis died; and Alexander Inglis some time after mindful of the trust on which said real estate was conveyed to him, did, by lease and release, dated 22d and 23d, day of August, 1785, convey to John Lloyd and Isaac Motte, and George Inglis, their heirs

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&c. certain lands *and slaves in said indenture specified, in trust for the children of the said Alexander Inglis, and Mary his wife, and their heirs forever, in such manner, upon such conditions, and in such shares and proportions, as the said Alexander Inglis should afterwards by will or otherwise direct, limit and appoint. That some time after the execution of said conveyances, the said Alexander Inglis died, having first made a will, and appointed sundry executors thereof, of whom only William Marshall and Alexander Inglis, jun. have qualified; in which said will he devised and bequeathed all the real and personal estate so conveyed to the complainants in trust as aforesaid, to and amongst the children of the said Alexander Inglis, on the said Mary Inglis begotten. That after the death of said Inglis, the said William Marshall and Alexander Inglis, jun. executors as aforesaid, possessed themselves of the aforesaid real and personal estate so conveyed to complainants in trust, and have received the profits thereof. That complainants have since the death of said Inglis, applied to William Marshall and Alexander Inglis, jun. for possession of said real and personal estate, and for an account of the profits thereof received by them since the death of said Alexander Inglis. But that they conceiving that the said conveyance of real and personal estate by the said Alexander Inglis

to complainants, is void against the creditors of the said Inglis, and that the estate of said Inglis, exclusive of the estate so conveyed, is insufficient to discharge his debts, refuse to deliver to your orators possession of the estate so conveyed to them as aforesaid, and to account for the profits thereof received by them since the death of the said Alexander Inglis.—The bill therefore prays that possession of the aforesaid real and personal estate may be delivered to the complainants, and that the defendants may be compelled to account for the profits thereof which have been received by them since the death of the said Alexander Inglis; and that such further and other relief may be given to complainants as the court shall think fit.

Answer admits that testator Alexander Inglis intermarried with Mary Deas, where-

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by he became entitled to *a considerable personal estate; and also to a qualified right of a real estate. That his wife joined with him in conveying to John Lloyd, one of the complainants, her real estate; and that said John Lloyd re-conveyed the same to the testator of defendants; but defendants were not privy to any agreement or conversation between said Mary and their testator relative to the objects of said complainants, or the conditions on which the same was made; nor do they know that the consideration and condition in bill mentioned were terms stipulated by the parties, or the motives which gave rise to the conveyance, being ignorant of said business, otherwise than as they heard from Mrs. Inglis herself. That said Alexander Inglis did make conveyance in bill mentioned, dated in August 1785, whereby he conveyed the property mentioned in complainants' bill, to complainants and Mr. George Inglis; and that defendants have possessed themselves of said property, conceiving the same liable to their testator's debts, which they believe will not be satisfied out of the remainder of his estate, if the property claimed by complainants in behalf of the children should be adjudged them. The answer then concludes praying dismission with costs, &c. &c.

Mr. Lance was examined as a witness without prejudice to any objection which might be made to the admissibility of such parol evidence. He stated that it was intended the land should be held in trust for the children of Mrs. Inglis. He understood from Mrs. Inglis that she wished the estate to be placed in the hands of her husband in such manner as would enable him to divide it among such of her children as were most deserving of it, and that one child should not take the whole. That considering Mr. Inglis a rich man, he (the witness) drew the titles in such a manner as merely to divest Mrs. Inglis of the estate, and put it in Mr. Inglis's power to fulfill her intentions. Mrs. Inglis was then in a very bad state of health, and she died before the execution of the trust deed from Inglis to Lloyd and Motte. It was objected at the hearing that this parol evidence was inadmissible, being to vary a deed which would be contrary to the statute of frauds.

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*Mr. Parker for complainants contended that the doctrine of trusts is entirely with this court, and the common law has no cognizance of it. The statute of frauds would apply at common law, but not here. Trusts respecting personal estates are not included in the statute of frauds; and parol evidence is admitted respecting personalty, even in contradiction to a deed. Mr. Parker produced the deed executed by Inglis, after the death of his wife, as evidence of the parol trust, to which it was to give effect and operation. As this court would have compelled Mr. Inglis to do what had been agreed to be done, a fortiori, it will support the execution of the trust which has been made by Inglis. 3 P. Wms. 337. If Lance's evidence is admitted, it establishes the parol trust. The statute of frauds relates only to transactions between the parties themselves, and not to creditors; and an executor is not obliged to plead the statute in favor of creditors. 2 Atk. 155, 417. Burr. 2628. If defendant waives the statute of frauds, no one else has a right to set it up for him, not even the court. 1 Atk. 526. 2 Vesey, 631, 3. The creditor can have no more equity than his debtor. Inglis did not record the deed of trust; if he had, he would have brought all his creditors upon him. 3 Co. Rep. 80, 89. The deed is bona fide, and for valuable consideration. Parol evidence may be produced to prove a parol trust. See 3 Wilson, 275.

General Pinckney for complainants insisted that the creditors of Inglis could never have trusted him on this property, because all his debts were contracted previous to the execution of the deed, which divested the property out of Mrs. Inglis. The deed from Mr. and Mrs. Inglis to Lloyd, was dated the 23d July, 1785. The deed of trust from Inglis to Motte and Lloyd for the benefit of his children, as he might direct by will or otherwise, was dated 23d August, 1785. Cited 2 Ves. 377. 2 Vern. 380. 1 Eq. Cas. abr. 19. 2 Eq. Cas. abr. 749, 310, 260.

Mr. Smith for defendants said, the court is obliged to take notice of the statute of frauds, though not pleaded; and that statute prevents the admission of parol evidence in such a case; and without the parol evi-

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dence, the com*plainant has not made out any case for the court to decree upon. Cited 2 Vern. 98, 621. Cases Temp. Talbot, 240. 2 Atk. 372, 172, 383.

Mr. Lee for defendants said, the doctrine is settled, that even in cases between the parties, and no third persons or creditors interested, the court will not admit parol evidence to shew what was the intention of the parties by the deed, and that there was something omitted. See Comyn's, title chancery, 171, 175. 1 P. Wms. 618, 620; and if the parol evidence be rejected, the complainants have no ground to stand upon.

Mr. Pringle for defendant said, where a statute declares a debt to be void ab initio, an executor is bound to plead it, or he is liable to be charged with a devastavit. Powel, 430. 276, 294, 5. The statute of frauds is a remedial law, and the court will give it that construction which will advance the remedy, and prevent the mischief.

Mr. Rutledge for defendants said, the statute of frauds forbids the admission of parol evidence to establish a declaration of trust. If a deed is not executed agreeably to the statute, you cannot bring a third person, who was standing by and saw the execution, as a supplementary evidence; for, as he did not sign his name as a witness, he cannot be admitted as such by parol. Cited 2 Ves. Lord Townsend v. Windham. 3 Atk. 8. 2 Bla. Rep. 1249.

This case was, on motion for a re-hearing, argued a second time. Afterwards, Chancellor MATHEWS (in whose handwriting the decree is extant, corrected by Chancellor HUTSON) delivered the decree of the court:

This is a demand made by trustees under a deed, which it is contended, if admitted to operate according to the intention of the grantor, will materially affect the claim of the creditors; in whose behalf it is contended, that Mr. Inglis had no right to make such a deed, because there is no legal evidence that the deed from Mr. and Mrs. Inglis to Mr. Lloyd, was intended as a trust for the benefit of their children; but that on the contrary, it is a plain and absolute conveyance in fee simple from Inglis and wife to Lloyd, and so of Lloyd back to Mr. Inglis. That the parol evidence offered and

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admitted in this cause, *ought to be disregarded, and judgment to be given on the deed alone. Although the arguments were very long, and placed the case in every point in which it could possibly be viewed, we think there is but one to which our attention is to be confined, and on which it will be necessary for us to decide, viz. the deeds from Inglis and wife to Lloyd, and from him to Inglis. As to the parol evidence of Mr. Lance, although it was refused at the first hearing, but admitted at the second, yet we are of opinion that no kind of notice should be judicially taken of it, as such cognizance would be attended with dangerous consequences, and would be in direct violation of the true intent and meaning, and of the objects contemplated by the statute of frauds. A distinction has been taken at the bar between the admission of parol evidence to prove a trust of personal and of real estate: That in the first case it is admissible, though not perhaps in the second; in the latter, it clearly is not; and that is the nature of the case now before us. And we are firmly supported in this opinion by the authorities of Brown v. Selwyn, reported in Talbot's cases, and which was affirmed in the house of lords, by the case of Ulrick v. Litchfield, 2 Atk. which respected personal estate; but still, the parol evidence was not admitted, though the chancellor said he wished to do so, yet he was not authorised to follow his inclinations: also, by the case of Parteriche v. Powlett, in the same book, even when the parol evidence had been heard, yet the chancellor in giving his decree said, "he should pay no regard to it, for to add any thing to an agreement in writing, by admitting parol evidence, which would affect land, would not only be contrary to the statute of frauds and perjuries, but also to the rule of common law before that statute was in being." By the case of Montacute v. Maxwell, in 1 P. Wms. where the chancellor said, "that one who relies on the honor, word, or promise of another, the statute making those promises void, equity will not interfere." This is similar to the case before us, for much stress has been laid on Mrs. Inglis' intention of creating a trust for the benefit of her children, at the time she executed the deed which de-

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prived her of *her inheritance in the lands in question: But as it was no more than an intention on her part, it is from hence to be presumed that she placed an implicit confidence in her husband to have the same carried into effect; and there can be no doubt but that the trust deed from Inglis to Lloyd and Motte, and his will in consequence thereof, would have fulfilled such intentions, had there been no creditors in the case: But as there are, and they have put in their claims, we are bound to notice them accordingly. The case of Dalzell and wife v. Timrod, determined in this court, where parol evidence was read to prove that there was a mistake in the deed, owing entirely to the drawer of the deed being ignorant of the technical meaning of the word spinster; the intention of the grantor in that case being to convey to Catharine M'Infuss, the wife of Michael M'Infuss, and not to Catharine the daughter. But the court overruled the evidence, declaring that they would not admit parol evidence to explain away the words of a plain and solemn deed. In the case of Todd and wife v. the executors of Rivers [1 Desaus. 155,] also determined in this court, parol evidence was admitted to

prove that a bond and mortgage was given merely as a counter security; but in that case the evidence of several persons was full and clear to this point; therefore, the court allowed the evidence to stand, and granted relief accordingly. For, it not being a bona fide debt, but merely a cautionary engagement by one party, to save the other harmless, as his security, these facts being so clearly proved, under the particular circumstances of the case, the court did allow the parol evidence; and this is the only instance which we can recollect of its ever having been admitted in this court. But in the same cause it appeared, that another bond and mortgage was given for the same purpose, on another account, but for want of sufficient proofs, the court refused to interfere. In the case also of Olyphant v. the executors of Singleton, determined here, the court would not admit the parol evidence that had been offered as sufficient to set aside the bond. From the train of adjudications here referred to, and for the reasons

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we have offered, we think we are well *warranted in rejecting the evidence of Mr. Lance. And as the case then stands simply on the deed from Lloyd to Inglis, we cannot hesitate a moment to say it is a case in which this court cannot interfere: And whatever might be our private opinions, and however hard we may think the case is with regard to minors, yet we cannot, consistent with the rules of law, pursue any other line of conduct, but such as they prescribe. The bill must therefore be dismissed with costs.

[The court said, that notwithstanding the decree, it would be open for the defendant to file a bill against Mr. Lloyd, to discover whether the deeds from Mr. Alexander Inglis and his wife, were upon any and what trusts; and when the deed was executed; and at what time delivered to his possession. This was accordingly done; but Mr. Lloyd in his answer stated, "that neither Mrs. nor Mr. Inglis at the time of the execution of the deeds of conveyance from them to him, ever signified to him that it was their intention to create a trust estate." That with respect to the settlement made by Mr. Inglis, after his wife's death, he (Mr. Lloyd) was not consulted about it; but Mr. Inglis delivered him as trustee a deed under a sealed cover, which he said was a settlement of the property he had acquired by marriage on his wife's children; and the deed remained unopened till some years afterwards, when Mr. Inglis' property was advertised for sale by his creditors; upon which, he advised him to take the advice of counsel as to its validity, and he re-delivered the deed for that purpose. This answer not establishing any trust in the first deed, the decree was acquiesced in.]

1 Desaus. 340

Case LXXXVII.

Present.—Chancellors Hutson, Mathews and Rutledge.

ANN FITZPATRICK and MARY GALLAGHER v. O'BRIEN SMITH, Administrator of John Fitzpatrick, and Kyrian Fitzpatrick.

(June, 1793.)

[*Shipping* ⇐68.]

The court will not admit parol evidence to shew that an absolute bill of sale is merely conditional and a security. It might be another question as to creditors.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 290; Dec. Dig. ⇐68.]

[*Arbitration and Award* ⇐82.]

Award of arbitrators supported. Captain of ship not entitled to the freight of money. Sale of vessel fairly made is valid, though sold very low.

[Ed. Note.—Cited in Shinnie v. Coil, 1 McCord Eq. 482.

For other cases, see Arbitration and Award, Cent. Dig. §§ 440–450; Dec. Dig. ⇐82.]

This was a bill filed by the mother and sister of John Fitzpatrick, deceased, for an

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account of his estate, and *other purposes. The bill charged that the deceased left a considerable property in bonds, negroes, and a brig called the Mary. That O'Brien Smith administered, and took possession of the estate; and complainants have applied for an account and settlement without success. That O'Brien Smith had employed the negroes of the estate in planting his own lands, and refused to account for the proceeds of their labor, under pretence that the negroes and other property were conveyed or assigned to him, though it alleged that such assignment was a mere security for an inconsiderable debt. The bill charges that Kyrian Fitzpatrick received £500 sterling for the charterage of the brig Mary (of which he was merely captain) from Charleston to Amsterdam, and the freightage of said brig back to Charleston, which is unaccounted for. And that the administrator and Kyrian Fitzpatrick confederating together, the brig was put up to sale, and bought in by the latter at a very low price. The bill prays for an account and settlement, and a subpœna duces tecum, for the production of the books and papers of John Fitzpatrick's estate. The answer of O'Brien Smith admitted that John Fitzpatrick died possessed of several bonds and notes for money due him, but he was more largely indebted to others. That defendant administered on the estate, out of which he has furnished complainants for their relief £20 and sundry articles. Defendant denied that the complainants have any right to the negroes formerly belonging to the deceased John Fitzpatrick, because the latter had in his life time made an absolute bill of sale for them, in consideration of £420 which he had advanced him. Defend

ant admits that John Fitzpatrick died possessed of a brig called Mary, and that defendant caused her to be sold; but he denies that he confederated with Kyrian Fitzpatrick to have her sold at a low price; on the contrary, the defendant bid against him, and thereby made him give a higher price than he would otherwise have done. Defendant is ignorant of the transactions between John and Kyrian Fitzpatrick, except as far as an account was rendered by the latter, by which it appears he was indebted to the deceased in £101 3s. 2d. The defend-

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ant denies *that he had refused to account, but was always, and is now ready to account with the complainants. The defendant Kyrian Fitzpatrick states, that he knew nothing of the property of John Fitzpatrick, except that he had purchased the brig Mary for £800 in bonds of small value. That he himself purchased the brig fairly at public auction after the death of John Fitzpatrick for £140 and that she was very rotten and worthless, cost him great sums in repairing, and after one or two hazardous voyages, he sold her for £180. That after he purchased her, he left more than was due by him, on her account, in the hands of Thomas Martin, the agent of the administrator. The defendant has advanced some money to the complainants, and is ready to account and settle with the estate.

Mr. Harper for the complainants stated, that the principal questions were, whether the bill of sale from John Fitzpatrick to O'Brien Smith was not merely a security for payment of a debt; and whether the property was not really the estate's, and O'Brien Smith a trustee for it. Whether the purchase of the brig made at the sale by Kyrian Fitzpatrick, was not made for the benefit of the estate of John, and Kyrian merely a trustee. And whether the cargo brought by captain Kyrian Fitzpatrick to Philadelphia, was not the property of John Fitzpatrick; and the cargo brought from Philadelphia to Charleston, purchased with the proceeds of the former, and therefore to be accounted for as the property of the estate of John Fitzpatrick. At the hearing, the following evidence was given:

Mr. O'Hara swore, that when captain Kyrian Fitzpatrick was going his last voyage, he told him the vessel owed him about £150 and on his return, he told witness the vessel owed him about £700 but that the cargo was worth £800 or £900.

Mr. Manson swore, that the tackle and apparel of the said vessel, were worth almost £250. Port money is usually allowed in foreign ports.

Graham stated that the sale was a fair one, though she brought only £140.

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*Captain Thompson stated, that the vessel might have been worth about £400. Port money is not usually allowed here. If a small sum of money is put on board, the captain usually has the freight of it; if a large sum, the owners have it.

Mr. Hazlehurst stated, that captain Kyrian Fitzpatrick was a respectable sea captain. He did all the business of the vessel. John Fitzpatrick was a necessitous man. Primage from Charleston to Amsterdam is 5 per cent. and more from there back. The captain receives his primage from the owner of the goods, not of the vessel. Port money is allowed at Philadelphia. Captain not entitled to all the freight on large sums of money shipped; but he should have half, on account of his responsibility.

Mr. Stewart stated, that if the captain does the business of the vessel, and charges no brokerage, he is entitled to port money.

Mr. Williamson said, that from hence to Philadelphia, the captain always received the freight of money, be the sum what it may. This vessel was a very bad one; he would not have accepted her as a gift.

Mr. Peppin states, that it is the general custom to allow the captain the freight of money. The primage to London is 5 per cent.

Mr. Geoghegan states, that he was at the sale of the vessel. It was a very fair one. Mr. Smith bid repeatedly on captain Kyrian Fitzpatrick, who was offended at it. He heard Pritchard the ship carpenter tell captain Fitzpatrick not to give more than £150 for her.

Mr. Mey stated, that the primage from Holland is 10 per cent. to America. He sold the vessel to John Fitzpatrick. He parted with her because he thought her a bad vessel. He got £800 in old bonds.

Mr. Martin stated, that after captain Fitzpatrick had bought the vessel and repaired her, he heard a report that he had bought her for the estate; whereupon, he offered to deliver her up for the price of the cost of repairs, but it was refused.

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*Mr. Corbett stated, that Mr. Smith told him in the beginning of 1791, that he would send Fitzpatrick's rice to town.

Mr. Harper for complainants contended, that the vessel had been sold greatly below her value, and ought to be accounted for at her value. That the primage on the passengers ought to be struck out of the account, as it was improperly made a charge against the vessel. That Mr. Smith's declaration to Corbett, that he would send Fitzpatrick's rice to town, shews that he did not look upon the sale of the negroes as absolute. It was a mere security to cover a small debt; otherwise the rice made by these slaves could not have been called Fitzpatrick's. After the date of the bill of sale, it appears that John Fitzpatrick bought cloth for the negroes, and left it to be made up for them. His estate

ought to have the benefit of them, after paying the money advanced by Smith.

Mr. Dom. A. Hall, and General Pinckney for defendants, argued, that the complainants claiming as the representatives of John Fitzpatrick, can be entitled to no more equity than he would have been; and he would not have been permitted to deny his own deed, and say it did not mean what it expresses on its face. The rice mentioned by Smith to Corbett to be Fitzpatrick's, was the rice that had been planted by Fitzpatrick's negroes before he sold them to Smith. The creditors of John Fitzpatrick are not before the court; so that this deed, if it were really voluntary, cannot be shaken in this cause; for though by the statute of 13 Elizabeth, gifts to protect property from creditors are void as to them, they are good between the parties.

Chancellor RUTLEDGE delivered the judgment of the court. There are five points for determination in this case. 1st. Whether the bill of sale made by John Fitzpatrick to O'Brien Smith was bona fide, and for valuable consideration, and absolute; or only a security for an unliquidated debt due by John Fitzpatrick to O'Brien Smith? 2d. Whether an award made between the parties by arbitrators, should be set aside? 3d. Whether the cargo is the property of Kyrian

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Fitzpatrick or John Fitzpatrick? *4th. Whether Kyrian Fitzpatrick should be allowed to retain freight for money carried? 5th. Whether the sale of the brig was fair and open? As to the first, the defendant O'Brien Smith swears, that the bill of sale was for valuable consideration, for a debt of £420 justly due him, and without condition; and in order to avoid the imputation of fraud, he also files an account, the items of which make up the amount. He needed not have done this.—The complainant now insists that he should go into proofs of the account. But as the greatest part is for money lent, it is presumable when John Fitzpatrick gave the bill of sale, the vouchers were given up. It would be unreasonable to order the account to be unravelled now. There might be a difference if the creditors of John Fitzpatrick were complainants. Parol evidence was offered to shew the bill of sale was a mere security, and the conversations of defendant Smith with two of the witnesses, were adduced to shew the nature and effect of the bill of sale. The court has frequently decided not to admit parol evidence to contradict or explain a deed, contrary to what appears on its face, unless there is a charge of fraud in obtaining it. But here the deed itself is confirmed by the positive oath of defendant Smith, which stands wholly unimpeached, except as to the loose conversations stated to have taken place several years ago. The court is of opinion that the bill of sale must be considered absolute, and not conditional, or merely as a security. The account cannot now be investigated. 2d. The award was made by persons chosen by the parties, and made up with great care and labor, and there is no charge of fraud or partiality on the part of the arbitrators; the award therefore is conclusive: let it be confirmed. 3d. The cargo from the evidence, appears clearly to be the property of Kyrian Fitzpatrick, and not of his owner. 4th. As to the freight for the money from Amsterdam to Philadelphia, there appears to be no fixed custom that the captain of the vessel should have it. There is a difference of opinion among the witnesses. It seems to be the custom between this port and Philadelphia; but it is not established by testimony as to other trades. The defendant

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Kyrian *Fitzpatrick, the captain, must account for this freight to his owner. 5th. The evidence shews clearly, that the sale of the brig was fair and open, without fraud or collusion, and the defendant Kyrian Fitzpatrick, was the highest bidder, and really gave the full value. The court therefore decreed that Kyrian Fitzpatrick should pay to the administrators of John Fitzpatrick, the sum (£123.) awarded by the arbitrators, to be due by him to the estate of John Fitzpatrick; and also the freight of the money from Amsterdam to Philadelphia, deducting primage; and that he do pay all the costs of this suit, except those of defendant Smith, which must be paid by the complainants.

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1 Desaus. 346

Case LXXXVIII.

Present.—Chancellors Hutson, Mathews and Rutledge.

DE BARDELEBEN v. BARNARD BEEKMAN and SAMUEL BEEKMAN.

(June, 1793.)

[*Fraudulent Conveyances.* ⟸154.]

If possession does not accompany bill of sale, and the same be not recorded, it shall be void as to the creditors, though no doubt of the fairness of the transaction.

[Ed. Note.—Cited in Nelson & Co. v. Good, 20 S. C. 234.

For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 485–492; Dec. Dig. ⟸154.]

[*Fraudulent Conveyances* ⟸132.]

[Possession of personal property by the grantor is not fraudulent, where the conveyance has been duly recorded.]

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 414; Dec. Dig. ⟸132.]

This was a bill filed by complainant to discover if the defendant Barnard Beekman had not made certain bills of sale of a number of slaves to his nephew Samuel Beekman, in order to cover them from his creditors, and particularly from the complainant, who had recovered judgment against Barnard Beek-

man, on bonds in which he was security. The defendants in their answer stated that Barnard Beekman was justly indebted to his nephew Samuel Beekman, and had executed several bills of sale, conveying to him a number of negro slaves, whom he accepted in payment. That several of them were delivered to, and actually in the possession of Samuel Beekman. But that there were others who were necessary to the immediate service, attendance upon and comfort of his aged and venerable relation; and whom therefore he permitted to remain with him, and in his service. The bills of sale were proved, and shewn to have been executed to satisfy debts bona fide due to Samuel Beekman; and they were all, except one, recorded in the proper offices, in proper time. The two de-

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fendants were men of great probi*ty, and their answers were corroborated by proofs which were satisfactory. But it was contended by the complainant's counsel, that the personal property which remained in the possession of Barnard Beekman must, notwithstanding the bill of sale to Samuel Beekman, be subject to his debts. The securityship was in 1784; the bills of sale were in 1787, and were recorded before complainants got judgment at law, except one, which has never been recorded. Some of the negroes which were left in the possession of Barnard Beekman, were included in the bill of sale recorded, and some in the bill of sale unrecorded. All that remained in the vendor's possession must be subjected to his debts, according to Twine's case, reported in 3 Coke's reports. See too 2 Durnford and East, 537, which was decided by twelve judges of England in the exchequer chamber. For the defendant it was contended, that though these were bills of sale, made bona fide to pay, or rather to secure a debt, yet it was intended to make it executory, so as to cover the just debt due to the defendant Samuel Beekman; and that being executory, the property might remain with the vendor, without being liable to his debts. The court delivered the following decree:

The court said, that the only question in this case is, whether certain negroes in the possession of Barnard Beekman are his property, and liable to his debts, or the property of Samuel Beekman. The latter produced bills of sale for them as far back as 1787, previous to complainant's obtaining judgment and execution against Barnard Beekman. There are two bills of sale, one of which is recorded, and the other not. The transaction between Barnard Beekman and Samuel Beekman appears to be quite fair. The debts for which the bills of sale were given, were justly due; satisfactory vouchers were produced; all the negroes therefore, the possession of whom went with the bills of sale (and there were some under both) are clearly Samuel Beekman's property. But it is contended that Barnard Beekman's remaining in possession of the other negroes, and exercising all acts of ownership over them, he is to be consider-

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ed the real *owner of them, and that they are liable to his debts. Possession certainly is the criterion of personal property, and the vendee's permitting the vendor to continue in possession, is prima facie, to countenance fraud by giving the vendor a false credit. The court has no doubt of the fairness of the transactions in this case: and that the conduct of Samuel Beekman was even laudable to his aged relative; but the law must prevail. There is, however, a distinction between the negroes which are yet in Barnard Beekman's possession; because some of them are named in the recorded bill of sale, and some in the unrecorded. As to those in the recorded bill, the court has no difficulty in declaring them to be the property of the defendant, Samuel Beekman, though they remained in Barnard Beekman's possession; because every one could have access to the public records, and obtain correct information, and no false credit is held out. But as to those in the unrecorded bill of sale, and in possession of Barnard Beekman, the bill of sale must be considered void on the principle that possession is the criterion of personal property. It was therefore ordered and decreed, that the negroes in the possession of Barnard Beekman, named in the unrecorded bill of sale, be considered as his property, and as to those the bill of sale is considered void —Costs to be paid by defendant, Barnard Beekman.

Calhoun, E. Rutledge, and Desaussure, solicitors for complainants—Pringle and general Pinckney, solicitors in the cause for defendants.

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1 Desaus. 348

Case LXXXIX.

Present—Chancellors Mathews and Rutledge.

MARY HAIG, Widow of Dr. George Haig, v. The Executors of Dr. GEORGE HAIG.

(March, 1794.)

[*Husband and Wife* ⊜116.]

Deed by a father by which he gives directly to his married daughter, without trustees, several slaves, to her only use and behoof: The marital rights attach, and the property is liable to the husband's debts: Though the deed was in the husband's handwriting, yet he afterwards bequeathed them to her, which shewed his view of his rights.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 414; Dec. Dig. ⊜116.]

The bill was brought to establish a deed of gift of sundry negroes made by the complainant's father, some years after her marriage, directly to her, without the interven-

tion of trustees. The deed declared that the

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slaves *should be "to the only use and behoof of my said daughter, her heirs and assigns." It was contended for the complainant that the marital rights of the husband could not attach in this case. That the words of the deed shewed that the father meant to give a separate estate. After hearing the arguments of council, the court delivered its opinion that this being a direct gift of personal property to the wife, the legal estate immediately vested in her husband, and the marital rights attached absolutely. It was argued that the words "to the only use" of Mrs. Haig, shewed the intention to make it a separate estate; and that to give effect to that intention, the husband should be decreed a trustee for his wife.† But the court said that if the husband had manifested by any act that he so considered and understood it, or had been guilty of any fraud with respect to the negroes, something might have been said for complainant; but Dr. Haig, by disposing of these negroes by his will as he has done, shews he did not consider it, nor understand it in that manner. The cases cited are generally of wills; and it was insisted that the modern doctrine is, that the rule is the same as to deeds and wills, where the intention discernible; but the marital rights are not to be so easily overthrown. See 2 Fonbl. 321. 3 Atk. 399. Darly and Darly. The case of Ralfe v. Hudde, stated in 2 Eq. Cas. abr. 153, was relied upon for the complainant, but it is not like this case; and besides, it is the case of a will. The wife had been ill used by her husband, and lived separate from him. It was properly decided that in such a case, a direct gift to the wife should be protected. There is nothing of those circumstances in the case under consideration. See also 2 Atk. 558, Tyrrell v. Hope, which was relied on. That was like the present, the case of a deed: but it was a marriage settlement, and the husband's assent was ascertained from the fact, that he corrected the error in the deed in his own hand writing. It is true that the deed in question executed by Mrs. Haig's father, was

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in Dr. Haig's hand *writing; and it was insisted that furnished the evidence of his consent to the property being held as a separate estate under the deed; else it was asked, why make the deed of the slaves to her, to her only use and behoof, and to her heirs, if Dr. Haig was immediately after to become the absolute owner by virtue of the marital rights? It certainly was presumptive evidence of such assent; but Dr. Haig afterwards bequeathing these very slaves by his will, shews he did not consider them his wife's separate estate, or that he supposed her father meant them to be so. The circumstance of the negroes being liable to be taken by Dr. Haig's creditors, unless protected by the court under the deed, does not alter the case. The court is bound to regard the rights of creditors, as well as of married women. Neither the deed nor the circumstances justify the court in decreeing Dr. Haig to have been a trustee for his wife. If Mrs. Haig takes the slaves under her husband's will, (as they are bequeathed to her) she will be entitled to an account from the defendants for hire and labor of the slaves; but subject to the debts of the estate of Dr. Haig, like his other property. Bill dismissed—costs to be paid by defendants out of the estate.

†See 9 Vesey, 583, where a husband was decreed to be a trustee for his wife, though no trustee was mentioned in the will.

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1 Desaus. 350

Case XC.

Present—Chancellors Mathews and Rutledge.

WILLIAM SMITH v. WILLIAM BRAILSFORD.

(March, 1794.)

[*Specific Performance* ⟸41.]

Bill for specific performance of a parol agreement respecting lands. The defendant pleaded the statute of frauds, and also answered. In his answer he admitted the parol agreement as stated in the bill: and that he had taken possession of and held the land under the agreement. The court was of opinion, that the admission in the answer of the agreement, takes the case out of the statute.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 120; Dec. Dig. ⟸41.]

Bill states that complainant and defendant became joint purchasers in 1785, of a lot of land in Meeting-street, from Mrs. Taggart, for £30. cash, and £3200. payable in indents. That it was agreed one of them should settle for the purchase, and give bond. That the titles were made to the complainant, and he gave his bond. He paid taxes and all other expenses, and charged defendant with half as per agreement. In 1788, defendant afterwards proposed, that one of them should take the whole purchase, and give the other 20 guineas for his bargain. This was agreed to, and defendant was to be the purchaser, and

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*was to pay the whole debt to the commissioners of the treasury, and cancel complainant's bond to Mrs. Taggart. Complainant made and executed the title deeds, and he and defendant settled their accounts, and complainant charged defendant with the 20 guineas and taxes, and delivered the deeds; and defendant repeated his promises to pay the debt, and cancel complainant's bond. Mrs. Taggart demanded payment of defendant to no effect, though he made promises of payment to her, particularly by letter, of

the month of January, in the year 1789 or 1790. That defendant afterwards set up a pretence of a deficiency in the lot of 8 or 10 feet in depth; and refusing taking up the bond, the complainant was exposed to the demand. The bill prays relief, &c. &c. The defendant answering, admits he was jointly concerned in the purchase, and the arrangements were made as stated in the bill. He admits he agreed to take the bargain off complainant's hands, understanding that the quantity of land was as described in the deed and plat; but that on a resurvey, there was a deficiency of 12 feet in depth, and as there was no agreement in writing, he pleads the statute of frauds; but he says, if the land had been found equal in quantity to the description in the deeds, he should have held himself bound in honor, though no writings had passed, and though in fact the lots had fallen in value.

At the hearing of the case Mr. Waring gave evidence, that the lot was sold by plat, 36¼ feet front, and 188 feet in depth; that the defendant Brailsford, called on him some years after the sale, and requested a sight of the plat, as he imagined there was a deficiency in the land.

Mrs. Taggart testified, that Brailsford never mentioned any thing of a deficiency till three years after he had possession of the lot. Defendant said he had the indents, and would settle the debt.

Mr. Campbell testified, that he was present at the settlement between complainant and defendant, when the latter seemed perfectly satisfied. In July 1790, the defendant told witness (acting as the attorney of Mr. Smith) that he had indents, and would settle the matter.

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*Mr. T. R. Smith, and Mr. E. Rutledge contended, that the plea of the statute of frauds could be of no avail to the defendant, because he had taken and kept possession of the land in pursuance of the agreement, and because his answer acknowledged the agreement. Powell, 148, 292, 9, 308. 2 Vern. 412. As joint tenant the defendant could have known whether there was a deficiency; but he did not set up the pretence of a deficiency for several years after he had possession, and only when the value of the property had fallen materially.

C. C. Pinckney agreed, that if the defendant admits in his answer the parol agreement, as stated in the bill, then it is binding, for he thus renders it an agreement in writing. 1 P. Wms. 770, Hawkins v. Holmes, which is a leading case. Ambler's Rep. 586, Gunter v. O'Halsey. But the terms of the agreement must be proved, even when part executed. 6 Bro. P. C. 45. Powell 231, 291. As a joint tenant, Brailsford had a right to let Stevens make use of the land. 2. Bro. C. C. 559.

The court directed an issue to ascertain, if there was any and what deficiency in the lot. That issue has been tried, and the common law judge who tried it, has certified that the jury have found that there is no deficiency. There being therefore no deficiency, and defendant having admitted in his answer that he was bound in honor, if there was no deficiency, "the court has no difficulty in decreeing the agreement to be specifically executed for the defendant, by his answer which he signed; having acknowledged the agreement, the court considers it such an assent in writing, as overrules his plea of the statute of frauds." Decree that the defendant should accept complainant's titles to the property in question, and pay off the debt of complainant on his bond to Mrs. Taggart; and meanwhile give complainant his bond and security to indemnify him. The defendant to pay costs.

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*Chancellor Hutson having died in the winter of 1793, James Green Hunt was elected in his room, at the session of the legislature in May, 1794.

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1 Desaus. 353

Case XCI.

Present—Chancellors Mathews and Rutledge.

Mrs. KEITH v. EDWARD PERRY.

(March, 1794.)

[*Perpetuities* ⟸7.]

Bequest of the use of certain property to a lady during her life, and at her death to the heirs of her body, and to her heirs and assigns, is a good bequest, and gives her a life estate, and upon her death the property will go to her children, not subject to her husband's debts. (He was dead before any division.)

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 48, 54, 55; Dec. Dig. ⟸7.]

[*Wills* ⟸617.]

The court construed her into their, to give effect of the intent of testator.

[Ed. Note.—Cited in Sease v. Sease, 64 S. C. 221, 41 S. E. 898.

For other cases, see Wills, Cent. Dig. § 1431; Dec. Dig. ⟸617.]

The testator John Bullein, by will, after devising his real estate to his two daughters, Mary and Susanna, and their heirs forever, to be divided equally in value, directed his personal estate to be appraised and divided into four equal parts, which he particularly disposes of. The question in this case is upon the following clause: "and the remaining other fourth part, with the increase, I give, devise and bequeath to my second daughter Susanna, the use of, during her life; and at her death, I give, devise and bequeath the same to the heirs of her body, and to her heirs and assigns forever." It has been contended for defendant that the limitation over was void, as being too remote, for the use of

the property being given for life, and at her death to the heirs of her body, and to her heirs and assigns forever, the absolute estate vested in her; the last words to her heirs and assigns enlarging the estate for life given to her, and extending the limitation over to a dying without issue generally, which the law will not allow in the bequest of personal estate, as being too remote and tending to a perpetuity. The question respecting the limitation over of personal property after the death of the first taker, where it is confined to a life or lives in being, or twenty-one years after, has been so repeatedly determined to be good, that one would suppose it would hardly be again agitated; and the only possibility of a doubt that could arise in this case is, what construction should be given to the words "and to her heirs and assigns." In order to form a right judgment, and make the true construction, we must resort to the intention of testator, as expressed in all the parts of

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his will: his *meaning must be collected from the will itself, by attending to the several parts of it, by considering and comparing them together; not by an arbitrary construction, but a violent and strong presumption arising from the several parts. Now it is manifest that the testator intended an equal distribution of his whole estate real and personal (after some few legacies) between his two daughters; for in the first part of his will, where he disposes of his lands, he directs an equal distribution in value to be made between his two daughters; and when he comes to bequeath his personal estate, the same disposition is equally apparent. One fourth part he gives to each of his daughters absolutely, and in the fourth that he gives for life, he appears to be equally solicitous to make provision for their children. In the bequest to his daughter Mary, he has given it to her for life, and at her death to the heirs of her body and to their heirs forever. In the bequest to his daughter Susanna, immediately subsequent, he has used the same words, with this difference only, that the word her is put instead of the word their, which is a palpable mistake; for if it should be construed her, the provision which he intended for her children would be totally defeated, by enlarging the estate in Susanna, and vesting the same absolutely in her. And that he could not intend to do so is also further evident, by another clause in the will, where he disposes of that fourth part bequeathed to the heirs of the body, to the survivor of his two daughters (in case either of them died under age or unmarried) for life, and at her death to the heirs of her body, and their heirs and assigns forever. That courts of equity have the power of correcting mistakes which are plain and manifest, in order to give effect to the testator's intentions, where such intentions are not inconsistent with the rules of law, cannot be doubted. They frequently transpose words in a will, and sometimes have construed the word or into and, and vice versa, where it is evident that such was the testator's meaning, and that without such construction his intention would be frustrated—and in the case of Guerard v. Guerard, where the testator made a double provision for Isaac and

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none at all for Jacob, the *mistake was so grossly apparent that the point was given up.

Upon a review of the whole will, and comparing the several devises and bequests to the daughters with each other, it is obviously the meaning and intention of the testator to place them on an equal footing, and likewise to make some provision for their children after their deaths. We are therefore of opinion that to give effect to his intentions the word "her" should be construed "their." In so doing every clause of the will will have its due operation, and a contrary construction would totally defeat the intention of the testator.

As that part of the personal estate which came to the possession of complainant's husband has never been subdivided agreeable to the will, in order to ascertain the fourth that Mr. Keith became entitled to on marriage, decreed that ——— be appointed commissioners to divide the same into two equal parts or shares; one of which shares to be retained by complainant for her use during life, and at her death to go to the heirs of her body, agreeable to the will of testator: and the other part is to be considered as belonging to the estate of her deceased husband, and be disposed of accordingly, being liable to his debts; and that defendant do pay the costs of this suit.

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1 Desaus. 355

Case XCII.

Present—Chancellors Mathews, Rutledge and Hunt.

WILLIAM REYNOLDS v. The Executors of A. CALDER, Executor of H. Bailey.

(June, 1794.)

[*Husband and Wife* ⇐11.]

A bequest to daughters payable to them at sixteen years, or day of marriage: one of them marries, and the legacy is paid to her husband, he giving bond to refund if she died without issue. She had issue which died, and then she died. This was a vested legacy, and being reduced to possession by the husband, he is entitled to keep it, and not bound to refund.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 53; Dec. Dig. ⇐11.]

[*Wills* ⇐593.]

A devise of real estate to daughters, but if all his children should die leaving no lawful issue, then limited over to others. The limitation is good.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1307; Dec. Dig. ⇐593.]

The bill states that Henry Bailey, the complainant's testator, executed his last will on the 7th day of November, 1784, wherein he desired that his personal estate might be sold at public vendue, and divided amongst his family, consisting of his wife and three daughters, share and share alike; his wife to receive her part immediately on his decease, and his daughters their parts at the

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*age of 16 years, or the day of marriage, which should first happen; but in case any of his children should die before they attained the age of 16 years, or the day of marriage, then their parts or portions should go to his surviving children or child: and further, that when his youngest daughter should attain the age of 16 years or the day of marriage, then his real estate should be sold at public vendue, and the monies arising from such sale, to be equally divided share and share alike amongst his three daughters, to them and each of them and their heirs forever. "But if it should so happen that all his children should die, leaving no lawful issue of their body, then one half of their estates and portions he gave and bequeathed to his loving wife Mary Bailey and her heirs forever; and the other half to his loving nephew Archibald Calder, and to his heirs forever. That the said Henry Bailey constituted the said Archibald Calder, Andrew Townsend, and James Clarke, executors. That the said Henry Bailey soon after died, leaving his will in full force and virtue. That the said Archibald Calder was the only qualified executor of said will. That after the decease of the said Henry Bailey, two of his daughters, Mary and Elizabeth, departed this life under the age of 16 years, unmarried, and without issue; whereby their shares of the said estates became vested in the surviving daughter. That the said surviving daughter Sarah Bailey, intermarried with the complainant, who became thereby entitled to the legacies bequeathed to his said wife. That some time in the month of July, 1774, the said Archibald having previously sold and disposed of the real and personal estate of the said Henry Bailey, came to a settlement with the complainant William Reynolds, and they agreed that the said William Reynolds was entitled to receive the sum of £6339 5s. 4d. current money of the (then) province: that upon application made to said Archibald Calder to make payment of said legacy, he refused, unless the complainant William Reynolds would execute proper deeds and bonds obliging the complainant to return the amount of said legacy in case his wife died without leaving lawful issue. That the complainant not knowing the

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said Archibald to *be a residuary legatee to one half of said estate, and reposing confidence in his integrity, executed a certain deed, demanded by said Archibald, bearing date 26th July, 1774, whereby he bound himself to said Archibald to return and repay the said sum of money in case the said Sarah his wife died leaving no lawful issue; and also entered into a bond in the penal sum of £6339 5s. 4d. on the said 26th July, 1774, for the performance of the above condition; that thereupon the complainant received payment of his legacy; and that he had issue born alive by his said wife Sarah, some time in the month of , A. D. 1784, which lived about six months and departed this life. That the complainant's wife departed this life in the year 1789, without leaving any issue alive. That Mary Bailey, the wife of Henry Bailey, hath departed this life after the death of her said daughter Sarah, and leaving three children by her second husband, Mr. Eddings; and that the said Archibald Calder hath also departed this life A. D. 1777, leaving a son a minor, and a daughter, and appointed Ephraim Mikell, Thomas Whally, Ralph Bailey, and Joseph Seabrook, executors of his last will and testament. That since the death of the said Archibald Calder and Mary Bailey, widow of Henry Bailey, and of Sarah, the complainant's wife, a suit has been commenced by the executors of said Archibald, against the complainant William Reynolds, on the aforesaid bond, in the court of common pleas, in Beaufort district, which suit is now at issue depending for trial in said court and district. The bill therefore prays a perpetual injunction, as the complainant contends the limitation over is too remote to take effect; and that he ought not to have been required to give the said bond.

The executors of Archibald Calder, executor of Henry Bailey, admitted all the facts stated in the bill of complainant; but they contended that as Sarah, the daughter of Henry Bailey, and wife of complainant William Reynolds, died without leaving any issue alive, the limitation over took effect; and the defendant's testator, Archibald Calder, being a residuary legatee, they hope they may be permitted to continue to prosecute

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this suit at law, and *that the bill may be dismissed with costs. The case came to a hearing, and was argued by Mr. Ford for complainant—and General Pinckney and Mr. Rutledge for defendant.

Mr. Ford. The testator meant to make a distinction between his real and personal estate. The first clause makes a complete bequest, and ought not to be affected by the subsequent restrictive clause, which relates to the real estate. The time of vesting of the real estate is different from that of the personal estate. The personal was to vest when his children reached 16 years of age or day of marriage. The real, not till all his children should die without issue. This is such an indefinite failure of issue, as is too remote and void.

Mr. E. Rutledge and General Pinckney for defendant. The limitation over is not too remote: it is within the rule of a life or lives, in being, and 21 years of age. See Fearne, 353. 1 P. Wms. 663, Forth v. Chapman. And many cases decided in this court—Sams and Mathews—Elliott and Elliott—Logan and Ladson, and Keating and Reynolds in the common pleas.

The question arises on the will of H. Bailey, father of complainant's late wife. It is, whether the words of limitation contained in the 2d clause, pervaded the 1st clause, so as to render bequests contained in the 1st clause, subject to the limitations in the 2d, notwithstanding they are very different from the limitations of the 1st clause, or whether the 2d clause was not so totally distinct, both as to the property conveyed, and the limitations, as to make them totally different. By the 1st clause, the testator directed his personal estate to be equally divided between his wife and three daughters, M. S. and E. to them, and each of them, and their heirs forever. The wife to receive her portion immediately after his decease, and the daughters theirs at the age of 16 years, or day of marriage; and if any of them should die before the age of 16, or day of marriage, their portion to go to the survivors. The 2d clause begins with an "item," and goes on to provide, that when testator's youngest daughter should attain 16 years of age, or day of

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mar*riage, "then all my real estate shall be sold, and the money equally divided between my daughters M. S. and E. to them and their heirs forever." "But if all my children die, leaving no lawful issue of their body, then one half of their estates and portions I give to my wife and her heirs forever; and the other half to my nephew Archibald Calder and his heirs forever." Two of the daughters died under 16 years of age and unmarried; one of them attained 16 years of age, and married the complainant W. Reynolds, and then died without issue. The husband filed this bill to recover the personal estate bequeathed under the 1st clause to the three daughters. The 1st clause is a complete disposition by the testator of so much of his estate, as was comprehended in the clause to his daughters, who, in certain contingencies, were to have benefit of survivorship. The question is, do the limitations in the 2d clause which spoke of different property, defeat the 1st estate under the 1st clause, by converting the estate bequeathed to the daughters in the 1st clause, into a mere life estate, with limitations to the wife and nephew. The use of the word item, in a will, is construed a conjunctive, as and, or also, to connect sentences together. It has never been construed a disjunctive, but is only made use of to distinguish the clauses of the will. See 1 Atkins, 438. The 1st clause not only designates a distinct estate and property from the 2d, but all the parties are not the same. The court cannot think then they are bound by any rule of law to connect these clauses, so as to attach the limitations of the 2d clause, which are very different from those of the 1st, to the property contained in the 1st; nor does it appear that testator meant to do so—but rather the contrary. And as one of the daughters did attain 16 and day of marriage, and also survived her sisters, the court is of opinion that she took all the property contained in the 1st clause, not controlled by the words of 2d clause, and on her death without issue, it goes to her husband. The other clause takes effect, and the property goes over to the wife and the nephew. Decreed accordingly, and costs divided.

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1 Desaus. *360

*Case XCII.

Present—Chancellors Mathews, Rutledge and Hunt.

WILLIAM WASHINGTON and Wife, and R. BERESFORD, v. BENJAMIN HUGER.

(June, 1794.)

[*Descent and Distribution* ⟸84.]

A father who was tenant by courtesy sold his son's land in fee simple and received the price. To secure the purchaser he gave him a bond of indemnity and a mortgage of other land of his own. The son claims his land: the heirs of the purchaser file a bill to have the benefit of the indemnity bond and security. The father's estate being insolvent, a judgment creditor sold the land, but subject to the said mortgage, and bought it in. The son being willing to accept an indemnity for his land, and make titles to the purchaser, the court decreed that he should be paid out of the sales of the mortgaged land the amount of the price received by his father, and interest.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 324; Dec. Dig. ⟸ 84.]

[*Certiorari* ⟸35.]

[Certiorari does not lie to remove a cause commenced in the court of a state against an inhabitant of such state, by a foreign citizen, to the circuit court of the United States.]

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 47; Dec. Dig. ⟸35.]

[*Damages* ⟸67.]

[The court of equity has power to allow interest by way of damages, although it cannot assess damages eo nomine.]

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 135; Dec. Dig. ⟸67.]

[*Infants* ⟸30.]

[An infant, who brings a suit for the recovery of land within the time allowed to infants, cannot be deemed guilty of laches in the prosecution of his claim.]

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 54; Dec. Dig. ⟸30.]

On the marriage of the defendant's father, major Benjamin Huger, to defendant's mother, he became possessed in her right of a

plantation on the Horse Shoe, and at her death he held the same as tenant by courtesy, and for her children in fee. In 1772 he sold said land in fee simple to Charles Elliott: and to secure him an indemnity, in case his title should be questioned and destroyed by his (Huger's) son, (on whom the land descended) he gave bond, in penalty of £52,000 currency, with condition to pay £26,000 on such event, and gave a mortgage of a plantation called Richmond, on Pedee. Major B. Huger died in 1779, (killed in front of the lines of Charleston, opposing the enemy then besieging Charleston,) and left his son Benjamin a minor, who attained his age of twenty-one years in 1789. C. Elliott died in 1781, and devised his said plantation at Horse Shoe to his wife (now Mrs. Beresford) and to his daughter (now Mrs. Washington.) Young Benjamin Huger returned to Carolina from abroad in 1791, and brought his action to recover his land (so sold by his father) in 1792. Whereupon this bill was filed by the complainants, to foreclose the equity of redemption on the mortgage of the Richmond plantation, and that out of the sales of that place so much as the Horse Shoe land had been sold for, to Elliott, should be paid to defendant, with an allowance for the use of the plantation; and that thereupon defendant should execute good titles for the Horse Shoe land to complainants. Major Huger died insolvent, and Hamilton, a creditor of major Huger, (the youngest judgment creditor) had seized and sold the Richmond place at Pedee, subject, however, expressly, to the claims of the complainants and of defendant—and Hamilton has endeavored to remove the cause by certiorari to the courts of the United States; having been first let in to this

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court, on petition, *to protect his rights as a creditor. This court positively refused to obey the certiorari on reasons fully given.†

Mr. B. Huger, the son, having established his right at law to the land sold by his father, (under an issue directed by the court) the cause came to a hearing.

Mr. E. Rutledge and General Pinckney, for Mr. B. Huger, the defendant, contended that there could not be any question about the reimbursement of the principal sum, or price of the land sold by the father of the defendant. The father, conscious that he had no legal title to the fee simple, (being only a tenant by the curtesy) gave a mortgage of another tract of land, his own abso-

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lute *property, to indemnify the purchaser, if ever the son should question the title. Young Mr. Huger finding his father's estate ruined by the war, and he himself charged with the money spent on his education, does question the title, and shews his clear right of inheritance under his mother. He must recover. The heirs of the purchaser then file a bill to enforce their mortgage and indemnify themselves. It is of no consequence to the creditors of Major B. Huger, whether the son takes his land, and the mortgagee is indemnified by the sale of Richmond, or that

†This case of Washington and Beresford v. B. Huger, being dependent in the court of chancery, Mr. Hamilton, British consul at Norfolk, and a creditor of the late Major Benj. Huger, who had forced the sale of the Richmond land, pending this suit, and had become the purchaser, petitioned the court to be let in to protect his rights; and he was allowed to come in as a party to the proceedings. Afterwards, and before the trial of the case, he obtained a certiorari from the circuit court of the United States to remove the cause from this court to the circuit court of the United States. This writ was served on the court, and after time taken to deliberate, the court refused to obey the certiorari, and gave the following reasons for its determination.—By the court. The suit pending in the court is between citizens. An alien applies by petition to be allowed to come in and defend his interests. This was granted. Since which he has obtained a certiorari to remove the cause up to the circuit court of the United States. A writ of certiorari is a writ issued by a superior to an inferior jurisdiction, commanding the removal of a cause from the latter to the former court. But this is not an inferior court to that whence the mandate issues. No law of the United States declares it inferior, or impeaches its equality. All that the judiciary act of congress provides for, is, to give a party defendant, who is not a citizen of the state where the suit is instituted, a right to apply by petition to this court to have the cause removed into the court of the United States. That is the form prescribed, and that excludes other forms not provided by the act. This does not warrant the use of the mandatory form of a certiorari. But it is said that the power given to the courts of the United States to issue "all other necessary writs" includes the use of this writ and warrants it. This is denied. The act of congress has previously pointed out the mode of proceeding for the removal of a cause from this court to the court of the United States, which has jurisdiction, viz. by filing a petition on entering the application for the removal of the cause. It could not be intended that the same purpose might be effected by a totally different process, under a few gen-

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eral and loose words in another *part of the act. The court acts under the sanction of an oath to obey the laws of the United States as well as those of the state under whose authority the court sits and acts. Looking to those laws, the court is of opinion, that the writ of certiorari, now presented, is not warranted by the words of the acts of congress, or by any reasonable construction of them. The court is therefore not bound to pay any regard to it—Nor would the court have obeyed a writ of certiorari, if it had been issued by the supreme court of the United States, to remove the cause thither, because that court has only appellate jurisdiction (see 22d section of the judiciary act) after final decrees and judgments, in cases determined in the circuit courts, brought there by original process, or removed there from the courts of the several states, or by appeal from the district courts. And the supreme court has no appellate jurisdiction in cases determinable in the state courts, between citizens of the same state, except in the case of a title to land, where the parties, though citizens of the same state, derive title under grants from different states.

The act of congress directs, that where a suit is commenced in a state court, by a citizen of

Mr. Huger, the son, consents to give up his land on his being paid the amount for which

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it sold. He and the *mortgagee must be first satisfied. But the interest is disputed: not however on any good ground. His right to the land accrued the moment his father died, and the tenancy by curtesy was ended. But he has been kept out of his right by the purchaser, who would not and could not safely deliver him the possession till his right was legally established. Having the right, those who kept him from the enjoyment of it are bound to account to him for the rents and profits. Whoever enters on the estate of a minor must account, as a guardian, for the rents and profits. 1 Atk. 484,/ Morgan v. Morgan; decided by Lord Hardwicke in 1737. Major B. Huger's creditors stand only in his shoes. He sold his son's estate without a title in himself. He, or his estate, would be bound to account, for such sale was a forfeiture of the tenancy by the curtesy. See Co. Litt. 251. 2 Bacon. 259. The counsel also quoted Comyn, 244. 2 Vern. 608. 1 Vern. 252. 2 Vesey, 590. 1 Eq. Cas. abr. 280, as to infancy. 2 Vern. 368, as to laches. 3 Atk. 130, as to rents and profits. In cases of account both parties are actors. Eq. Cas. abr. 93, as to surety.

Young Mr. Huger having been obliged to repay all the advances made from his father's estate for his education, has a most perfect right to insist on all his rights, and to require an account for the rents and profits of his plantation whilst it was held by the purchasers: and they have a right to be indemnified out of the mortgaged premises, given expressly to protect them against these claims. Hamilton, the creditor, has no title to favor. He forced the sale of Richmond pending this suit, though the youngest judgment creditor, and he bought in on speculation: he is therefore in the light of a purchaser with knowledge of the incumbrance, and must submit to all its effects. There has been no laches in Mr. Huger. He attained twenty-one in 1789, returned from Europe in 1791, and has made his claims in less time than is allowed to minors to institute suits. He might have been obliged to have gone to the court of law to recover mesne profits; but the complainants have a

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right to come here *to foreclose their mortgage and his rights come in incidentally.

For Mr. Hamilton it was contended, by Mr. Read and Mr. Ford, that Elliott knew he was buying a bad title; therefore he and his representatives are entitled to less damages; and Huger, the son, coming in on their ground, is entitled to no more. Huger's claims are for rents and profits, and he should seek his remedy at law; this court cannot give damages. If he had sued Elliott's executors for mesne profits, he could only have recovered rents, and not interest, which is much greater. The executors had no right to charge him for his education. Huger was of age in 1789, and arrived at home in 1791. There has been laches in claiming his rights. Major Huger, the father, had a life estate in the land; therefore an allowance should be made for it.

The court afterwards delivered its judgment as follows:

It was contended that the defendant should not be allowed interest for the detention of his land, because he has been guilty of laches in not pursuing his claim earlier. To this the court answered, that having brought his suit within the time allowed to minors, he was not guilty of laches. The 2d objection is, that the defendant should not be allowed the sum for which his land sold, with interest thereon; but that he should be referred to the court of law to ascertain his damages for the detention and use of his land. To this objection (made by a creditor) the court answered, that there was no necessity nor propriety in driving Mr. Benj. Huger, the son, to his action at law for rents and profits, or damages. His father had given a mortgage of Richmond to indemnify complainants' testator, in case their title was ever questioned by his son. The son has claimed his inheritance, and the complainants have filed their bill to foreclose the mortgage to indemnify themselves. The defendant was willing to accept, out of the sales of the Richmond plantation, repayment of what his land at the Horse Shoe had been actually sold for by his father, with compensation for the use of the land, and then to

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make good titles to *complainants for the Horse Shoe land. This is a fair and reasonable arrangement. Creditors cannot interfere to prevent its completion. The creditors could stand on no better ground than Major Huger himself as to this land, and the court would have compelled him to pay his son the value of his land improperly sold. Under the bond of indemnity given in this case, with the mortgage of Richmond, the court can and

that state, against an alien or a citizen of another state, on the defendant's entering his appeal, filing his petition, and offering security, on the first day of the term, the state court shall proceed no further in the cause. The present party has not pursued the course prescribed by the law; he has not applied by petition, nor offered security—the court therefore will pay no regard to the unauthorized course he has pursued, of obtaining a certiorari; but will proceed with the cause under consideration as the laws of the state authorize.

It appears, by a note of Chancellor Mathews, on his brief, that in some shape this question was discussed before the federal court, and that "the federal court on the appeal to them determined that Hamilton, having appeared in this court, by his petition (to be heard) has made his election into what court he would go; and having acknowledged the jurisdiction of this court, that (the federal court) would not take cognizance of the cause."

will direct the allowance of legal interest, as the compensation for the use of the land. The bond of indemnity ascertains the sum for which the land was sold by Major Huger to Mr. Elliott; and this, with the interest, is the true compensation. The executors of Major Huger have obliged his son Benjamin to repay the money expended, out of his father's estate, on his education, with interest, because the estate of his father was insolvent: there is therefore no claim on him to yield any of his rights. Another objection is, that this court cannot assess damages. This is true—but it may allow interest as a compensation, if it be an adequate one.

The next point submitted was, that as Major Huger lived seven years after the sale to C. Elliott, an allowance should be made for his tenancy by the curtesy; but the court saw no ground for this. Major Huger sold the land for the full value, got all the money, and had the use of it during his whole life, which was the extent of his tenancy by curtesy. It was therefore decreed that the defendant should be paid out of the sales of the Richmond land £3714. being the amount of the sale of his Horse Shoe land, with interest from the death of Major Huger, until paid. That Benjamin Huger, the defendant, account for the rents of the Richmond place, or for so much as he used or cultivated. That Benjamin Huger the defendant, on being paid, as above directed, do make and execute good conveyances to complainants of the Horse Shoe land in fee simple. That the creditor Hamilton, who was let into this case (on his petition) do comply with the decree out of the sales of the Richmond place, of which he became the purchaser, or that the same be resold for the purpose of raising the money for the defendant.

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1 Desaus. *366

*Case XCIV.

Present—Chancellors Mathews, Rutledge and Hunt.

JOHN F. GRIMKE v. the Executors of J. P. GRIMKE.

(June, 1794.)

[*Wills* ⇐86.]

A father promised by letter to his son to convey a particular house to him, but afterwards substituted and conveyed another of less value, which the son accepted and occupied. The court will not, after the father's death, enforce the original promise.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 206-220; Dec. Dig. ⇐86.]

[*Executors and Administrators* ⇐202.]

The father's estate decreed to pay the son a legacy derived aliunde, and which had got into the father's hands.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 730, 738-745, 748, 754, 763; Dec. Dig. ⇐ 202.]

[*Executors and Administrators* ⇐267.]

Interest allowed on it.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1032-1043; Dec. Dig. ⇐267.]

[*Wills* ⇐30, 482.]

A husband assenting to his wife's making a will of personal estate, manifested by its being in his handwriting, and disposing of her separate estates, is a sufficient authority to support such will, though not republished after his death; but such will does not pass the wife's proportion of her husband's estate, which she acquired on his death. Such proportion is distributable.

[Ed. Note.—Cited in Ward v. Glenn, 9 Rich. 130.

For other cases, see Wills, Cent. Dig. §§ 64, 1009; Dec. Dig. ⇐30, 482.]

[*Wills* ⇐734.]

The legacies to a wife, as a separate estate from her husband, and which she disposes of by her will, do not bear interest. The husband had got possession of them, and is not accountable for arrears.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1847-1872; Dec. Dig. ⇐734.]

[*Executors and Administrators* ⇐202.]

Father promises by letter to give his son £2000 on his marriage; his estate decreed to pay it with interest from the marriage, though he had alleged that his estate was deteriorated, and that his son had agreed to take less.

[Ed. Note.—Cited in McKeegan v. O'Neill, 22 S. C. 467.

For other cases, see Executors and Administrators, Cent. Dig. §§ 730, 738-745, 748, 754, 763; Dec. Dig. ⇐202.]

[*Husband and Wife* ⇐144.]

[The husband, who used a fund which was by will to be invested for his wife, who had power of appointment by will, is liable to the appointee for interest only from the wife's death.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 551; Dec. Dig. ⇐144.]

The bill states that Mary Faucheraud, the complainant's grand mother, was seized and possessed of a considerable estate, and made her last will on the 27th May, 1763, wherein, amongst other things, she bequeathed £600. of the then currency, to her son-in-law, J. P. Grimke, to be put to interest, and improved by him, and finally to be paid to her three grand children; £400. thereof, with the increase, to John F. Grimke the complainant, and the other £200. to her two grand daughters. She further bequeathed £7000. of the then currency to the said J. P. Grimke in trust, to improve the same, and to pay the interest to her daughter Mary Grimke; and ultimately to pay the said £7000. to and among such of the said Mary Grimke's children, and in such proportions, manner and way, with such limitations as she should direct, by virtue of any deed or will, attested by two witnesses, and executed by her whether covert or single; and for want of such appointment, to be equally divided among all the children of her body, and the issue of any who might be deceased. And the said Mary F. Grimke died, leaving the said will in full force, and her son-in-law J. P.

Grimke obtained possession of the sums aforesaid. That in the year 1788, after complainant had attained 21 years of age, his father, without solicitation, tendered to complainant an old debt due to him by Ch. and J. Wright, whose estates were confiscated, in satisfaction of the legacy of £400. and interest; and complainant being accustomed to pay implicit obedience to his father, and being very dependent on him, and supposing the debt good, accepted the same, and gave a receipt for the legacy. But learning afterwards that the estates of Ch. and J. Wright were insolvent, he returned all the papers to his father and stated his reason for doing so. That complainant's grand father Gideon Faucheraud, in and by his last will dated the 27th December, 1751, bequeathed £5000. cur-

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*rency to be put out to interest by his executors, and the interest paid to his daughter Mary Grimke; and at her death to be paid to such persons as she should direct by her last will, or other writing, executed in the presence of two witnesses, whether covert or single; and for want of such appointment to and among the issue of her body, which said will he left in full force at his death. That complainant's father J. P. Grimke was seized and possessed of a considerable estate, and particularly of a dwelling house in Meeting-street, numbered 101, and being so seized, did, on the 12th July, 1785, make his last will and testament, wherein and whereby he, amongst other things, bequeathed to his wife three slaves, "which said slaves, with every thing else I gave to her, she may dispose of as she pleases." He also devised to her the house No. 101, in Meeting-street, with his plate and furniture, during her life; and after her death he devised the said house No. 101, to his daughter Mary Grimke, and her heirs. He also devised to his son, the complainant, the house No. 100, in Meeting-street, for which he had previously given titles to his son, at his own desire. And after several other devises and regulations, he bequeaths the rest of his estate to his wife and his two daughters; stating that he had already provided fully and sufficiently for his son, the complainant. The testator also states that it had been his intention to have given his son, the complainant, £2000. on his marriage, but as his fortune had suffered materially by the depreciation of indents and other losses, he hoped he would be satisfied with what he had done for him, and left him in addition a mourning ring. The bill charges that the testator died on the 9th January, 1791, leaving his will in full force; and the defendants have qualified as executors, and possessed themselves of the estate. That by the said will, the complainant's sister Mary, appears to have acquired a title to the house in Meeting-street, No. 101; but the complainant contends that he is equitably entitled to the same; and that it ought to be vested in him on his conveying to her the house and lot No. 100, in the same street, which he is willing to do, because complain-

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ant's father had often promised that *complainant should have the house No. 101, at his death and his wife's; and in a letter of the 26th October, 1782, he writes to complainant—"if you can contrive the deeds for my house I now live in (which was the No. 101) in such a manner as to come to you, and to be entirely your own property after my and your mother's death, then have them drawn, and I will execute them when you come to town." And in another letter, the next day he recognizes and confirms his promise. That complainant drew the deed and delivered it to his father for perusal and execution; and after some time he did execute a deed, but it was a conveyance of house and lot No. 100, to complainant, and not of No. 101, according to his promises; and complainant's father at that time required of him a defeasance, so that complainant might not be entitled to both houses. A copy of what he gave is as follows:—"I hereby promise to deliver up to Miss Mary Grimke, the house No. 100, in Meeting-street, for which I have received a deed of gift from Mr. J. P. Grimke, whenever I shall be put in possession of the No. 101, in which the said Mr. J. P. Grimke now lives, &c. the original of which must be among the papers of the late Mr. John P. Grimke." Complainant states that being about to marry with Miss Mary Smith, daughter of Mr. Thomas Smith, complainant's father to induce his consent thereto, promised the said Thomas Smith, in a letter he wrote to him, that he would give his son £2000. sterling. Whereupon, the said Thomas Smith consented to the marriage, which took effect. That complainant has never received any part of the said £2000. That his father soon after his marriage tendered him specialties and indents for the said £2000. but complainant conceiving it would be an imposition on his father-in-law, declined receiving them. That complainant's mother Mary did, on the 8th of February, 1786, in the life time of her husband, make and execute her last will and testament, by which she did, among other things, bequeath to complainant two guineas, and to her two daughters Mary and Ann, all her property, jewels, servants, &c. and also the legacies left her by her father and mother,

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with all the rest and resi*due of her estate, to be equally divided between her said daughters; and she died leaving said will in full force; and Mary Grimke, one of the legatees, and executrixes, has qualified on said will, and possessed herself of the estate; and she and the executors of complainant's father, refuse to do him justice in the premises, and to pay him what is justly due to him out of the estates of his said father and mother; and refuse to let him into the possession of

the house and lot No. 101, which he is entitled to on his making titles to the lot No. 100. The bill prays for relief.

To the complainant's bill, the defendant, Mary Grimke, pleaded the statute of frauds and perjuries, as to the claim of complainant, for the house and lot No. 101, in Meeting-street, which her father devised to her. The defendants also, for answer to the complainant's bill, admit that the grand father and grand mother, and father and mother of the complainant, made the several wills stated by him in his bill, and that J. P. Grimke got the monies of the several legacies bequeathed as stated. The defendants admit that J. P. Grimke may have offered and paid the legacy of £400. currency to complainant, by transferring his claim on the estates of Ch. and J. Wright, which was for a larger sum, and from which complainant doubtless expected an advantage; and they admit they found complainant's letter and conditional receipt, dated 16th December, 1784, for said debt, as, and towards satisfaction of said legacy. But they found a memorandum in the hand writing of Mr. J. P. Grimke, on said letter, bearing date the 16th of April, 1788, in these words—"My son let this money for the legacy be deducted out of Olyphant's bond (which he had given him some years before in advancement) as also of any other demands he might have." And they find among said papers complainant's receipt in full for said legacy, dated 28th July, 1785, which they rely on as an acquittance; though the demand on Wright's estate was lost. The defendants further insist, that the house No. 101, in Meeting-street, vested in the devisee Mary Grimke, under the will of her father, and cannot be shaken by the loose communi-

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ca*tions between a father and a son, never perfected or carried into execution. That the defendants know nothing of any defeasance, nor have they formed any such paper as stated by complainant; nor do they believe that after Mr. J. P. Grimke the testator, executed titles to his son for the house No. 100, that he ever intended to give him house No. 101, which he expressly devises to his daughter Mary. Defendant admits that J. P. Grimke may have written the letter to Mr. Thomas Smith, which is stated by complainant as an inducement to his consent to the marriage of complainant with his daughter, in which he promised to give his son a fortune of £2000. sterling. But the defendants contend "that their testator J. P. Grimke only intended to give him so much money on such securities as he then possessed; for to the knowledge of two of the defendants, had J. P. Grimke paid such sum in cash, (£2000.) he must, in order to raise the same, not only have sold the greater part of his securities, but also part of his real estate," from the difficulty of getting money at that time on old debts, and the low value of securities. That defendants were well informed, and believe the letter of J. P. Grimke to Thomas Smith was written, and the promise to give £2000. made under a special agreement between J. P. Grimke and complainant, to pay the same in specialties; and also by complainants offer in case he had no issue at his death, that the said £2000. was to be returned to J. P. Grimke's family. The defendants submit how far the complainant's not executing a bond to secure the return of the £2000. to the father, in case of complainant's death without issue, and how far his refusal to receive specialties and indents offered to him by his father, ought to bar the claim of the £2000. and interest thereon. The defendants insist that the testator made his will deliberately, and on a full knowledge of his affairs, and upon a conviction that he had done enough for his son, and that what remained of his fortune was properly due to his wife and daughters. The defendants insist that the will of Mrs. Mary Grimke, the mother of complainant, executed on the 8th February, 1786, by which she bequeathed all the proper-

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ty at her disposal (un*der the several wills of her father, mother, &c.) to her daughter, was made with the consent of her husband, (in whose hand writing the original draught was) and they submit that such consent gave her the power to make such will. And also that Mary Grimke having survived her husband, without revoking her will, the same amounted to a republication of the will made whilst she was under coverture. Defendants admit that they have not admitted complainant to the benefit of any distributive shares of the estates of his father or mother, because their wills bequeathed the same wholly to the two daughters, and complainant has no right to any part of said estates. And defendants state, that J. P. Grimke acknowledged himself in writing to be very largely indebted to his wife and daughter for the legacies he had received, and monies borrowed by him from them, which must be paid before complainant could claim any division of the estates, even if he had any rights therein. Defendants deny complainant's allegation, that he offered to convey the house No. 100, to his sister, but if it had been made, it would have been refused. Defendants set up various discounts against the demands of the complainant for supplies, and deny all combination, &c. This cause came to a hearing before the court, when the following evidence was produced, as taken from the minutes of Chancellor Mathews:

Letters from J. P. Grimke to John F. Grimke, dated 26th and 27th October, 1782, relative to the house and lot No. 101; also, the titles for the house and lot No. 100.

J. P. Grimke's letter, promising £2000. sterling on his son's marriage (without date.)

A statement of what was assigned by J. P. Grimke, and what was actually received.

A copy of Mrs. Mary Grimke's will, in the handwriting of her husband.

Letters from J. P. Grimke, of 16th December, 1784; of the 16th July, 1785; 16th of April, 1786, and 7th of February, 1788.

A statement of account due by J. P. Grimke, to Mary Grimke.

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*Deeds drawn but not executed, from J. P. Grimke to J. F. Grimke, for the house and lot No. 101.

J. P. Grimke's account of what had been expended by him on his son.

Note of hand of J. P. Grimke, to his daughter Mrs. Coslett, for £2000, dated 1st of January, 1785; and note to his daughter Mary for £2000, same date.

An acknowledgment from J. P. Grimke, on the back of a bond to his wife, for £3700, for the legacies that had been left to his wife.

General C. C. Pinckney for complainant argued, that the letters from the father to the son, promising to convey the house and lot No. 101, formed a contract, which was voluntary indeed, but binding on a father making a provision for a child; and the court will even supply a defect in such voluntary conveyance. 1 Vern. 40, Thompson v. Attfield. See Cowper, 710. The release of J. F. Grimke, to his father J. P. Grimke, of the house and lot No. 101, for one of very inferior value, No. 100, was a mere submission to parental authority, and not the exercise of a perfect free will; and the court will lay hold of the circumstances stated, to replace the son in his rights. A release obtained unduly by a father, will be set aside in equity. 1 P. Wms. 641, 639. Courts of equity consider that done which was agreed to be done. 2 Powell, 56, 7, 9. The case of Clavering and Clavering, 2 Vern. 473, is much stronger than the present, where the first voluntary engagement was supported, notwithstanding subsequent arrangements by the father. This doctrine is supported by Lord Hardwicke, who is followed by the modern writers. Powell on Powers, 204, 5. It is the business of courts of equity to relieve against lapse of time. See 2 Powell on Contr. 272, 3. But complainant had no right to claim the fulfilment of the promise for the house No. 101, till the death of both his father and mother; for his father's letters expressly fix that time for the commencement of his rights. Such cases are out of the operation of the statute of frauds. See 1 Eq. Cas. abridged, 22. 1 Vernon, 110.

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*With respect to the legacies from the grand father and grand mother, to the mother, which came into Mr. J. P. Grimke's hands, interest ought not to be allowed on them out of his estate. It is quite settled that the wife cannot, after the death of the husband, recover the arrears of her separate estate for more than one year. See Powell v. Hankey and Cox, 2 P. Wms. 82. Thomas v. Bennett, 2 P. Wms. 341. Fowler v. Fowler, 3 P. Wms. 355. Lord Townsend v. Wyndham, 2 Vesey, sen. 7. Peacock v. Monk, 2 Vesey, sen. 190. Nor should the legacies put into the treasury and sunk, or greatly depreciated, be made good out of Mr. J. P. Grimke's estate. Brown v. Litton. 1 P. Wms. 141, 648. Mrs. Mary Grimke, the mother, could not make a will, and dispose of her separate estate, as she has done to her daughters to the exclusion of her son the complainant. As a feme covert she could not make a will by our laws. See public laws, 138, 149. If the wife outlives the husband, and does not actually confirm her will made in his life time, it will not be good. 4 Burn's Eccles. Law, 47, Clavering v. Clavering. 2 Vernon, 474 (though that relates to a will of real estate.) With respect to the promise of 2000*l.* on the marriage of the son, there can be no doubt of its being obligatory on the father. Marriage is the highest consideration in law. 2 Atk. 158, 9. 2 Powell on Contr. 26; and children are a party to it. A contract or agreement may be supported by blood or natural affection. 1 Powell on Contr. 361. A letter will, in equity amount to an agreement. 1 Powell on Contr. 288, Moor v. Hart. 2 Rep. Chanc. 147. 1 Vern. 201. 2 Ventr. 361. A mother agreed to give her daughter a portion, and only signed the marriage articles as a witness. This was held sufficient to bind her. 1 Wilson, 118, Wilford v. Buzely. Children are purchasers on good consideration; and equity will dispense with the form of the instrument. Powell on Powers, 163, 183, 4. Equity will decree any contract, which ought in foro conscientiœ, to be carried into specific execution. See 2 Powell on Contr. 10. Strange, 456. As to the time of payment, when a person promises and fixes no time, the money must be

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paid presently. 1 Powell on *Contr. 180, 260. Therefore, the 2000*l.* ought to bear interest from the day of complainant's marriage. A clandestine agreement, if such had been made, which is denied, to return a part of the portion, is void, as a fraud on the other party. 2 Powell, 165. 1 Eq. Cas. 88. 1 Vern. 348. 2 Eq. Cases, 187, 585. 1 P. Wms. 121, 496. 1 Vern. 475, Gale v. Lindo. Where a parent is of ability, he is not at liberty to charge his children for maintenance and education (even when they have separate estates.) See 1 Bro. C. C. 370, Hughes v. Hughes.

Mr. Read and Mr. Pringle for defendants argued, that the complainant's acceptance of the conveyance of the house and lot No. 100, being subsequent to the letter of the father, promising to convey house and lot No. 101, is a bar to his present claim of the latter. Complainant was free to accept the exchange or substitution of the one for the other. He did in fact accept it, and recorded the deed for the house No. 100, as late as the 1st

March, 1784, so that he acted with deliberation. And there is no proof of any undue means or influence used by the father to induce the son's acceptance of the one house for the other; and that will not be presumed. The proposition to settle the £2000 on the marriage, originally came from the father to the son. It is a voluntary agreement, which, though regarded by equity, is not put on so high a ground as agreements on valuable consideration. See 2 Powell, 221. 1 Powell, 340. 2 Stra. 138. 2 Eq. Cas. abr. 52. 2 Comyn's digest, 571. The will of Mrs. Mary Grimke being in the hand writing of her husband, it is an assent by him to her exercising that power; and it is a good disposition to her daughter of all the property she had a right to bequeath. As to the interest on the 2000*l.* no time is specified, and no interest is allowable till demand made, which is from the filing this bill.

Mr. E. Rutledge for complainant. His claims are for the house No. 101; his grand mother's legacy of £400; the £2000 marriage portion, and interest from the marriage. Also, to his proportionate share of several legacies to his mother, which his father had reduced to possession, and the wife had no

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right to dispose of them by *her will. Complainant is also entitled to a third part, being a distributive share of Mrs. Mary Grimke's (his mother) estate. She was entitled to one third of J. P. Grimke's personal estate; that surely could not pass under a will made before her husband's death, and had no relation to it. As to the house, the ground of the claim has been fully stated. As to the legacy of £400 the father had no right to direct his son to pay himself out of the bond by Olyphant, which he had previously (nearly two years) before assigned as a gift, and an advancement to his son. Besides, that bond might never be productive; it was not so at that very time. With respect to the £2000 promised on the marriage, there is not a shadow of doubt about that. The right to interest follows of course from the time of the marriage; for the object of such provision is the means of immediate subsistence; at least as far as the interest. The law prohibits married women from making wills; and when they are permitted to do so, under a power given by a third person to dispose of something, she acts merely as the attorney or appointee of such person. See 2 Atk. 661. When there is a provision for a separate maintenance, and the husband supports her, she has no right after his death to demand arrears. †

†No question seems to have been made in this case, of the right of the complainant's mother to bequeath to her two daughters, in exclusion of her son (except two guineas which she bequeathed him) the whole of the legacies, which had been given to her by her mother, with authority to dispose of them by deed or will, "to and among her children, in such proportion, manner, and way, and with such limitations as she might think fit." Doubtless the able counsel who argued this case considered the words of the will, giving the power of appointment to the mother, as vesting in her an uncontrollable power over the subject, too clearly to warrant an argument against its use, or even its abuse, by a very unequal distribution. Nevertheless, the authority of the court of chancery to control and regulate the exercise of this power of appointment when abused, has been long established. Lord Chancellor Nottingham, in the case of Gibson v. Kinder, 1 Vern. 66, decreed, that the appointment was illy exercised and void, because the division made under the power was extremely unequal; and that without any good reason shewn to warrant it, and he directed an equal distribution. The same was decided in Wall v. Thurbourne, 1 Vern. 355,

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414. *Powers are considered as trusts in this court. See Kemp v. Kemp, 5 Vesey, 856. And the chancellors have generally followed lord Nottingham's doctrine, that this trust must be exercised justly and impartially; but its application has been found to be extremely difficult and delicate; so much so, that several of the judges in equity have been very desirous to get rid of the rule altogether; but they felt themselves too strongly bound by the authorities. It seems now to be settled, not however without some exceptions, that where a power is given to a parent to divide any property among his children, in such proportions, as he may think fit, it is required in the exercise of the power, that some proportion of the property should be given to each child; unless another adequate provision be made for the child attempted to be excluded, either by the original donor, or by the person entrusted with the power of appointment; or unless some other good reason be shewn for the exclusion. But the proportion of the property which must be given to each child, is left at law wholly, and in equity a good deal, in the discretion of the person authorised to appoint. That proportion, however, must not be so small or nominal as to be entirely illusory. It must be something substantial, or the court will interfere, and declare it void. But what that proportion must be, is unavoidably left quite undefined, and this has frequent-

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*Chancellor MATHEWS delivered the decree of the court:

In this case there are several claims of a distinct and separate nature. It has been stated that these claims are original or derivative, direct or collateral; that is, such as immediate engagements with, or devises to, the complainant, or such as alight upon him by mere operation of law. Of the first class is the claim upon the house No. 101, in Meeting-street. Second, of four hundred pounds, old currency, bequeathed by the last will of his grandmother, Mary Faucheraud. Third, of two thousand pounds sterling, promised by his father as a marriage portion.

John Paul Grimke, by a letter dated the 26th October, 1782, writes to his son, the complainant, as follows: "If you can contrive the deeds for my house I now live in to come to you, and be entirely your own property after my and your mother's death, then have them drawn, and I will execute them when you come to town."

The complainant, on the 7th February,

1788, writes to his father, requesting to know "which of his houses he intended for him,

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as he wished to tile the one which *should be his;" and the father, by his answer, confirmed to him the right in the house No. 100, of which he has since been constantly possessed. And in several letters, of dates subsequent to the father's letter, he acknowledges himself perfectly satisfied with the provision made for him by his father, though No. 100 was not the one originally spoken of, and not so valuable as No. 101.

It was considered then by the court, from the whole tenor of the evidence, that this indeterminate engagement of the father, entered into from mere good will, without any special consideration moving thereto, was acquiesced in by the son; and that in satisfaction thereof, independent of other provision, he held the house No. 100, without complaint till his father's death.

2d. A legacy of four hundred pounds was left to the complainant by Mary Faucheraud, his grandmother, which came to the hands of John Paul Grimke as natural guardian of the complainant, to be kept for his advantage, and to be paid him upon his arrival at full age. This legacy was discharged by payment of an old bond of German & Charles

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Wright, whose estate was afterwards *confiscated, and which has since proved insolvent. The complainant gave to his father a full discharge for this legacy; but since the date of his receipt to his father the demand against the confiscated estate has been returned to the father, and since his death has been found among his papers. A letter of John Paul Grimke to the complainant has the following paragraph: "Then return me again said assignment, provided it is not recorded, and I will find some other way to pay you said legacy." And in another letter, dated April, 1788, he says, "Let this money for the legacy be deducted out of Olyphant's bond." We then cannot but consider the efficacy of the discharge rendered abortive by these subsequent undertakings of the father; more especially where it appears that the consideration for which the receipt was given, had actually failed, without any improper delay in the complainant. But it has been contended, that by the same paragraph in which he re-assumes the payment of the legacy, he has also apointed the fund out of which it shall be paid. Yet by his letter to Mr. Smith, and also in a letter of anterior date to his son, he expressly enumerates this bond as one given to his son for his advancement. We will then receive this equitable reassumption of the debt, discharged from condition of payment out of a fund, over which the father then had no control.

The next direct claim of the complainant is the sum of £2000, promised by his father as his marriage portion. It was not disputed, but that this promise had been originally made; but three grounds of objection were made by defendant's counsel. 1st. That the promise was made on condition that the complainant should assure the defendant's testator, that on failure of issue in himself, the 2000*l.* should return to the family of John Paul Grimke, which condition he never complied with. 2d, That the 2000*l.* must have been intended to be paid out of such facilities or securities as he then held, there being little or no money at that time in circulation. 3d, That in payment or discharge of the marriage portion (if decreed by the court) an account of monies advanced, and of other things given by his father, should be

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admitted. The first objection *was obviated by the production of John Paul Grimke's letter without date, wherein he says, "As I do not desire the bond from you to refund according to your own promise," &c. And it was also urged by the complainant's counsel on the authority of several well adjudged cases, particularly 1 Wilson, 118, Powel on Powers, 163, and Powel on Contracts, 165, that any condition annexed secretly to an agreement of this nature, whereby a third person may be imposed on, shall be void. And in this case Mr. Smith having given to his daughter 2000*l.* absolutely and unconditionally, the complainant in reason should not have been bound down to such unfair terms; if therefore the condition had not been avoided by the subsequent declaration of John Paul

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ly produced the greatest embarrassment to the judges in equity. The cases are collected, and the difficulty of applying the rule is stated very

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fully by the master of the rolls, lord Alvan*ley, in the case of Spencer and Spencer, reported in 5 Vesey, 362, and more fully in the case of Kemp and Kemp, 5 Vesey, 849, 856; and subsequently by the master of the rolls, sir William Grant, in the case of Butcher v. Butcher, reported in 9 Vesey, 382. Since which the cases of Bax v. Whitebread, 10 Vesey, 33, Maundrel v. Maundrel, 10 Vesey, 255, Burgess v. Mawby, 10 Vesey, 319, Dyke v. Sylvester, 12 Vesey, 126, and Mocatta v. Lonsada, 12 Vesey, 123, have been decided; and especially Butcher v. Butcher, 1 Vesey and Beames, 79 and 99. These cases are distinguishable from another class of cases, where there is a trust, arising out of the words "I desire," "I wish," &c. used by the donor or testator: in which, the person entrusted, must follow strictly the directions given, or the wish expressed. See the case of Harding v. Glyn, 1 Atk. 469, Saunders' edition, where the authorities are collected. See also 1 Vesey, jun. 270. 2 Vesey, jun. 333, 529. 4 Vesey, 708. There is also another question of importance—it is as to the right of property going with the power of appointment. A gift to A. (indefinitely) and to such person as he shall appoint, is absolute property in A. without an appointment. But a gift to A. for life, and after his death, to such person as he shall appoint by deed or will, he must make such an appointment in order to entitle that person to any thing. See Bradley v. Westcott, 3 Vesey, 452. See the cases collected in Bridgman's Anal. Index, title, power.

Grimke himself, this event would have released the agreement from the imposing condition annexed to it. The second objection was not sustained by any evidence, but merely submitted to the court as the probable intention of the parties at that time, taking into view the situation of the country, and the nature of all the transactions of that day. Upon mature deliberation, we do not conceive ourselves authorised from mere suggestion, without any evidence to support us in so doing, to alter the reasonable and equal agreement of the parties; especially as it was in evidence that the complainant constantly refused to receive any thing but money, or the full value in good property in discharge of his marriage portion; in like manner as he had received from the father of the lady with whom he had married under the full permission and consent of his father, and with his written assurance of giving him £2000 for the express purpose of equalizing his fortune with her's. How then is this to be done? Not surely by receiving in payment securities, in which there was no security? A part, or the whole of which, from the fluctuation of the times, might eventually be of little or no value. This would be unequal and inequitable. Unequal, because Mr. Smith's inducement for advancing £2000 to his daughter, would thereby be lost; and inequitable, as imposing on his son a shadow for a promised substance. With respect to those claims which alight upon the party by

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the mere operation *of law, the complainant's counsel have stated as follows: "That Mary Grimke, mother of the complainant, was entitled under the will of Mary Faucheraud, her mother, to the sum of six thousand pounds old currency; and also by the same will to one other sum of £1000 like money: and that she was also entitled to a further sum of £5000 like money, under the will of Gideon Faucheraud. And that she was entitled to a further sum of £200 like current money, under the will of Susanna Villeponteaux; amounting in the whole to the sum of £12,200 old currency, which sum John P. Grimke in his life time reduced into possession, and thereof had the use and advantage; and at his death left incorporated with his other estate. That the mother, Mary Grimke, in the life time of John P. Grimke her husband, made her will in writing, with his express approbation and consent, he having written with his own hand a will for her, of which the one executed by her was a mere transcript. John P. Grimke by his last will bequeathed three negroes, and one third part of his residuary estate to his wife Mary Grimke, so that at the death of the said Mary Grimke, supposing her will to be valid as to all the interest contended for by the defendants, she had disposed of to her two daughters, Mary Grimke, and Anne Coslett, the sum of £12,200 old currency, with interest, and the three negroes, with one third part of the whole residuary estate of the said John P. Grimke. But the complainants object, 1st, That the will is altogether invalid, as having been made during the life time of John P. Grimke, and never republished since his death. 2d, That even if the court should overrule this objection, that nothing would pass by the will so far as relates to the legacies left by Mary Faucheraud, Gideon Faucheraud, and Susanna Villeponteaux, as these were made to her whilst covert, and not to trustee for her use; and therefore, in fact, was a bequest to the complainant's father, and shall be deemed a part of his residuary estate; to one third of which the mother was entitled, and which will be distributed among the complainant and his sisters according to law. 3d, The complainant contends that in the event of the £12,200 being

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decreed to be well *disposed of, that no interest should be allowed on it, being expressly given for the support and maintenance of Mary Grimke. 4th, That no part of the father's estate intended for the mother, can be conveyed by her will, it having been executed in the life time of the father before the legacy was vested, and never republished according to the act of the assembly of 1789. The first objection under common circumstances, we conceive would be fatal; but certainly an express and written consent of the husband will enable the wife to convey a property given for her separate use; and he by such declaration shall be considered as trustee to carry such will into effect. 1 Fonb. 98, which opinion is there supported by several respectable quotations. In this case the husband may, with propriety, be said to have made this will himself for so much of the estate, as he was the composer of the will, it being originally in his own diction and hand writing, and merely transcribed and executed by the wife. This then shall be deemed a sufficient assent by him to enable her at all events to bequeath those legacies, and the will pro tanto needed no republication, and shall not be void in toto. The second objection has been necessarily obviated in answering the first. The third objection this court will sustain, because it appears from the words of the wills, under which these bequests were made, as well as from the reason and nature of the case, that the interest arising on these several sums of money were to go for the support and maintenance of Mary Grimke the legatee; and were a contrary opinion to prevail, what husband of a moderate fortune would receive a legacy which would seduce his family into a more extravagant style of living than his circumstances would warrant; but which his estate must eventually, after the lapse of many years, make good with an immense accumulation of interest? We are of opinion that the fourth objection ought to prevail; a

republication of the will being necessary to convey an interest which accrued to, and was vested in her after the execution of her said will: and the court decrees that the will can pass no part of the estate devised by John Paul Grimke to Mary Grimke his wife. To

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sum up the *whole of this case then, this court decrees, 1st, That they will refuse their aid to carry into effect the agreement respecting the house No. 101. 2d, That the legacy of 400*l.* old currency be paid with interest, to be computed from 12 months after the death of Mary Faucheraud. 3d, That the sum of £2000 sterling be paid with interest from the time of his intermarriage with Miss Smith. 4th, That the will of Mary Grimke does not convey a right to any estate derived by her from John P. Grimke, and that such estate shall be equally divided between the complainant and Mary Grimke, and Ann Cosslett. And lastly, that the legacies amounting to 12.000*l.* old currency, draw no interest until the death of Mary Grimke, and that from thence legal interest be allowed thereon. That it be referred to the master to ascertain the several sums due under this decree—And that the costs of suit be paid by defendants.

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Case XCV.

Present—Chancellors Mathews, Hutson and Hunt.

PEIRCE BUTLER v. JAMES O'HEAR.

(June, 1794.)

[*Specific Performance* ⟸95.]

The court will not compel the specific performance of an agreement, and oblige defendant to accept a title which the complainant cannot make out to be clearly good and free from incumbrances.

[Ed. Note.—Cited in Fuller v. Missroon, 35 S. C. 326, 14 S. E. 714; McMichael v. McMichael, 51 S. C. 559, 29 S. E. 403.

For other cases, see Specific Performance, Cent. Dig. § 257; Dec. Dig. ⟸95.]

[*Contracts* ⟸212.]

[When no time is mentioned in a contract for the performance thereof, a reasonable time is intended.]

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 947; Dec. Dig. ⟸212.]

[*Contracts* ⟸10; *Vendor and Purchaser* ⟸23.]

[Where the owner of land transmitted to a proposed purchaser a memorandum of an agreement to purchase, with a request that he would sign it in case he wished to purchase, which was signed accordingly, it was held that it was binding upon both parties, though it contained no promise to sell, and was not signed by the vendor.]

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 24; Dec. Dig. ⟸10; Vendor and Purchaser, Cent. Dig. § 28; Dec. Dig. ⟸23.]

The bill was filed for the specific performance of an agreement for the sale of a house and lot in Charleston. The bill charged that Thomas Bourke executed deeds on the 11th and 12th of August, 1789, by which he conveyed a house and lot of land on East Bay-street to John Williamson, his heirs and assigns. That at the time of the execution of said deeds, there were several judgments subsisting against Thomas Bourke, which are stated in the bill; and he had also mortgaged the property to the commissioners of the loan office, to secure the payment of a sum borrowed from that office. That complainant having been bound as surety for John M'Queen in several debts, he applied to him for counter security or indemnity. And he stated that he had made arrangements by which he could apply the house and lot in question to that purpose; and that Mr. John Williamson would convey the premises to any

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person to whom the complainant *might dispose of the same: and complainant was apprised by Williamson of his consent to such arrangement. That the complainant understanding James O'Hear wished to become the purchaser of said house and lot, had some conversation with him about the terms, and then addressed him a letter, and requested him if he approved the same, to sign a memorandum of agreement, which he inclosed: of which the following is a copy: "I have this day agreed to purchase of P. Butler, a certain house on East-Bay, at present occupied by captain H. Grant, for which I promise to pay £3000. in fundable indents, exclusive of the interest that may be due on them, on receiving such titles as Mr. Ward may approve of." That James O'Hear returned the paper, signed in the presence of a subscribing witness; and the said O'Hear kept a copy of the said agreement. That complainant previous to the signing said agreement by James O'Hear, apprised him of the judgments and mortgage which encumbered the premises, but that the complainant having an assignment of the first judgment, he assured him that the same should never have any effect on the premises, and that he would release the premises from the same; and it was agreed between them, that with respect to the other judgments and mortgage, the defendant O'Hear should keep in his own hands as many of the indents as at the current rate of sale might satisfy the mortgage; and that the judgments should be paid out of the consideration money upon the payment thereof. By defendant it was also agreed, that John Williamson should convey the house and lot to said O'Hear in fee, but without warranting against the said judgments and mortgage, as he, O'Hear, was to retain in his hands the means of indemnity; and the said O'Hear was to sign some paper expressive of such restriction of the warranty. That defendant O'Hear soon after took possession of the premises, as purchaser thereof under the agreement, and the complainant's solici-

tor soon after drew sufficient deeds of conveyance in fee from the said John Williamson to said defendant O'Hear; and said deeds were sent to Georgia to be executed by

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said Williamson and his wife. In the *mean time the defendant O'Hear repenting his bargain, wrote a letter to complainant, dated 12th July, 1791, in which he declares "that as he had contracted with major Butler, and knew nothing of Mr. Wiliamson, he could not accept this title, but must have conveyance from major Butler." But complainant afterwards satisfied said O'Hear of the propriety of accepting the titles from Mr. Williamson, who executed the deeds, and transmitted them to his agent to be delivered to complainant or said O'Hear, on his being indemnified against the incumbrances. That said James O'Hear being satisfied that he would be safe, as he would have the application of so much of the purchase money as was requisite to pay off the said encumbrances, agreed to execute a deed to release Mr. Williamson from the operation of the covenants contained in the said deed in relation to said judgments and mortgage; and such a deed was prepared, and was approved by Mr. Ward the defendant's counsel. That the agent of said Williamson, in confidence that the said deed would be executed by the said James O'Hear, delivered to the complainant the deed of conveyance from said Williamson, in order to tender the same to defendant in performance of his agreement. That a day was appointed for the delivery of the deeds, and for the payment of the indents, and the application of part of the indents to satisfy the judgments and mortgage; but some difficulties arising about the dower not having been properly renounced, the defendant (although complainant made such offers to obtain the regular execution of the dower, and to indemnify him as satisfied the mind of his counsel) upon this and some disagreement about the indents to be reserved, refused to go on with the completion of the business, and shortly after wrote to complainant that unless he received an unencumbered title from complainant himself (and not Williamson) he should consider himself warranted in declining the business altogether. That a few months after the proper renunciation of dower was obtained, and complainant's counsel informed defendant that he was ready to deliver the deeds to the defendant, convey-

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ing a full and clear title from Mr. *Williamson; but defendant said, as the 1st of October had elapsed, (which he had limited for the delivery of the deeds) he considered the agreement void. That complainant's credit has suffered by his disappointment; that Mr. Williamson has withdrawn the deeds from the hands of his agent, because he was apprehensive they might be delivered to defendant before he was indemnified and released; but complainant was at all times ready to indemnify him, and doubts not he will be able in a short time to procure again the titles from said Williamson, so as to enable him to deliver them to defendant. Complainant's bill prays that defendant may be compelled to a specific execution of the contract upon complainant's delivering him good and sufficient titles from said Williamson, or such other good and sufficient titles as the court may direct.

The defendant James O'Hear admits that Thomas Bourke was seized and possessed of the house and lot in question; and that he conveyed the same to John Williamson; but this defendant has reason to believe, not for valuable consideration, but to cover and protect the property from his creditors; and that Bourke continued to receive the rent of the house long after said conveyance to Mr. Williamson, who has conducted himself throughout the business as a mere stakeholder or trustee, without any interest. That defendant learnt those things after his agreement with the complainant, and they made him cautious in his conduct, as he understood the creditors of Bourke meant to look into that conveyance, and set it aside if they could. Defendant admits that there were divers judgments and a mortgage of record against said Bourke; but defendant denies that complainant apprised him of that circumstance; on the contrary, that he found them out himself, and mentioned it to complainant, and told him they must be removed out of the way before any contract could be carried fully into effect; and that he expected all the judgments against Bourke, and also the mortgage should be previously satisfied, which complainant promised should be done; and defendant avers that it was under this assurance that he signed the agree-

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ment *in bill stated; that he agreed to give £1800. sterling or £3000. in fundable indents, at twelve shillings in the pound; and complainant agreed to accept £3000. in indents, and the agreement was signed accordingly; but most expressly on the ground that all the incumbrances were to be removed, and defendant was to assume the loan office debt on himself, and retain indents at the then price (twelve shillings) sufficient to pay it off. Complainant directed defendant to take possession of the house, and told him to hold it rent free till titles were made, which he did. Defendant denies that it was agreed that the different judgments against Thomas Bourke were to be paid out of the purchase money. Defendant relied on the complainant's assurance that the incumbrances were to be removed. Defendant denies that it was mentioned to him at the time of the agreement that the titles were to be made by Mr. Williamson—he expected them from complainant, with whom he was contracting; and he learnt with surprise afterwards from

his counsel, Mr. Ward, that the title was not in complainant, but in Mr. Williamson, and he thereupon expressly in a letter of 12th July, 1791, disclaimed having any thing to do with Mr. Williamson. Defendant denies that he took possession as purchaser, but under complainant's permission to occupy the house, rent free, till the titles were completely executed. Defendant says that he was desirous to learn what sort of titles complainant meant to bring forward; and he soon learnt from Mr. Ward that even if he (the defendant) should be willing to receive titles from Mr. Williamson, that gentleman was unwilling to make a full conveyance, with the usual clauses of warranty, but only to warrant against himself and those claiming under him, which defendant declared to Mr. Ward he would not receive; and on complainant wishing defendant to write a letter to Mr. Williamson, requesting the execution of titles, without any warranty, defendant again wrote to complainant that he had nothing to do with Mr. Williamson, but solely with complainant, with whom alone he had contracted; and that if he could be induced to accept of a conveyance from Williamson,

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nothing but a full and *complete warranty would satisfy him; and that if the matter was not satisfactorily closed by the 1st of October, 1791, he should consider the business at an end; and defendant avers that he was ready on that day to have complied with his contract, having kept his funds in his hands for that purpose. That complainant went to Georgia, where Mr. Williamson resided, as he said, to get a title, and on his return called on defendant and informed him that he had now arranged all matters, and requested a day might be fixed to settle. That accordingly a meeting took place, but defendant then found that even Mrs. Bourke's dower had not been renounced, nor the judgments taken up. Defendant admits that complainant offered to give his bond of indemnity to defendant, touching Mrs. Bourke's dower, and offered to assign him the judgment he held in interest till he could recover against Bourke; but as this was leaving open an incumbrance against the property, the agent of Mr. Williamson (to whom he had transmitted the deeds of conveyance) refused to part with the titles, unless defendant would subscribe a formal exoneration and release of said Williamson from all responsibility, and all general warranty, which he was instructed positively to require; upon which, and upon complainant's refusal to allow defendant to retain indents (at the then selling rate) to meet the debt on mortgage to the loan office, the parties separated; and defendant refused to go on with a contract so full of intricacy, and where such a doubtful title was offered him; and he wrote to complainant on the 4th of August, 1791, declining any further negotiation, or to accept of any other than direct conveyances from the complainant himself, and that all the incumbrances should be actually removed, except the mortgage which defendant was to assume. To this letter defendant got no answer; and though it was injurious to him to keep such a sum unemployed, he did so till October, when he wrote to Mr. E. Rutledge (whom he understood to be the complainant's counsel) that he considered the contract at an end, unless the proper titles were delivered on that day, and the business settled, and offering to deliver up the premises, or to rent

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them. *To this letter defendant got no answer. Defendant states, that though he meant to submit to Mr. Ward's judgment the legal questions which might arise, he never meant to submit to him whether defendant should receive titles from a person with whom he never contracted; and still less whether complainant's bond of indemnity should satisfy defendant instead of an actual renunciation of dower by Mrs. Bourke. That Mr. Williamson's agent did not deliver the conveyance to complainant to be tendered; but at the request of his counsel for perusal, with a promise of re-delivery, which was made; and the agent has since returned them to his principal. Defendant believing the business at an end after the 1st of October, 1791, did, in December, enter into a new purchase, and applied his funds to that purpose; and he trusts he will not now be compelled to specific execution of a contract so often varied by complainant, and since abandoned; nor does he now believe that complainant could obtain or give a complete, clear, and secure title to defendant. He prays to be dismissed.

The cause came to a hearing, and the following evidence was given. The memorandum of agreement for the purchase of the house and lot by O'Hear, as stated in the bill of complaint; conveyances of the house and lot from Mrs. Ellis to Thomas Bourke; conveyances from Bourke to John Williamson, for the consideration expressed of £3000.; deeds recorded 23d September, 1789; deeds prepared from Williamson to O'Hear, and to be delivered on certain terms.

Mr. Gaillard testified that he held one of the judgments against Bourke, and complainant had agreed to pay him indents at par: he attended for that purpose the meeting at Mr. O'Hear's.

Mr. Lamotte testified that he knew Mr. O'Hear took possession of the house, when Mr. Grant left it. He considered him taking possession as a purchaser, as he knew of the agreement for the purchase. Witness acted as attorney for complainant, and received balance of rent from Grant.

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*Mr. Pringle testified that he knew the bond and judgment of Waters against Bourke to be now the property of complainant.

The titles were drawn by him, and sent to Mr. Williamson to be executed. He does not think they were ever shewn to Mr. Ward or Mr. O'Hear, before they were sent to Mr. Williamson. He knew that the Island of St. Catharine's was the consideration on the part of M'Queen for the house in town.

Mr. Ward testified that when the titles from Williamson to O'Hear were shewn to him at the meeting spoken of by the parties, O'Hear asked him if they conveyed a clear and an unencumbered estate; he told him no, explicitly.

Mr. Grant testified that Williamson sent him an order, dated 18th of April, 1791, whilst he was occupant of the house, to pay the rent to Butler. He never after that paid any rent to Bourke, but he had advanced Bourke eighteen month's rent before. He quitted the house sooner than he wished, as O'Hear was anxious to get in. He left it on the 10th of June, and O'Hear entered on the 12th of June. He entered as purchaser—O'Hear told him so.

Mr. Prince testified that the complainant told him he would go to Georgia, and get titles from Williamson, and then he would make titles to O'Hear, as he had objected to titles directly from Williamson to himself. Complainant told O'Hear he would take off every incumbrance on the house with the purchase money. He heard complainant say that he had never agreed to O'Hear's retaining any of the indents at all. Complainant told O'Hear immediately after signing the agreement, he might go into the house, and sit rent free till he delivered him good titles.

Mr. Morrison heard complainant say he had never agreed that O'Hear should retain any of the indents to take up the debt to the loan office; but that O'Hear wanted to be off the bargain.

Mr. Daniel Desaussure testified that Mr. Williamson had sent him the titles for the house which Bourke had conveyed to him, with instructions not to deliver them to

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*O'Hear, to complainant, or any other person, until he, Williamson, should be completely released from all responsibiity, on any account for incumbrances, title, or otherwise. That the witness did once, at the request of Mr. Pringle, loan him the titles, with a promise to return them, which was done. That finding the incumbrances were not effectually removed, and that O'Hear refused to release Williamson from the clause of warranty, and other obligatory clauses of the conveyance, which Williamson required (as he had no real interest, he would not be bound in any shape) he returned the title deeds to Mr. Williamson.

Mr. Williamson certified that he had instructed his friend Mr. Desaussure, to whom he sent the deed of conveyance of the house, not to deliver the deed until he was completely exonerated from all responsibility or liability for defect of title, or any incumbrances on the same; and that his agent acted as he directed; and finding that he, Williamson, was not effectually released, returned the titles.

Mr. Pringle for complainant. From the words of the agreement it is specified, that the money was to be paid on the delivery of good titles. Then it is not indispensible that the titles should be from the complainant; nor is any precise time fixed when the titles are to be delivered. That part of the agreement signed by Butler mentions that he was not acting for himself, therefore it could not have been intended that the titles were to come from him. 2 Eq. Cas. abr. 689. 2 Powell, 37, 33, 268, 271. 1 Ves. 88, as to the retention of the money. 2 P. Wms. 630. 1 Atk. 12, 1 Bro. P. C. 218. 18 Viner, 188, Powell, 7. If the titles had been made directly by Williamson to Butler, the object of the conveyance to Williamson would have been defeated, because M'Queen intended the property put into Butler's hands to identify him for being M'Queen's security; whereas, had the titles been made to Butler, the house might have been subjected to his private debts, and left M'Queen liable to their joint debts.

Mr. E. Rutledge for complainant. O'Hear knew of every incumbrance on the land be-

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fore he signed the con*tract. In searching the offices for incumbrances he must have found the titles from Bourke to Williamson, and that there were no titles to Butler; how then could he expect titles from Butler? O'Hear took possession of the house after he was informed that titles were drawn and sent to Williamson for execution. This shews that he understood Williamson was to give the titles and that he acquiesced. On 21st December, 1791, Mrs. Bourke's renunciation of dower was executed, and offered to be delivered to O'Hear. This completed the title. The declaration of trust must always be made by the person in possession of the legal estate. This was in Mr. Williamson, and he has done so. The estate must follow the terms on which it was conveyed. It was expressly conveyed to Williamson to hold in trust to indemnify Butler against his securityship for M'Queen. Quotes 1 Atk. 12. 1 Ves. 88. 2 Bro. 415. Powel, 231, 265.

Holmes for defendant. This court will never decree the specific execution of contracts, unless mutual, and the circumstances such that the court could enforce its performance on both parties; but that could not be done in this case. The legal estate in the house was in Williamson. He resided out of the jurisdiction of the court. Neither Butler nor the court could compel him to execute the agreement made by Butler. He has tried to induce Williamson to do so; but he would not, unless clogged with such conditions of

release to himself, as no prudent purchaser would give, and no court would direct. This ground alone is sufficient to prevent the court from interfering, and decreeing specific execution.

Mr Harper for defendant. O'Hear did not know any thing of Williamson in the first instance. As soon as he was informed that Williamson was to make the titles to him, he wrote (on the 12th July, 1791) stating that he expected titles from Butler. This was within a month after the agreement. The contract wants the great ingredients of mutuality and certainty. Butler could not perform his part of the contract in a reasonable time; nor is it certain that he could at any rate, on such clear unqualified terms as would be

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just and safe to the purchaser. *The dower of Mrs. Bourke was not renounced in due form till December, 1791, six months after the contract; and such titles as Mr. Ward would approve (which is the condition of the agreement) have not yet been produced. Mean time circumstances are materially altered. Contracts entered into to be performed on a day certain, are void, if not performed at the day. But the conveyance from Bourke to Williamson being in trust for M'Queen, it became liable to his debts; and the title from Williamson could not have got the land clear of that incumbrance; these were concealments on the part of the complainant. At the time of the purchase, the house was incumbered with judgments and a mortgage, which was not made known to O'Hear at that time. This is clearly a contract made under such circumstances as this court will not enforce. Quoted 2 Powell, 221. 3 Atk. 384. 2 Eq. Cas. abr. 20, 58, as to the contract. 1 Vern. 227. 2 Vern. 415, as to the uncertainty. 2 Eq. Cas. abr. 689, as to the alteration of circumstances. 1 Bro. 27, as to delay.

Mr. Read for defendant. Mutuality of contract; and of the remedies upon them, are essential to their justice, and to induce this court to decree specific performance. If O'Hear had filed his bill v. the complainant for specific performance, he could not have obliged him to execute the agreement; for, as the complainant's counsel insist (for another purpose) Butler was not acting for himself, nor does he state for whom he is acting. Then by the statute of frauds, he is not the party to be charged with the fulfilment of the agreement. If he could not be enforced to the performance of the agreement, this court will not decree against the other party. The complainant's counsel contended that Williamson held in trust for M'Queen, and that by M'Queen's direction Williamson was to convey to whomsoever Butler should direct.—If so, the house is liable to the debts of the cestui que trust, M'Queen, and these incumbrances have never been removed; and the court will not decree a party to accept a title under such embarrassments and doubts.

Mr. Ford for defendant. The rule is most clearly established that contracts must be

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fair, reasonable, mutu*al, certain, made for valuable consideration, and free from concealment or surprise, or this court will not decree a specific execution. See 2 Powell on Contracts, 221. 2 Comyn's Digest, 129; but this contract was not reasonable, or mutual, or certain. Complainant was not tied down to any certain time. Defendant was obliged to hold his funds idle, to be always ready to meet the demand when it suited complainant to comply. There was no mutuality. The defendant alone signed the contract, which was drawn and presented by the other party, and he was the only party bound. Complainant was not under such an obligation to convey the house, that he could have been compelled to do so. There was also concealment on the part of complainant. He did not disclose at the time of making the contract that the title of this property was not in the contractor, but in another; and that he really had no power to convey the land. Why conceal this fact till O'Hear had signed the agreement? Because the knowledge of it might have prevented the purchaser agreeing to go on with the contract. He also concealed from defendant that M'Queen had any interest in the premises, and that the house might be subjected to his debts, and he concealed the fact in whom the legal title really was. The opening and conducting the negotiation was in complainant's own name; and this surely led defendant to believe that he was dealing with him a known person, in whom he supposed he could rely; but it turns out he is dealing for others; some of them unknown to defendant, and in none of whom he had any confidence. Thus he was misled into the contract. Such concealments are solid objections to a decree for specific performance. 2 Powell on Contracts, 222, 205. See Shirly and Gratton, 1 Bro. C. C. 440. The complainant who seeks a specific performance must shew that he himself was able and willing to have complied with the contract, and had taken all the steps incumbent on him to have done so; but complainant was not able at the time, of himself, to have made good titles. The legal title was not in him, but in Williamson; who, acting for another, would not be bound to do as

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complainant required, and actually re*fused to convey, but on terms which the purchaser was not bound to accept. He lived out of the jurisdiction and control of the court; besides, Williamson held in trust. In trust for whom? M'Queen says for him; and he authorises complainant to act. But where is the evidence of this? A letter from M'Queen.

Was this obligatory on Bourke? or even on Williamson? Surely not. Then complainant was not in a capacity to comply with the contract; and if so, is not entitled to enforce it on defendant. A deed of trust must express the trust on its face; or there must be a declaration of trust by some collateral deed made by the grantor. The statute of frauds declares trusts void which do not carry these marks of authenticity. If the trust was valid as to M'Queen, then the house was liable to his debts as cestui que trust, and complainant must remove those incumbrances, which has not even been offered or attempted. See 3 Atk. 186. 2 Vesey, senior, 52. 5 Bac. 590. 1 P. Wms. 323. O'Hear refused, as he had a right to do, to receive titles from Williamson, when he was informed that it was intended to get titles from him, and required them from complainant as the person with whom he had contracted. But complainant has never been ready; nor has he yet offered to make titles himself to defendant; and the titles he does offer from Williamson do not contain those full and distinct warranties and covenants on which purchasers rely for their security; but he warrants only against himself, and those claiming under him, and requires a release from all liability for incumbrances. This court can never be prevailed upon to decree a specific execution of a contract by one party, when so many difficulties exist to his getting a good, clear, indefeasible title. But it is alleged that O'Hear, though he refused at first to accept titles from Williamson, afterwards agreed to do so, and to release the covenants of Williamson, and to accept a bond of indemnity against the dower. If the contract was ever so varied, it must have been by parol; for there is not a tittle of written evidence produced to that effect. Everything written is to the contrary; and the answer denies these allegations. Now the rule of the

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court is clear. Where *the answer denies the allegations of the bill, the denial is conclusive, unless the answer is contradicted by two witnesses, or one witness supported by strong circumstances. 2 Comyns, 124. So far as the defendant admits in his answer that he had nearly been prevailed upon to accept of the second proposals, to accept the title from Williamson, he expressly declares that he reserved to himself the right of examining when complainant brought forward the titles, and judging if he should be safe; and also to have the consideration disposed of according to the proposal. But even these second proposals were not adhered to by the complainant. He denied the right of defendant to retain indents to satisfy the mortgage at the price of twelve shillings, which was the price at the time of contracting, and insisted they should be retained at the rate of eighteen shillings, the price on the day of the meeting. Upon this point, as well as others, the parties broke off, and this was the fault of complainant. These were imperfect negotiations, not binding on either party. Again Mr. Ward was referred to in the agreement as the counsel, who was to be satisfied with the conveyance to Mr. O'Hear; and he has given his decided opinion that the titles offered to O'Hear did not secure a good and sufficient title; and this difficulty is conclusive. Complainant must do every thing necessary to be done on his part. He has not done so. He never would take Williamson's title to himself, and then give a clear, full, indefeasible title to defendant. There is a great difference between the court refusing to decree specific performance and destroying the contract. See 3 Atk. 383. 1 Vesey, sen. 279. It was contended that O'Hear's taking possession of the house was conclusive as an execution of the contract. But defendant swears in his answer that he did not take possession with any intention to bind himself to the terms complainant should dictate, or to give up any just objections to the title. He took possession of the house because he supposed complainant would comply with his contract, and give him a good title; and because he was told he might take it rent free till good titles were made out to him. This his answer

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states, and is corroborated by the *testimony of one Prince. Mr. Grant's testimony does not destroy this evidence, for though he says Mr. O'Hear took possession under his purchase, he does not pretend to know or explain the terms of the contract. To make a possession taken under such circumstances, conclusive on defendant, would be to entrap him, and to produce an effect never contemplated by him. See 1 Powell, 306. 2 Powell, 153, 221. 1 Vern. 229. 1 Vesey, 279.

General Pinckney in reply for complainant. The conveyance by Bourke to Williamson in trust for M'Queen was good, though the trust was not expressed, if the proceeds were applied to pay his debts. 1 Bro. C. C. 81; and it is immaterial whether Williamson knew of the trust at the time it was created or not. The estate in M'Queen was a power of appointment coupled with a beneficial interest, and there can be no lien on it in equity; but he may dispose of it to such of his creditors as he prefers. He has done so, and preferred the complainant, who was his security; and the trustee is bound to carry his directions into effect; if he does not, the court would remove him, and appoint another. Complainant had such an interest in the house, under the trust, as the court would have compelled him to convey to O'Hear if he had sought a specific performance. O'Hear being a purchaser without notice, no incumbrance on the land since the contract would attach to it, only prior incumbrances. 2 Eq. Cas. abr. 42. 2 P. Wms. 629. The statute of frauds applies to executed trusts,

and not to executory trusts. 18 Viner. 118, 119. The agreement was general to take a title, and it is of no importance whether from Williamson or Butler.

Sometime after the argument, Chancellor RUTLEDGE delivered the decree of the court:

This suit is instituted by complainant to compel a specific performance of an agreement entered into by defendant for the purchase of a house and lot, and to pay the purchase money on complainant's delivering him good and sufficient titles from J. G. Williamson. Defendant, by his answer, admits he signed that agreement, but without taking a counterpart, so as to bind the complainant to a compliance with his part of it; and he

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denies that *at the time of making the contract it was agreed that the titles were to be made by Williamson; his name was not even mentioned, and defendant believed the title was in complainant. There is a variety of other matter contained in both bill and answer, relative to parol agreements and conversations between the parties subsequent to the written agreement, and varying it in some measure; but as nothing was concluded upon finally, it is unnecessary to particularize it. Various grounds of objection were urged by defendant's counsel to the execution of this contract. 1st, That it wants certainty, for that it is not specified by whom the titles were to be made. 2d, That there is no time limited for the making or delivering of titles. 3d, That it wanted mutuality; for, that by the agreement, defendant was bound to pay the money, but complainant was not thereby obliged to convey. 4th, Concealment on the part of complainant, in not disclosing to defendant at the time of making agreement, the various incumbrances which the property was liable to satisfy. 5th, That circumstances had materially altered since the agreement for the purchase. 6th, That complainant is not now able to make or procure a good title; for, that the estate conveyed by Bourke to Williamson, although on the face of the deeds it appeared to be an absolute conveyance, yet it was merely confidentially and in trust for J. M'Queen, and liable to satisfy his debts. In support of these objections, a variety of cases were cited, many of which were very applicable and strong; and it was conceded that under the authority of those cases and the rules laid down in the books, if any of the objections were well founded, they would go so far towards vitiating the contract, that this court will not decree a specific performance of it. Uuon mature consideration, the court are of opinion that of the various objections made, there is only one that appears to be well grounded, all the rest being sufficiently obviated by the defendant himself as will appear by referring to his answer, or are refuted by complainant's counsel. With regard to the uncertainty by whom the titles were to be made, the defendant after declaring that he looked on complainant as the

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owner of the house, and that he was *to convey (which is something extraordinary, as the complainant in the letter wrote immediately above the agreement, declared he was not acting for himself) he goes on and says that in five or six days after signing the agreement (and which by the by was before he took possession of the house) he was informed by Mr. Ward that the title was in Williamson, and that Mr. Pringle was drawing conveyances to be executed by Williamson to defendant; nor did he object to receiving titles from Williamson, till 12th July, more than one month after he had signed the agreement, when he wrote the letter to complainant, which is recited in his answer; so that however uncertain it might have been who was to convey at the time of signing that agreement, it was reduced to an absolute certainty in the course of a very few days afterwards. The second objection is, that no time is limited when titles are to be made. We do not apprehend it is material, because when no time is mentioned, it must always be intended a reasonable time. In the case of Crafton v. Cook and Ragland, Ragland's not having complied with his contract within the time limited in his bonds for making titles, was only one of the reasons assigned by the court for decreeing complainant's bond to be cancelled; but there were several other grounds for the decree equally strong. Ragland had never made or tendered titles to complainant; he was not able to make them within the time limited; he had parted with his whole estate in the lands several years before; that estate was never revested till 1791, and complainant had been sued for the purchase money in 1789, and Ragland could not at the hearing of the cause make an indisputable title to the whole of the land, one fifth part of it having been sold under execution, issued out of the court of chancery in North-Carolina. But lapse of time, unattended with other circumstances, is not of itself a sufficient ground for the court to refuse its aid, to compel a specific performance of an agreement. In the cause of Lewis v. Lechmore, which has been very much relied on, the time was held to be material, because the price of stock from whence the money for the purchase was to arise on

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the day specified in that agreement, *was 260 per cent. and at the hearing but 92 per cent. That case therefore does not apply in the present instance for it is in evidence that fundable indents are nearly at the same price as when the agreement was made. The objection as to want of mutuality, was answered by complainant's counsel by the cases which they cited. And indeed there is no

doubt but the court would have compelled him to make titles if he had refused on a bill brought by defendant for that purpose. As to the objection on the point of concealment, it must be observed that there is no charge of fraud, circumvention or surprise imputed to complainant; so that that objection is by no means well founded, especially as defendant by his answer acknowledges that all the incumbrances of the mortgage and judgments were known to him previous to his signing the agreement, and that he first understood and discovered them himself, and mentioned them in the first instance to complainant; nor could he undertake to say that complainant would not have mentioned them to him before the contract was closed. That circumstances have materially altered since the agreement for the purchase, may be an objection on defendant's part, because he has parted with the indents which he then possessed: but it is not a solid objection, for the price of fundable indents (we have it in evidence) is nearly the same now that it was when the contract was entered into. The only objection then that remains is, that complainant is not now able to make or procure a good title, and this is the only one about which the court entertained a doubt. It was contended for complainant that M'Queen took merely a power coupled with a beneficial interest in this land, and though liable to his debts, it was so only sub modo; and that he had a power to direct the trust to be executed in favor of such of his creditors as he chose to transfer it to. If in the conveyance to Williamson there had been a clause declaratory of the trust, vesting expressly a power in M'Queen to direct conveyance of the premises to the use of such of his creditors as he chose, it might possibly have prevented any judgments against him from attaching on that particular property; but

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as that is not the case, and from Wil*liamson's testimony it appears that he held the premises confidentially, and in trust for M'Queen's use, subject to his control and direction; and that M'Queen exercised every act of ownership over the house that cestui que trust could do, by receiving and disposing of the rents prior to Penman's judgment; and as it is also admitted by complainant that his letter to Williamson directing him to convey to such person as complainant should direct, was subsequent to Penman's judgment, we cannot consider him in the light merely of an agent, vested with a power of directing the trust to be executed in favor of particular creditors but as the real cestui que trust; and therefore that the estate must be liable to all the incumbrances to which such estates are subject in the hands of cestui que trust. The court therefore will refuse its aid to compel defendant to a specific performance of his agreement to accept a title which may eventually involve him in future litigation; and ordered the bill to be dismissed with costs.

A motion was made for a re-hearing, and was argued by Mr. Pringle and General Pinckney for complainant; and by Mr. Ford and Mr. Read for defendant. It was urged on the part of complainant, that Mr. O'Hear having no notice of the trust to M'Queen at the time he made the purchase from Mr. Butler, could not be affected by the judgments against M'Queen; and being safe, he ought to perform the contract; and the direction of M'Queen to convey as Butler should direct, shews a trust for him as a counter security. That after articles for the sale of land are executed, the interest vests in the vendee, and no judgments after the articles and before the execution of titles can affect the land. The common law cannot lay hold of a personal trust estate, though the statute of frauds gives a remedy against the lands by extent. The counsel cited 2 Powell, 56, 61. 1 Chan. Cas. 34, 39. 2 Comyns, 339. 18 Viner, 118, § 7, Title Purchaser. 5 Bac. 583. 2 P. Wms. 81, 618, 678. For the defendant it was argued that the title was in too much obscurity for the court to impose it on the defendant. Here are trusts upon trusts; a conveyance in fee to William-

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son, who has no in*terest. He is said to hold in secret trust for M'Queen; and M'Queen directs Williamson by letter to convey as major Butler should direct. This raises another trust for Butler. How the judgments and liens against these several parties would affect the lands, cannot be seen; and the court will on no account oblige defendant to take a title under such difficulties, especially when the person to make the legal title requires to be released from the effect of such incumbrances and from the usual liabilities of a seller. It cannot be pretended that all these difficulties were disclosed either at the time of the sale, or indeed at any time pending the negotiations; and such concealment is fatal to the contract. The counsel quoted 18 Viner, 118. Chanc. Cas. 34.

[I have no official statement of the opinion delivered by the court on the motion for a re-hearing; but it is understood to have been rejected.]

Chancellor Hunt died in the summer of 1794, immediately after the rising of the court, and the vacancy was not supplied for some years. The court continued to be held by Chancellors Mathews and Rutledge.

1 Desaus. 401

Case XCVI.

Present—Chancellors Mathews and Rutledge.

JOHN WARD, Administrator of John Wilson, v. LEIGHTON WILSON, and K. SIMONS and Wife.

(September, 1794.)

[*Dower* ⟸40.]

A marriage settlement even of the property of the lady, not recorded within the time prescribed by law, is void as to creditors; but the wife shall be relieved from her agreement contained in the settlement to give up her dower in her intended husband's lands; and the master was directed to report a proper allowance for dower to the widow.

[Ed. Note.—Cited in Cheney v. Lubbock, 1 Nott & McC. 451; Speake v. Kinard, 4 S. C. 56.

For other cases, see Dower, Cent. Dig. § 113; Dec. Dig. ⟸40.]

[*Husband and Wife* ⟸29.]

[The statute of 1792 in relation to recording marriage settlements does not apply to the second clause of the act of 1785; and a settlement made between the times of passing the two acts, and not recorded, is void.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 167; Dec. Dig. ⟸29.]

[*Husband and Wife* ⟸29.]

[Where a woman had been in possession of property under a marriage settlement void for want of registration, supposing her title perfect, the court refused to charge her with the income thereof in favor of the husband's creditors, by whom the settlement was avoided.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 167; Dec. Dig. ⟸29.]

[*Husband and Wife* ⟸31.]

[A person who, after the death of the husband, marries the widow on the faith that the settlement is valid, will have no greater rights under the settlement than the former husband.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 179; Dec. Dig. ⟸31.]

The bill states that after the death of John Wilson, the complainant administered on the estate, and possessed himself of the personal estate of the said intestate, except certain slaves named in a deed of settlement, a copy of which is filed with bill; which said slaves the complainant understood were secured by said deed to the sole use of Eleanor Simons, the widow of the said John Wilson, deceased; but who, since his decease, hath

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intermarried *with Mr. Keating Simons. That the complainant hath not only exhausted all the credits of said intestate's estate in discharge of the debts, but hath advanced considerable sums above the assets which have come into his possession. That notwithstanding his said advances, he is still pressed for the payment of several other large debts of equal degree with those which he hath already satisfied, and which by the rules of law and equity, he will be found to pay in average and proportion to the relative value of the estate of the said John Wilson at the time of his decease, and which will be greatly distressing to the complainant, as he will have no means of indemnity in his hands. That the said John Wilson also died, seized of certain lands, a list of which is filed with bill, over which land the complainant hath no control, although he hath been constantly obliged to pay large sums for taxes; that he hath applied to Leighton Wilson, the nephew and heir at law of the said John Wilson, deceased, stating the premises, and requesting that he would consent to the sale and apply the proceeds of said lands to the payment of the said intestate's debts; and also to the said Keating and Eleanor since their intermarriage, to deliver up the said negroes claimed by them under the deed aforesaid, and which your orator is advised does not in law, and cannot in equity protect the said negroes from the payment of the said John Wilson's debts, inasmuch as it is stated not to have been recorded within the time prescribed by law; and he well hoped that they would have complied, as in justice and equity they ought to have done. The bill prays that the said lands may be ordered to be sold for the benefit of the creditors of the said John Wilson's estate, and that the said Keating and Eleanor Simons may be ordered to deliver up the said negroes with the issue of the females, and that they may be sold and disposed of for the benefit of the estate of the said John Wilson, deceased; and that the complainant may be relieved in the premises.

Defendant Leighton Wilson's answer. The defendant admits that the late John Wilson died intestate, and that the complainant ob-

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tained letters of administration on his *estate; but he neither admits or denies that the complainant has fully administered the estate and effects of his said intestate, and humbly prays that the master may be directed to enquire thereinto. The defendant also admits that the said John Wilson did die possessed of the lands described in complainant's exhibit D; and that he hath been applied to by complainant to have the same sold, but being informed that the proceeds would be entirely and wholly applied to the payment of said John Wilson's debts, this defendant refused to intermeddle with the business. That he is ignorant of the nature of the deed made by the said John Wilson on his marriage with the defendant Eleanor, now Eleanor Simons, or whether the negroes named therein are thereby protected from the payment of the late husband's death. That he admits himself to be the heir at law of the said John Wilson, deceased, and humbly prays that his interest in the lands may be protected; or should it be deemed expedient to sell and dispose of said lands, or any part of them for the payment of said John Wilson's debts, that the same may be sold on a

reasonable credit, and the surplus money, if any should remain, be paid over to him.

The answer of Keating Simons and wife admits that the said John Wilson died intestate, and that the complainant obtained letters of administration on his estate, and possessed himself of the personal estate, but not of the negro slaves named in the deed of settlement, a copy of which is with the bill filed, which was in fact a settlement made of the defendant Eleanor's own property on her, previous to her intermarriage with the said John Wilson, and which secured the said negroes to her, on the event of her surviving the said John without issue, which event has happened; and the said deed did not comprehend any part of the property of the said John Wilson, but contained a renunciation from her of all right to dower in his lands; and these defendants admit that the complainant always understood, as he in bill sets forth, that these slaves were secured by the said deed to the sole use and behoof of the said Eleanor on the event above mentioned; and they humbly submit that

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they were so secured. That *this was also the belief of the defendants, and in conformity thereto they were never appraised as the property of the estate of the said John Wilson, and never were in the possession of his administrator the complainant. The defendant Eleanor for herself says, that she took possession of the said negroes shortly after the death of the said J. Wilson, and they continued uninterruptedly in her possession till her intermarriage with her present husband Mr. Keating Simons, when they went into the possession of John Ball, appointed her trustee on her second marriage, and now remain in his possession. She denies that the complainant ever made any application to her during her widowhood for the delivery of the slaves, nor did she know that he had any idea of claiming them till after her marriage with the present husband; that she does not know positively when the settlement which was made previous to her marriage with the said John Wilson was recorded, but is informed it was about the 16th of August, 1790. The defendant Keating Simons for himself says, that previous to his intermarriage with the defendant Eleanor, he knew that the slaves in question had been secured to her by a marriage settlement, made previous to her intermarriage with the said John Wilson, and that they remained in her possession; that he knew of no claim that existed against them, nor did he know or believe that they were liable to the payment of the said John Wilson's debts; that under this impression this defendant by a deed made previous to his intermarriage with the defendant Eleanor, did make a marriage settlement, conveying the said negroes to certain uses contained therein, and which settlement has been duly recorded; that he considers himself and humbly submits that he is in fact a bona fide purchaser of those negroes for the most valuable consideration, and he humbly prays that he shall be protected in his rights to them, and more particularly because all the debts due by the said John Wilson were contracted long previous to his the said John Wilson's intermarriage with the said Eleanor, and not on the credit of the said negroes, and the said settlement was not a secret one, but was notorious to the said complainant and many

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others. They *contend that in equity the said negroes cannot be made liable for the said John Wilson's debts, as well for the reasons above mentioned, as because it appears by the exhibit A. that at the time the said John Wilson contracted with the said Eleanor before her marriage, that this property should be reserved to her in case of her surviving him without issue, he obliged her to contract on her part that she should have no dower in his lands, which, without she had entered into such contract, she would have been (notwithstanding his previous debts) entitled to; reserving thereby to his creditors all the property he had, on the credit of which they trusted, and reserving to the said Eleanor on the event above mentioned only her own property; which contract these defendants submit is replete with equity, and should be carried into effect. And these defendants answering, say they know nothing of the accounts contained in the exhibit B. or with the particulars of the lands contained in the exhibit D. both with bill filed, and pray that they may be quieted in their right to said negroes; and the answer concludes in usual form.

The cause came to a hearing, and it appeared in evidence that the deed of settlement in question between John Wilson and his intended wife, previous to their marriage, of her property, was executed on the 1st of January, 1789, and was recorded on the 16th of August, 1790. That John Wilson was dead at the time it was recorded. The debts of Wilson were contracted chiefly before the settlement. Those after contracted did not exceed £160.

Mr. John Ward contended that the deed of settlement not having been recorded within the time prescribed by our statute on that subject, was void as to creditors, and the property included in it liable to their demands against the husband. The law is peremptory in requiring the deed to be recorded within a limited time, and no excuse is receivable for the delay. Marriage settlements are not to be favored; they are not adapted to our institutions and republican form of government.

Mr. E. Rutledge and General Pinckney for defendants, Mr. and Mrs. Simons, contended

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that as the pro*perty included in the settle-

ment was wholly the wife's, and as she actually agreed therein to renounce all claims of dower or other interests in her intended husband's estate, she stood in the most favorable point of view; and the court would, if possible, protect her, though the deed was not recorded in the prescribed time. She was in reality a purchaser for the benefit of the creditors, who would obtain the benefit of the sale of Mr. Wilson's lands, without any diminution by dower. The creditors in question never gave a credit to Mr. Wilson on the faith of this property, for they were all creditors before the marriage, except to a small amount. The settlement was generally known, and neither the administrator or creditors took any measures to question it for several years. The administrator did not even include the negroes in the appraisement of the estate. This was an acquiescence which ought to be conclusive, as she has since married Mr. Simons, who, upon the faith of the property being in her possession, has made a new settlement thereof on his marriage with her, which ought not to be disturbed. If the property included in the settlement is taken from her, it will be a peculiarly hard case on her, because in consideration of such settlement of all her property, she renounced all claims on her husband's estate, and being of full age at the time, she will be bound by her agreement. It is a mistake to suppose that settlements are anti-republican; they are quite the reverse, and ought to be favored. Settlements take care that the property shall go equally among all the children; they prevent partiality, and bring back to that fairness and equality the property which, by the legal polity of a monarchy, was vested in one child to the prejudice of the rest. Settlements produce a conformity to the laws of Rome and others, where women had rights: not as according to the English laws where the woman's existence is supposed to be annihilated. The counsel cited 3 Co. Rep. 59. Cro. Eliz. 473. 2 Bac. 140. 3 Atk. 8. 2 P. Wms. 243. 1 Atk. 439. 2 Vern. 274. 4 Bacon, 645.

Chancellor MATHEWS delivered the decree of the court:

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*It will be unnecessary for us to follow the counsel through the wide field of argument they have gone into in this cause. We think the whole case is reducible to a single point, that is, whether the neglect of recording the settlement made by Wilson on his marriage with one of the defendants, now Mrs. Simons, will be fatal to such settlement or not; and this must altogether depend on the construction to be given to the law of 1785, and that of 1792, made for the amendment of the former. The first clause of the latter law only provides against the defect of the first clause of the first law. The second clause enjoins certain things to be done after the passing thereof, and takes not the least notice of such settlements as were made between the passing of the first and second law; and the proviso, which is the last clause, is prospective, and in no part retrospective. From hence we must conclude, that as the legislature from their review of the law of 1785, thought proper to explain or amend only the first clause of that law, because it was "defective and inadequate to remedy the mischiefs thereby necessary to be provided against," and have observed a profound silence with respect to the second clause, that they were satisfied that the second clause of the law which comprehends the cases of settlements made between the passing of the one and the other law, was adequate to the purposes of its original intention, and left it to its full operation. We must therefore consider ourselves bound to construe the remaining part of that law according to what was their intention, however inaccurately it is expressed. From this view of the subject, it would neither be decent nor allowable in us to say that the law of 1785, might have been made more clear and comprehensive than it is. The legislature have thought it sufficiently obligatory as it stood on those who came within its intention, either to conform thereto, or subject themselves to the penalty thereby to be incurred. As the case now before us is clearly included in the second clause of the law of 1785, the settlement having been made since the passing of that law, and not being recorded within the time therein limited, the penalty of the law is thereby incurred, and it is not

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possible for this *court to apply any remedy. On the contrary, we are of opinion that the settlement under that law has become forfeited, and must be liable to the debts of Wilson, the former husband of the defendant, Mrs. Simons. As to the defendant, Mr. Simons, her present husband, having also made a settlement of the same negroes included in the first settlement on his marriage, without any notice of the claim of Wilson's creditors on them, they not having been returned in the inventory of Wilson's estate, that he is thereby become a fair purchaser, and ought not to be divested of the negroes contained in the said marriage settlement, we cannot place him in a better situation than Wilson would have been. The negroes were forfeited in Wilson's life, and were subject to his debts. The law does not point out any time when the creditors are to demand the forfeited property, and it does not lay with us to animadvert on their indulgence to their debtors by not demanding it sooner; but as the property has once been forfeited by the law, we cannot restore it. Yet, as the negroes might have been demanded sooner, and Mrs. Simons was permitted to retain them in her possession, under an impression that

they were her property, we think the law gives us so far a discretionary power, as to say that the creditors have no claim to any compensation for the work and labor of the negroes. They had a right to demand them immediately, and if they neglected to do so, it was their fault. We therefore think it would be unjust that she should incur a double penalty.

The cause of Lennox v. Gibbes [1 Desaus. 305] determined in this court, must be the case referred to by the preamble to the law of 1792, as no other had been previously made, and that decision was upon the first clause of the act of 1785. But as the case before us comes under the second clause of that law, the two cases are materially distinct; and for reasons already given, must be subject to different constructions. There can be no doubt about the sale of the lands.

It is therefore decreed, that the negroes in the marriage settlement contained, with their issue and increase, be delivered up to the

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complainant, the administrator of *Wilson, to be applied to the payment of his debts. That the lands be sold by the master on a credit of one year, and the securities therefor be by him delivered over to the complainant, the administrator. But as from the forfeiture of the marriage settlement, the late widow, now Mrs. Simons, is restored to her right of dower in her former husband Wilson's lands, that the master do report what will be a proper allowance for her dower, if she chooses to take such compensation; otherwise that commissioners be appointed under the direction of this court, to assign to her her dower in the lands. And that the costs be paid out of the estate.

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1 Desaus. 409

Case XCVII.

Present—Chancellor Mathews and Rutledge.

W. W. BURROWS and CHARLES BROWN v. M'WHANN and CAMPBELL, Administrators of Patrick Carnes.

(September, 1794.)

[*Executors and Administrators* ⇐263.]

Co-securities in a bond have a right to call on each other to contribute to pay the debt of their principal, who is insolvent; & to have the benefit of the judgment obtained by the creditor against them all, though satisfaction had been entered up on the judgment: So as to let them stand as judgment creditors against one of the co-securities, who was dead and insolvent; but whose estate could pay his proportion of this debt, if considered a judgment debt.

[Ed. Note.—Cited in Lenoir v. Winn, 4 Desaus. 75, 6 Am. Dec. 597; Ex parte Reynolds, 68 S. C. 439, 47 S. E. 728.

For other cases, see Executors and Administrators, Cent. Dig. § 995; Dec. Dig. ⇐263.]

[*Equity* ⇐72.]

A lapse of 7 years is no bar to the equity under such circumstances.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 218; Dec. Dig. ⇐72.]

The bill charges that the complainants, together with Robert Forsyth, Patrick Carnes and Joseph Brown, became bound as securities for John Banks, the principal, in and by a certain bond or obligation bearing date the 4th December 1785, in the penal sum of £9,800 conditioned for the payment of £4,900. That a warrant of attorney being contained and inserted in said bond, James Warrington immediately entered up judgment against all the obligors. That the said John Banks after the obtaining the said judgment, quitted this state and died insolvent, leaving a considerable balance due on the said debt. That the said Robert Forsyth being greatly reduced by his unfortunate connection with Banks, was unable to discharge any part of said balance, but that the said Patrick Carnes, Joseph Brown and your orators remained liable and responsible for the same in equal proportions. That the said Patrick Carnes departed this life in 1786, intestate, and the said William M'Whann and David Campbell, on the 22d December, 1786, administered and

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possessed themselves of all his personal *estate: which, although not adequate to pay all the debts due by the intestate, were far more than sufficient to pay the said Carnes' proportion of the judgment aforesaid; which being the first judgment against his estate, at his decease, ought in justice and equity to be, (and your orators charge the said defendants by law are,) bound to pay, in preference to every other debt. That after the death of said Carnes, and said Forsyth being absent from this state and insolvent, your orators and the said Joseph Brown, anxious to discharge said judgment which bound their estates as well as that of the said Patrick Carnes deceased, came to a settlement in respect of the balance then due, and advanced and payed large sums of money towards satisfaction of said debt. That the said Forsyth lately died insolvent; and the said Joseph Brown being also insolvent, was unable to pay an entire third of the said judgment, but that a very trifling balance remaining thereon, was paid by W. M'Whann, one of the administrators aforesaid, and a creditor of said Carnes' estate. That immediately on said payment, and without the knowledge of your orators, he caused satisfaction to be entered up on said judgment. And your orators shew that the sum paid by them as aforesaid is considerably more than their just proportion: That they have frequently applied to the defendants as administrators aforesaid, stating the insolvency of said Joseph Brown, and of the estates of said Banks and Forsyth, and requesting that they, the

said administrators, would come to a fair and equitable settlement in the premises, and pay to your orators a rateable proportion of said judgment, with legal interest, or any fair balance which on such settlement appears to have been advanced by your orators over and above their proportion: But the administrators of the said Patrick Carnes have on various pretences refused to do so, and the bill prays relief.

The joint and several answer of W. M'Whann and D. Campbell admits, that the complainants, with R. Forsyth, P. Carnes and Joseph Brown, became bound, together with, and as the securities of Banks, to J. Warrington, in and by a certain bond or

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obligation, as stated *in complainants' bill. They admit that the said Warrington, immediately on the execution and delivery thereof, proceeded to sue, and entered up a judgment against all the obligors aforesaid. They admit that the said Banks, shortly after the judgment was obtained, quitted the state, and died insolvent, leaving a considerable balance due on the aforesaid debt to J. Warrington. But they neither admit nor deny that the said Forsyth was reduced to very indigent circumstances, or that he was unable to pay his proportion of the debt. They admit that the said Carnes departed this life about the time the bill mentions, and that they administered on his estate: but that the said D. Campbell never intermeddled with said estate and effects, and that the said M'Whann alone possessed himself thereof according to the inventory and amount sales of the same, herewith exhibited. That the said M'Whann soon after taking upon himself the administration aforesaid, searched the proper office to see whether there were any judgments entered of record against said Carnes in his life time, but was informed that there was none; he therefore appropriated, disposed of and applied the assets in his hands according to the account of his administration herewith exhibited. That during that time he had no notice of said judgment or any application from complainants to contribute any part or proportion towards satisfaction thereof, and it was not until a considerable time had elapsed that he was informed that there had been a judgment entered against the said Carnes, together with the complainants Banks, Forsyth and Joseph Brown, at the suit of said Warrington, as in bill mentioned. That being surprised at such information, he recurred again to the office, where he found that said judgment had originally and at the time of his search been entered on the dockets in the name of Warrington against Banks and others, the name of the said P. Carnes not being expressed; and the defendant having no information or suspicion that Carnes was one of the party included therein under the word others. That the other obligors to the said bond, as in bill mentioned, having previously paid towards

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satisfaction of the said judgment *the sums, and in the proportions in bill mentioned, the defendant W. M'Whann, upon application being made to him by the said Warrington and by some of the parties concerned, did on the 30th day of May 1792, pay the sum of 419*l.* 13*s.* 5*d.* being the full balance of the debt and costs due on the said judgment and costs and charges, and obtained from said plaintiff a full release therefrom, and of all demands against him as administrator. The defendant W. M'Whann says, that some time after, at the particular instance and request of the said Joseph Brown, he procured the plaintiff Warrington to have satisfaction entered of record on the said judgment in due form of law, which was accordingly done. The defendant W. M'Whann therefore insists, that as satisfaction was duly entered on said judgment after full payment made thereof as aforesaid, and that without any undue means or unfair practices on his part, the said judgment ceased to be any legal lien or at all operative against said estate; nor can this court justly, under the circumstances of the case, restore its pristine efficacy, or place complainants in any other rank of creditors than that in which the law in such case places them, viz. as simple contract creditors, entitled to recover the surplus of their own proportions by action, in nature of indebitatus assumpsit, for so much money laid out and expended to the use of the other co-obligors. The defendant presumes that the court will be less inclined to deviate from the law which prevails in such cases, when it is considered that the defendant is himself a specialty creditor of the said Carnes, who together with the said John Banks, stands jointly and severally bound unto him, in and by a certain bond or obligation bearing date the 27th of June 1783, conditioned for the sum of £2743. 14*s.* 8*d.* sterling, great part of which he will lose.—Defendants deny all combination, &c.—Answer concludes in usual form, with prayer for costs.

This cause came to a hearing at the sitting of the court in ——— 1794.

Mr. Ward for complainants argued, that the doctrine was quite settled, that where there are several securities in a bond, and

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the principal is insolvent, the securities *have a right to compel each other to contribute proportionably to pay the debt. So if the principal and some of the securities are bankrupt, the solvent securities are bound to pay rateably, and they shall have the benefit of the judgment or other security existing in the case. 1 Atk. 133–5, ex parte Crisp. 2 Vern. 608, Parsons and others v. Briddick and others. There was no judgment against Carnes in his life but this; and

his administrators were bound to have paid his proportion, as the principal, and several of the securities were insolvent. The payment of the balance by the administrator, of about 419*l.* was made the 13th May, 1792, six years after Carnes' death, and nearly three years after complainants overpaid their proportion. If the administrator M'Whann had then exhausted the assets as he states, why did he pay that sum? It seems his object was to get a satisfaction entered on the judgment, in order to get rid of the lien, and to endeavour to place the complainants, who had a right to compel a contribution from Carnes' estate, on the footing of simple contract creditors, as is avowed in the answer. But he has deceived himself—the court will not only compel the contribution, but will set up the judgment or mortgage if satisfaction has been entered thereon, so as to protect the securities: and that too even if executors have paid away the money in their hands on the supposition that such security was extinct. 1 P. Wms. 355, Pooly and Ray. But in this case the administrator had an interest to defeat the complainants, and put them on the footing of simple contract creditors, for he had bonds due him by Carnes—But the court will set up the lien for the benefit of the securities. 3 P. Wms. 400: And the insolvent party need not be brought before the court. 3 Atk. 406, Madox v. Jackson. 2 P. Wms. 313. Collins v. Griffith. The pretence set up by defendant M'Whann, that he searched for judgments before he paid away the funds of P. Carnes' estate, will not avail him. He was bound to have searched accurately. The judgment was on record, and might have been found.

Mr. Pringle for defendant.—The administrator M'Whann had no notice of the judg-

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ment against Carnes' *estate. He should have had notice. He swears he searched the office, and did not find any. He therefore paid away the assets in a course of administration, and the court will justify him, and not suffer him to be a loser by requiring him to pay out of his own estate the proportion due by Carnes on this judgment which he could not find; being indexed, as it since appears, in the name of Banks and others, and not of Carnes. See 3 Atk. 208, Ashly v. Pocock. Besides, satisfaction has been actually entered up by the creditor in this case, and this court has no power to set it up, and restore its pristine efficacy as a judgment. Therefore the demand for a contribution on Carnes' estate, is merely a simple contract demand; and the assets of that estate will not even pay all the bond debts. See 1 Comyn 141, and 2 Vesey, sen. 569, Woffington v. Sparks. See 2 Bac. 435, as to error in payment of debts by the executor. This court marshals equitable assets, such as bankrupts' and trust estates, but not legal assets.

Gen. C. C. Pinckney in reply for complainants.—Administrators are to be considered only as trustees for creditors. By our statute they have not even a right to pay their own debts, in preference to others of equal degree; as executors might formerly have done. Marshalling assets is the peculiar business of this court; and the court of law has nothing to with it. See 2 Atk. 439. 3 Atk. 333. This court will consider as done that which ought to be done. 3 P. Wms. 215. Now the administrator ought to have made provision for the payment of the proportion of Carnes' estate of this debt, in common with the other co-securities who were solvent; and will oblige him to do so now. It is his fault that it has not been done; for it is a mere excuse to say that he could not find out a judgment, standing openly on record, and the only judgment subsisting against Carnes in his life time. If he really had no notice he waived the want of notice by afterwards paying a part of the debt on the judgment, though far short of the third part to be provided for by Carnes' estate. If a surety pays off the debt, he is entitled to assignment to enable him to obtain satisfaction. 1

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*Atk. 135. And bonds extinguished at law may be set up in equity. 2 Vern. 480, Acton v. Peirce. In a joint bond, if one of the obligors dies, the remedy is lost at law, against the executors of the deceased—but yet it is set up in equity. Bishop v. Church, 2 Ves. 100, 371. The justice of the case is wholly with the complainants, and the court will prevent the contrivance of the administrator of Carnes getting satisfaction entered on the judgment, to defeat that justice; especially as the inventory returned of Carnes' personal estate shews that it was very sufficient to pay his proportion of this debt, which was the first judgment.

The court took time to deliberate, and afterwards Chancellor MATHEWS delivered the judgment of the court:

This case has demanded our serious consideration, and we have bestowed on it more time and attention than usual, as it is of a new impression not only in this court, but also in that from which we have derived our jurisprudence, and by whose rules of decision we are still directed. That the case is a novel one in this court, we well know, and we must conclude it to be so in that we have alluded to, because, had any decisions been there made, the books would have shewn them; and could they have done so, we are persuaded they would not have escaped the researches of counsel, with whose ingenuity and industry we are so well acquainted. We have been equally unsuccessful in our labours. As it then becomes our province to fix the rule of decision, we have been at uncommon pains in forming our judgment.

The material point in the case is, whether

the judgment at law against the complainants and Carnes, whose administrator the defendant is, having been satisfied, this court ought now to interpose its authority, so as to afford any and what relief to the complainants?

A great number of cases have been quoted, and commented on with great ingenuity by the counsel on each side, for the purpose of applying the principles on which those cases have been determined to the case now before us. All those cases relate to sureties, or co-obligors who having paid the bond of the

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principal, or more than their *proportion of the obligation, have come into this court to be indemnified out of the estates of those whose debts they have been obliged to pay. How far the case of a satisfied judgment and that of a satisfied bond differ or can be assimilated, is the point now for consideration. And here, as in all cases, the circumstances that enter into and accompany them, in the course of the transaction, must always have material weight in the decision of the case, as far as they are admissible under the rules of the court.

The counsel for the defendant has laid down the two following positions, viz. that this court cannot interfere in this case without intrenching on the rules and laws of another forum: But that if it does interfere, and revive the judgment, all the relief that can be given to the complainants, will be to give them a right to a special action on the case, for an implied contract, as sureties, who had been obliged to pay the debt of the principal, whereby they will be entitled to come in as simple contract creditors.

This court has always studiously avoided breaking in upon the rules of any other jurisdiction, and as in the various and multiplied instances, in which it has been called on to exercise its extraordinary powers in restraining proceedings at common law, we have never yet been charged with exceeding our powers, we hope we shall not incur that censure on the following occasion.

We will first inquire into the powers of this court with respect to injunctions to stay execution. The right to grant them is not to be questioned, it is every day's practice. But yet it is an interference with the jurisdiction of the court where the judgment was obtained. It does not however impeach the right of that court to award the judgment; it merely relates to something, which by the strict rules of that court would not admit of correction, but which by the more enlarged rules of this court can be restrained and relieved against. Here is no clashing of jurisdiction; the laws of each court are known and uniformly admitted.

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*Another instance in which this court interposes its authority against the rigid rules of law is, in the marshalling of assets, contrary to the legal course of administering them.

This court has in several instances directed new trials at law, when by the rules of that court the time had elapsed, when the application ought to have been made; and as they never deviate from that rule, this court has, in cases where manifest injustice would arise from a strict adherence to it, directed new trials to be had. It will be unnecessary to multiply instances of the like nature. These are sufficient to shew that this court does interfere with the rules of the courts of common law; and from whatever source they have arisen is now immaterial; it has been for ages the established practice, and consequently has become the law of both courts.

It is true, neither of these cases come up to the case before the court. But let us examine the principle on which they are founded, and see whether they are not so far analogous as to demand the same claim to relief. In the case of an injunction against an execution at law, it will be found that the execution is as mandatory as any act of that court can be, and the signing of the execution is the last act of the court on any suit preferred there; yet the writ of injunction issuing from this court is equally mandatory, positively forbidding that to be done which had been by the other court ordered to be done. But it is contended, that in the present case, every requisite that could be wanting to the completion of a suit at law, was complied with; not only to the payment of the money demanded by the suit, but even the entering satisfaction on the judgment, by which final act the complainants must now be barred; because, if they ever had a right to come here for relief, it ought to have been in some intermediate stage of the proceedings at law; but as they have not done so, it is their own laches, and if they have been injured, they ought to suffer for it.

That the complainants have been injured is most evident. It is a maxim of law that there can be no right without a remedy; and

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that equity regards not the cir*cumstance, but the substance of the act. Are there not various instances in which this court will relieve against what has been considered as the final adjustment of the claims of parties? For instance, where a receipt in full of all demands has been given, yet if it can afterwards be clearly proved that there was an omission of some right of the party giving the discharge, will not this court take cognizance of such a claim, and if found to be a just one, grant relief to the injured party? In case of a conveyance of land, in which there is the clause of a certain number of acres, more or less, for a certain sum, when it is afterwards found that there is a very material deficiency in the quantity or quality

of the land, does not the court grant relief against even so solemn an act of agreement of the parties, and sometimes carry their authority so far, as totally to rescind it? In cases of wills, where subsequent events which could not have been foreseen or guarded against by the testator have turned up, which would operate to the ruin of those he intended to benefit by his bounty, if the will of the testator was to be literally carried into execution,—has not this court under these peculiar and oppressive circumstances over-ruled the express directions of the testator, and done that which would tend to the accomplishment of the benevolent intentions of the testator? In all these cases, and others that might be mentioned, this court has always exercised those extraordinary equitable powers vested in them, that the objects of their appointment might be fulfilled. Were we to act otherwise, this court would be an useless institution. We consider ourselves placed here to do certain things, which the courts of common law by the strictness of their rules cannot do. Indeed the first principle of a court of equity is, to correct the rigor of the common law.

This brings us immediately to the material point, viz. whether the powers of this court can be extended so far as to alter the records of the courts of common law, by reviving a judgment, which is become inoperative in consequence of satisfaction having been entered on it, whereby it is rendered a mere litera mortua.

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*We have said this is a new case; we are then called upon to act as our predecessors have acted under the like circumstances; that must be on principle, and the equity of the case. Under this impression, we are of opinion, that this is a case over which this court ought to exercise its jurisdiction, as no possible relief can be had at law, and unless we do interfere it will be at once to pronounce to the citizens, that although they may in a particular case be ever so much injured, yet our laws are incompetent to the administering of a remedy. This would be derogatory to one of the first principles of law. How can we then, consistently with the duties of our office, in one breath declare, that a party upon the truest principles of equity and justice, is entitled to relief against an oppressive act done by another, yet in the next breath say, the laws of our country do not authorize us to administer relief. In this case we cannot act so inconsistently.—But let us be clearly understood. We do not mean to say, that there is no case of hardship but what is to be relieved against; because we know of one, viz. that of Oliphant v. Singleton, where we could not give relief, although it was a hard case: But it was from the very particular circumstances of that case, that no remedy could be applied to the injury. As private men, we were convinced, from the well known character of Oliphant, that he had paid the money; but as there was not one tittle of proof that he had done so, as judges we could not say he had, and consequently could not extend relief. But is that the case here? It is not; because here is the clearest evidence to the point on which relief is required, and opposed to which is the mere formal act of entering satisfaction on the judgment, as will hereafter appear.

The complainants, together with P. Carnes and others, were securities for Banks in a bond to Mr. Warrington for 4900*l.* and which was accompanied with a warrant of attorney to confess judgment thereon, which was accordingly done, and judgment entered up against all the parties to the bond. The principal in the bond becomes a bankrupt; so do several of the securities, leaving a considerable sum due on the judgment. The com-

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plain*ants have been obliged to pay a very large sum on this balance; and Joseph Brown, another of the sureties, has also paid a part thereof, since which payment Joseph Brown has become insolvent. Carnes died without paying any thing on the judgment. The defendant, the acting administrator of Carnes, who was also a large bond creditor on his estate, (but as security only for Banks,) pays out of the assets which came to his hands the balance due on the judgment, and gets satisfaction entered thereon; and the remaining assets (except a few trifling expenses incurred by himself on account of Carnes) are sold, and he applies them towards payment on his own debt. But the complainants contend, that this was not a fair payment, for as Carnes was equally bound with them, that his estate was liable to, and ought to have contributed equally with them for satisfaction of the judgment; the principal and rest of the securities being insolvent. That the administrator's taking advantage of a payment (made by himself) of the small sum due on the judgment, and getting satisfaction entered thereon without their privity or knowledge, was taking an undue advantage of them; and his now insisting on sheltering himself under such advantage derived to him by the rules of common law, is contrary to equity, and therefore prays relief.

The defendant M'Whann, the acting administrator of Carnes, insists on the right obtained by him at law; and that this court ought not to interfere to deprive him of such right.

The administrator of Carnes can be in no better situation than Carnes himself would have been, had he now been before this court. Would he not have been obliged then, under the circumstances of the case, to contribute his full proportion towards satisfaction of the balance on the judgment? He certainly

would. Shall his administrator then be allowed to avail himself of the advantage he has got, and in the manner in which it was obtained? If this is admitted, it would be countenancing an act which we must consider as a very unreasonable and mischievous one. Because a man finds he can do a thing which will work a material injury to another,

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and to his *own particular benefit, under cover of the precise forms of law, shall he therefore be permitted to do so, and such act be implicitly acquiesced in, when it is derogatory to every principle of substantial justice? Although the act of entering satisfaction on a judgment is so far substantial as to shew to all the world that the debt is paid, and will be a perpetual bar to any future claim of the creditor, yet it is well known that it is a thing very seldom done, because the debtor knows that if he once obtains possession of his bond with a proper acquittance for the payment of his debt, it will at all times be a sufficient voucher for him to shew that the debt is paid, and to prevent an execution being taken against him for the same debt, with these documents in his possession. It is a very rare instance for a man to demand of his creditor to go to the prothonotary's office to enter satisfaction. In many instances it would be impracticable; for if a man of extensive dealings in Charleston was to be called on to do this in every suit he had brought in the different courts of the state, he would find very little leisure for any other business. It would therefore appear rather extraordinary that the defendant in the present case should have been so extremely cautious, did his conduct rest on this single circumstance: But it is readily explained when coupled with another, viz. the payment of his own debt; for it is evident, that the less of the assets of the intestate's estate he applies to the payment of other debts, the more will remain to satisfy his own. Was it for the purpose of paying his own debt only, that the administration was granted him? Surely not. Then again, when he did come to a knowledge of the judgment against Carnes, did he not plainly see, or did he not know from Warrington, what parties had paid money on the judgment? Did he not find that Carnes had paid nothing? Did he not find that some of the other securities had paid large sums? That on every principle of justice Carnes' estate was equally liable with the other securities for payment? Ought he not then to have called on all the parties concerned, and come to a fair adjustment of the business with them? This is what he ought properly to

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have done: But *what did he? Why he pays a small balance, due on the judgment out of Carnes' estate; and then applies the whole remainder of the estate in his own hands to the payment of his bond debt; and as he confesses by his answer, thus turns the other securities over to their action of indebitatus assumpsit, and obliges them to come in as simple contract creditors, whereby his specialty debt would be entitled to a priority of payment: when he at the same time acknowledges the estate to be insolvent. We may really say with the prayer of the bill, that such actings and doings are contrary to equity and good conscience. It might be further asked whether Carnes' estate has been benefitted by the payment made by the complainants? There is a lapse of near three years between the payment made by complainants and that made by the administrator of Carnes; is it not fair to presume from hence that Warrington was induced to wait for the small balance in consequence of the large payment that had been made him by complainants. But had no payment been made, the strong presumption is, that the parties would have pressed for payment; and had Carnes' estate been pressed for payment equally with the others, it must have been distressed, because it appears that the funds equal to such a demand did not come into the administrator's hands till March 1790; and the payment made by complainants was in 1789. The advance made by the complainants must clearly then have been a benefit to Carnes' estate. One remarkable circumstance in the accounts rendered by the administrator is, that the 419*l.* 13*s.* 5*d.* paid by him on account of the judgment, was the only debt paid by him, which had been incurred by Carnes as security to him for Banks; the remainder is for expenses incurred by himself; and out of 47*l.* 15*s.* so incurred, 42*l.* 16*s.* 3*d.* of it has been paid for towit counsel fees, and costs. One other circumstance too remarkable to be passed over in silence is, the application of Mr. Joseph Brown to the defendant, to demand of Warrington satisfaction to be entered on the judgment after he had paid the 419*l.* 13*s.* 5*d.* As he Brown was then confessedly insolvent, why should he

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have been so *solicitous for this being done? This must be best known to the parties.

It has been further contended, on the part of the defendants, that it is from the laches of complainant that any loss has been incurred by them; for had they given notice to the defendant of their intention to demand a contribution from Carnes' estate before defendant had paid the balance on the judgment, and had otherwise disposed of the whole of the assets which came to his hands, he would have been prepared to meet the demand, but as they never did so until he had administered the assets; and as there was a lapse of near six years from the death of Carnes to the time he paid the judgment, and near eight years before the demand was made, it is such an unreasonable delay and

laches in the complainants, that they ought not now to be permitted to come here and unravel the transactions of the administrator, to his great inconvenience and detriment.

It must be admitted, that there has been some laches on the part of complainants, but we do not think it such as ought to preclude them from relief, as one of the complainants resides out of this state, as all the parties are still alive, and as the payments made by the administrator has been to himself only. Had the payment been to a number of persons, and the relief prayed for would necessarily have turned the administrator over to such relief from the other creditors, this court would have entertained considerable doubt on the question; but as that is not now the case, and as the case is circumstanced, we think the complainants ought to be relieved.

From this view of the case, and from the most mature consideration, we are of opinion, that the complainants are entitled to be relieved against the act of the defendant: Because we do not conceive it to be one of those solemn requisites of law, that will not admit of a revision in a court of equity, and which, if corrected here, can be liable to any kind of dangerous or even inconvenient consequences; but on the contrary, it will be opening that door of justice, and admitting injured parties to the benefits which the real equity of their case entitled them to, which

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*would otherwise be for ever closed against them; not only to their oppression, but greatly to the discredit of the jurisprudence of the state.

As it is admitted that the estates of Banks and Forsyth are, and that Joseph Brown is insolvent, it must therefore be referred to the master to state what has been paid by complainants, and what by defendants out of Carnes' estate; that interest be allowed on each payment; that the amount be divided into three parts, and whatever sum shall be found to have been paid by the administrator of Carnes less than his third part, be by him paid to the complainants. And that each party pay their own costs.

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1 Desaus. 424

Case XCVIII.

Present—Chancellors Mathews and Rutledge.

WOODBERY v. Executor of COLLINS.

(September, 1794.)

[*Wills* ⊂=712.]

A legacy is given to a lady during her own life and that of her husband, and to the heirs of her body: but if she had none, then the property was limited over to others. The legacy was to take effect after £1000 was raised out of the estate for another legatee. The husband was a subscribing witness to the will, but he died before it was proved, and another subscribing witness proved it. This prevented his taking such an interest in the legacy as would make it void under the statute, on account of his being a subscribing witness. The wife surviving is entitled to the legacy.

[Ed. Note.—Cited in Taylor v. Taylor, 1 Rich. 540.

For other cases, see Wills, Cent. Dig. § 1693; Dec. Dig. ⊂=712.]

[This case is also cited in Taylor v. Taylor, 1 Rich. 551, on the application of St. 25 Geo. II, c. 6, to the execution of wills in South Carolina.]

The point for the determination of the court at present is on a clause in the will of J. Collins, in the following words: "I give and bequeath to Mrs. M. Hallone the following negroes, viz. Dolly and child, Nanny, &c., during the life of the said Mrs. Hallone, and that of her husband H. Hallone, and should the said Mrs. H. have heirs of her body, then to the said heir or heirs; but in case of no heir or heirs, then I give the said above mentioned negro slaves, and their increase, unto the eldest son of Dr. M'Gregor, and the eldest son of Alexander M'Gregor; in case there be no sons, then to the daughters."

The defendant the executor by his answer, admits that testator made his will in 1786, with such bequest as in bill mentioned: That testator died in 1789. That defendant alone proved the will and qualified, and is ready to deliver up the negroes, if the complainant will give security for their being returned at her death, in case the court should not think her absolutely entitled to them. At the same time he fully admits that

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it was the testator's *intention she should have a life estate in them even if she had no children. He then states that H. the husband was a witness to the will. A question arises, whether the legacy to his wife is not void, agreeable to the statute 25 Geo. II. which makes void any devise or bequest of real or personal estate, to any person who becomes a subscribing witness to such will. It was contended, that H. and his wife took an estate for their joint lives, and that by H's death, his wife's estate was at an end: But that even admitting that was not the case, he took a beneficial interest in such bequest to his wife; and being a subscribing witness to the will, the bequest was void under the words of the statute. It is manifest from the words of the bequest, that the testator had no intention of giving any estate whatever to H. the husband; the negroes being expressly bequeathed to Mrs. H. during her life time, and the life of her husband, with remainder to her heirs. To construe the bequest in the manner contended for, would be to frustrate the intention of the testator altogether; for as complainant was not to have the negroes until a legacy of £1000 to another person was raised by crops to be made out of the estate, the death of H.

before that period would prevent the legacy from ever vesting. The court was of opinion therefore, that as H. would have taken only a beneficial interest in the negroes during his wife's life, no estate either by intention or construction being bequeathed to him; and as there can be no doubt but that he would have had a beneficial interest in the negroes, the moment they were delivered over, so if he had made the present application agreeable to the words of the statute the court must have determined against him. H. is now dead, and for aught that appears to the court was dead when the will was proved; for it was proved by Bochet, one of the other witnesses, who is confessedly totally disinterested. The single question then is, whether the bequest is so utterly void from the circumstance of H's being a witness, that the court cannot decree a delivery of the negroes agreeable to the testator's intention? This is a specific bequest of a personal chattel. It did not vest immediately on testator's death, but required the execu-

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tor's assent before it *could vest; and such assent was never formally given.—The will has been proved in a court of competent jurisdiction by a disinterested witness. The bequest, so far from being contested by the executor, has been admitted by him to have been his testator's intention: And had this legacy been sued for in the court where the will was proved, it must have been adjudged to complainant. All presumption of fraud or imposition is taken away by the testator's having lived near three years after the execution of the will. The case of Ansty and Dowsing, reported in Strange, which is said to be a very singular case, and gave rise to the statute above mentioned, does not apply. There the legacy was expressly given to the witness himself, and the establishing the will would have defeated the heir at law's title to the real estate: but the case has been much shaken by subsequent adjudications since the passing of the act. This is a bequest of a personal chattel, which in no event can effect the real estate. It would have been good without any witness at all; and two of them were competent witnesses, one of whom proved it. Shall then the accident of a third person signing it, who might have been (but who is now dead, and therefore cannot be) benefitted by it, totally frustrate the intention of the testator, and deprive the complainant of his bounty? Surely not. Under all the circumstances of this case, and the particular mode in which this bequest is made, the court is of opinion that the estate being given expressly to Mrs. M. H. the complainant, to take effect at a distant period, viz., the raising a sum of money for another person out of the estate, the interest which her husband had was a contingent one, and barely possible: That as no act of his gave efficacy to the will, but it was proved by witnesses altogether competent, therefore the statute can have no operation in this case; but that the bequest is a good one, and complainant is well entitled to the negroes.

Decree that the executor, who is defendant, deliver to her the negroes, agreeable to the will of the testator, together with the increase.

Costs to be paid out of the estate.

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1 Desaus. *427

*Case XCIX.

Present—Chancellors Mathews and Rutledge.

HIGGINSON, Survivor of Greenwood and Higginson, and Executor of John Berwick, v. I. C. AIR and Others.

(March, 1795.)

[*Descent and Distribution* ⇐153.]

Creditor may follow the land of his debtor, in the hands of his heirs, after a great lapse of time, on the failure of personal assets: peculiar circumstances preventing the operation of the statute of limitations, or the usual effect as a bar, of a great lapse of time.

[Ed. Note.—Cited in Gregory's Ex'rs v. Forrester, 1 McCord, Eq. 326.

For other cases, see Descent and Distribution, Cent. Dig. §§ 523–525, 528; Dec. Dig. ⇐153.]

[*Partnership* ⇐187.]

Private estate liable for co-partnership debts.

[Ed. Note.—Cited in Dickinson v. Legare, 1 Desaus. 541.

For other cases, see Partnership, Cent. Dig. §§ 340, 342; Dec. Dig. ⇐187.]

[*Interest* ⇐60.]

Compound interest ceases when the mutual dealings cease.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 134–137; Dec. Dig. ⇐60.]

[*Interest* ⇐55.]

Interest during the war stopped.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 128; Dec. Dig. ⇐55.]

[*Limitation of Actions* ⇐143.]

[A new promise on an outlawed firm debt, made by one partner after dissolution, revives the debt as against other partners.]

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 580; Dec. Dig. ⇐143.]

[*Limitation of Actions* ⇐143.]

[Cited in Fisher's Ex'rs v. Tucker's Representatives, 1 McCord, Eq. 172; Shubrick v. Adams, 20 S. C. 56, to the point that admissions of surviving partner bind the other partner's estate, and that the law does not limit the time as to several of partnership debts by acknowledgment of surviving partner.]

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 578–583, 587; Dec. Dig. ⇐143.]

[*Partnership* ⇐118.]

[Cited in Ellis v. Commander, 1 Strob. Eq. 193, to the point that equity will restrain fraudulent act and waste by a partner.]

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 181; Dec. Dig. ⇐118.]

The substance of the case was as follows: Peter Benoist and Paul Townsend were engaged in trade in Charleston, under the firm of P. Townsend & Co. and were indebted to the complainants in England for goods shipped to them in the usual course of trade. In 1762 the mutual dealings ceased, and a balance was then due, as per stated accounts; and several remittances were made by Townsend, the surviving co-partner in successive years to the complainants. In the year 1772, Townsend the surviving co-partner, acknowledged the balance then due; and in 1773 made another remittance; and in 1774 acknowledged the receipt of the annual statement of accounts, but said he had not time at that moment to examine it. The revolutionary war then came on, and stopped the intercourse. After the war the legislature interfered, and various statutes impeded the recovery of debts, till the year 1793; but at the same time suspended the operation of the statutes of limitations, for a corresponding period. One of the co-partners Benoist died in the year 1759, and by his will bequeathed a particular property to assist in paying the debts of the co-partnership, if the funds should be insufficient. Some time after the death of Benoist, the partnership effects were sold, and £6000 of the then currency, part of the proceeds of the sales, were paid over to the executors of Benoist, in April, 1763: What has become of this fund cannot now be learnt. Benoist left a considerable estate; and amongst other things a tract of land, which he devised to his daughter and her heirs. Townsend, the surviving co-partner, ultimately died insolvent: and no co-partner funds can be found, nor indeed any property of Townsend or Benoist, except the said tract of land, which has been held by his family ever since his death in the year 1759.

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*In the year 1792 this suit was instituted to establish the debt, and to make this land liable for it.

For the defendants it was contended by Gen. Pinckney, that the length of time from the death of Benoist, and from the dissolution of the co-partnership, made this a stale claim which should be barred. That forbearance of suit for twenty years is a good bar to a suit in equity.—That the statute of limitations applied to this stated account; and that the acknowledgments of Townsend ought not to bind his deceased co-partner's estate. That if application had been made in a reasonable time, Benoist's personal estate was sufficient to have paid this debt, and his executors might have been made to pay the debt. But in the lapse of time it has been used and exhausted. Townsend was trusted and looked to by complainants fifteen years after Benoist's death. That even the fund set apart by Benoist for the payment of his proportion of the partnership debts, was sold and exhausted before the time of these defendants: And that at all events, if the claim could not be supported, compound interest ought not to be allowed after the mutual dealings had ceased—nor simple interest during the war. That the act of 5 Geo. II. for making lands in the colonies liable to debts, does not make them liable in the first instance to simple contract debts, but only after the personal estate is exhausted. The practical construction has been, that on failure of the personal estate, the plea of plene administravit is put in, and then the lands are made liable. That the complainants continuing to supply Paul Townsend the surviving co-partner with goods after the death of Benoist, and after the expiration of the concern of P. Townsend & Co. they must have trusted to him for payment. That no assumpsit of a surviving co-partner can bind the heir of the deceased partner, nor his estate. In the case of Sterling v. Drummond it was settled, that as soon as the mutual dealings ceased, and the account was stated, no compound interest should be allowed, nor should subsequent payments be considered as a mutual dealing. —The following cases were cited, 1 Atk. 80. 3 Atk. 105, 517. 1 Ves. sen. 499. Burr. 2613.

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2 Eq. Cas. *abr. 252. Douglas, 629. 3 Bac. abr. 513, title Partners, 1 Vern. 118, 456.

It was argued for the complainants by Mr. Pringle, that the laches was on the part of the executors of Benoist, who ought to have called on the surviving co-partner to close the affairs of the concern, and satisfy the debts. That not having done so, they acquiesced in all the acts of Townsend, the surviving co-partner. That he continued the mutual dealings until the year 1773: consequently compound interest continued according to the usage of the trade, and simple interest as soon as the account became stated. The statute of limitations never ran against this demand, for the payments to 1773 prevented that. In 1775 the statute of limitations was suspended; and the suspensions continued after the war to 1793. In 1791 this suit was instituted. Nor does lapse of time bar such a claim under the circumstances of a war of seven years interrupting the communication, and statutory interpositions between debtors and creditors for eight or ten years longer. That it is acknowledged the personal estate is exhausted, and no fund remains to pay the demand but this land: and there is no just ground that this land, descending from the ancestor, should not be liable to the debt of the ancestor.

The court delivered its decree:

The acts and assumptions of Townsend the surviving co-partner, as to the affairs of the co-partnership, bound the other partner's estate, and will bind his representatives; so as to make his private estate in their hands

liable to the debt on failure of the co-partnership funds. The law has fixed no limitation of time as to the surviving co-partner reviving co-partnership debts, by his acknowledgments. If the surviving co-partner wastes the funds this court would, on a proper application, protect the estate of his deceased co-partner, by obliging him to give security, or will appoint a receiver. In 1763 Benoist's executor received part of the co-partnership funds, nearly equal to his share of the co-partnership debt, which should have been applied to pay it. The complainants were somewhat blameable for indul-

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gence before the war, but as *Townsend continued to make remittances and promises till 1773, they are excusable. The time from 1774 to 1783 cannot be reckoned against the complainants, by reason of the war; nor from 1783 to 1788, because of the legislative interpositions between debtor and creditor, and the suspension of the statute of limitations; and this suit was brought in 1792. Compound interest ceased with the mutual dealings in 1762. Simple interest has been refused by a jury, half aliens. This court will not allow it, nor send to a jury. This case is hard on defendants: But Benoist's executors are dead, and no funds can be got at but the land in question; and the statute makes real estate liable even to simple contract debts, on the failure of other funds.

The court ordered that the master should report what was due, excluding compound interest, and interest during the war, and directed the land to be sold on twelve months' credit, taking bond and mortgage. Costs to be paid out of the sales of the land.

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1 Desaus. 430

Case C.

Present—Chancellors Mathews and Rutledge.

(Injunction Case.)

Executors of General GREEN v. WARRINGTON and BLACHFORD.

(March, 1795.)

[*Bonds* ⟸94; *Principal and Surety* ⟸109.]

A creditor taking collateral securities from his debtor, without stipulating to give further time to the original debtor, will not release the security to the original bond, even though such collateral security should altogether fail, from prior liens on it, which were on record.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 101; Dec. Dig. ⟸94; Principal and Surety, Cent. Dig. § 219; Dec. Dig. ⟸109.]

General Green became bound by bond, (in 1783,) as security for Banks & Co. to Harris and Blachford, in 18,473. Afterwards Banks & Co. gave H. and B. sundry orders on different persons, and assigned them bonds and notes, and H. & B. gave receipt for the papers so delivered them. Among other securities which Banks & Co. had assigned to H. & B. were bonds of M'Queen & Carnes. Some time in November or December 1783, Penman informed Harris that he held a mortgage of the negroes sold by Banks to M'Queen & Carnes, whose bonds to Banks were for those negroes which he sold them

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*subsequent to the mortgage; which bonds of M'Queen & Carnes were those assigned to H. & B. as collateral security for the debt in which general Green was security. In July 1784 sundry communications were had with general Green, in which Harris informed him of the state of the mortgage of negroes to Penman. In August and September 1784, further communications took place between general Green and H. & B. in which they offer to take the further risk of every thing except M'Queen's and Carnes's bond, and ask security for that. General Green refused further security, but proposed to settle with Penman for his mortgage, and to remove M'Queen's and Carnes's objections to paying their bonds. The assignment by Banks of M'Queen's and Carnes's bonds was in December, 1783. It was contended for complainant, that the mortgage to Penman being on record prior to Harris & Blachford taking the bonds of M'Queen and Carnes, (the principal matter in dispute,) H. & B. were bound to take notice of it. That their not doing so was a laches which the court will not relieve against. That besides, as they were positively apprised of the mortgage, by notice from Penman, at least six months prior to giving general G. notice, such negligence would subject them to the loss; for if general G. had received immediate notice, he might have procured some other security from Banks. That H. & B. having taken the bonds of M'Queen and Carnes, payable at the distant period of two years after the money ought to have been paid by Banks, the principal in the original bond, (to which general G. was security,) without the consent of general G. was changing the original contract, and would release the securities. That after knowing of the mortgage to Penman, (which weakened or destroyed the security of M'Queen and Carnes' bond,) they made a re-assignment to Banks, of debts he had assigned to them, instead of which they should have taken a further assignment of Banks and Carnes' books. That the receipt of H. & B. was evidence of their accepting the assigned bonds and notes as actual and not as a conditional payment, for the receipt says "Received contents in bonds and notes," from which the

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inference is, they *had received satisfactory bonds and notes, agreeably to the tenor of the order, and this is corroborated by letter of H. & B. acknowledging payment from Forsyth & Co. to the amount of the order.—

The cases of Skip v. Huey, 3 Atk. 91, and Nesbit v. Smith, 2 Bro. 579, were quoted.

It was contended by defendants, that from Harris & Blachford having demanded security from general Green on failure of M'Queen and Carnes' bonds, it is evident he did not consider general G. discharged. That they always designated the papers received as collateral papers, and additional securities. That taking them was not obligatory, but a favor conferred on the debtors. That the receipt refers to an account, by which it appears these papers taken were to be considered a payment, or a satisfaction when paid. That general Green's letter, so late as September 1784, considers them as collateral security. That the taking M'Queen's and Carnes' bonds, being without the consent of general G. was of no importance. It could not hurt, but might benefit him. That the reassignment of some of the collateral securities was to get better paper; and there is no memorandum or receipt to shew the papers were taken as payment. The case of Shubrick v. executors of Livingston was quoted.

The court said, that the whole evidence is to be taken together to explain the tendency of the receipt of H. & B. for the papers. The reference made by the receipt to the account, and what appears on the face of that, shews it was not the intention of the parties, that the assigned papers should be considered as actual payment. All the subsequent letters and communications shew the same. The circumstances indicate that Penman's notice to H. & B. of his having a mortgage from Banks [of the negroes which he had afterwards sold to M'Queen and Carnes, and taken their bonds, which he assigned to H. & B.] was subsequent to H. & B. having taken an assignment of them. The re-assignment of part of the assigned papers was evidently to procure better paper, and the new paper so procured is expressed to be as additional security. Had H. & B. been treating for the purchase of the negroes, they would have been bound to take

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notice of *the prior mortgage of Penman on record; but they were accepting as a collateral security bonds, which on their face did not relate to any other matter, and no incident then occurred to give them any suspicion that the bonds had any connexion with the mortgage. H. & B. may be blameable for not giving general G. earlier notice of the failure of M'Queen and Carnes' bonds—But not in such degree as to subject them to the loss of their debt. It was so determined in the case of Shubrick v. executors of Livingston [1 Desaus. 315]. Skip and Huey is not applicable here. There is no fraud chargeable on H. & B. nor imputed to them. It never was the intention to release general G. It has been established by a judgment at law, and he must remain bound.

Injunction dissolved; and bill dismissed with costs.

E. Rutledge for complainant, Ward and Pringle for Harris & Blachford, Desaussure and Ford for Warrington.

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1 Desaus. 433

Case CI.

Present—Chancellor Mathews and Rutledge.

MOSES GLOVER v. WILLIAM SMITH, Assignee of a Bond.

(March, 1795.)

[*Vendor and Purchaser* ⊂⊃113, 123.]

Purchaser entitled to have his contract rescinded, where there is a great deficiency in the quantity of land.

[Ed. Note.—Cited in Adams v. Kibler, 7 S. C. 58.

For other cases, see Vendor and Purchaser, Cent. Dig. §§ 201, 227; Dec. Dig. ⊂⊃113, 123.]

[This case is also cited in Wainwright v. Read, Dupont & Waring, 1 Desaus. 585, and distinguished therefrom.]

This was a bill filed in order to obtain relief against a bond executed by Wilson Glover, (given on behalf of his brother Moses whilst a minor,) on the purchase of a tract of land, formerly the property of Dupont, from the commissioners of confiscated estates. The tract was sold for 350 acres of high land, and 312 acres of swamp. Mr. Wilson Glover after giving the bond to the commissioners, urged them to have the land re-surveyed, that the real quantity might be ascertained. The survey however was not completed for a considerable time, indeed not till the year 1788. When it was made, it was found that there was a deficiency of 64 acres of high land, and 37 acres of swamp. The bond of Mr. Glover had remained in the treasury for some years; but was delivered, a little before the deficiency was ascertained, to the creditors of Dupont, whose land had

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been sold as confiscated property, under *that clause in the act which directed that the creditors of such persons should be paid out of the sales of their estates. Mr. Smith the defendant holds the bond as the agent of one of those creditors. Upon the deficiency in the quantity of land being discovered, Glover applied to be relieved. But the bond was put in suit against him at law. Whereupon he filed his bill, in January 1789, to obtain relief in this court.

It was insisted for complainant, by Mr. Lee, Mr. Pringle and Mr. E. Rutledge, that there was no notice of the incumbrance at the time of the sale; at least not of the incumbrance which has actually diminished the quantity of the land. And no principle is clearer than that wherever a diminution

in the quantity of land sold takes place, the purchaser has a right to a proportionate deduction from the price, or a rescission of the contract; according to the extent of the injury done by the diminution. There was no fault on the part of the purchaser. He solicited a survey, and none was made by the commissioners for several years after the sale. The words "more or less" in the deed of conveyance, are intended to cover trifling diminutions, and prevent litigation, but will not bind the vendee to take the land where the deficiency in quantity, or defect of quality, is material, and greatly affects the utility and value of what remains. The deduction from the price, if the court should think that sufficient, ought not to be made at the rate of what the land sold for per acre, but according to the value of the land taken away compared with the value of the land remaining. The assignee of the bond in this case cannot stand in a better situation than the state. The bond was passed to him, as an old creditor of Dupont, entitled to be paid out of the proceeds of the sales of his confiscated estate. But he must take it subject to all the equity which the purchaser had against the state. The counsel quoted Brown's P. C. 89. P. Wms. 192, 9, Pitfield v. Moore, 2 Eq. Cas. 20. 2 Bro. 118, as to the deterioration affecting the whole of the land.

Mr. Smith and General Pinckney, argued for the defendants, that all the allegations

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in a bill of injunction *must be proved, or the party fails in his action. That the minority of Moses Glover could not affect this case: for if a minor purchases at a sale, and declines to give up the purchase, but procures an adult friend to take the purchase on him, and to receive the titles in his name, and to give his bond, the transaction cannot be set aside, and the bond avoided on account of the minority of the first purchaser. The judgment against the adult can never be set aside, on account of the minority of the other. (This point was conceded, more especially as Moses Glover had done many acts of confirmation since he came of age.) No complaint on account of any deficiency was made for two years after the purchase. This is too long. See 1 Eq. Cas. abr. 25. Prec. in Cha. 206. 2 Bro. 118, 330, on a sale of lots of land, two of them could not have the titles compleated, but the court would not set aside the whole bargain. As to a want of a survey, Glover took possession without any, and should abide the consequence.

The court in delivering the decree stated, that there was no doubt of the deficiency in the quantity of the land sold to Glover. A resurvey has shewn a deficiency of 64 acres of high land and 37 of swamp. Glover had manifested a desire to have the resurvey from the time of the purchase. The delay was not occasioned by his fault, but that of the commissioners. The confiscation act, under which they proceeded, required the lines of the lands to be run, even before the sales. No resurvey was made until 1788; and the deficiency was then ascertained. The complainant could not apply for relief until the discovery of the deficiency ascertained that he had a reasonable ground of complaint. As soon as that was known he took means to be relieved. The bond had been previously delivered to defendant, who holds it for one of the creditors of Dupont; and it had been put in suit at law. Complainant filed his bill for an injunction against the bond, and for relief, in January 1789. Great stress was laid upon the bonds being in the hands of an innocent third person, a creditor of Dupont, to whom it has been delivered in payment of the debt due by him. But under the circumstances of this case, that

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cannot *make any difference. The state, which sold the land, and the creditors of Dupont, who received the purchaser's bond, stand in the shoes of Dupont: And as a deficiency in the land would have been a good defence against Dupont himself, had he been the seller, so it will be against the creditor who holds the bond. The equity is good against either, and the complainant is entitled to relief. The deficiency in the quantity of the land is material. It is one sixth of the whole quantity sold, and it takes away almost all the timber land. The plantation is greatly deteriorated by it. Mistake, misconception, or misrepresentation are all good grounds of relief, and for this court to interpose and even to set aside contracts, where the justice of the case may require that. In this case, most of these circumstances occur. It makes no difference that there was no intentional misrepresentation on the part of the commissioners. They were in error as to the quantity of the tract, and their representations led the purchaser into a mistake, from which he should be released. The fall of the price of land does not alter the case.

It was therefore decreed that the contract be rescinded, and that a perpetual injunction do issue, to stay proceedings at law on the bond given by Wilson Glover, on behalf of Moses Glover, to the commissioners of the treasury. The defendants to pay costs of suit.†

†In this case the purchaser was satisfied to have the contract simply rescinded, and the bond given up. So that no question of the quantum of damages, to which a person evicted by a paramount title, is entitled, came before the court. It is however a question of considerable difficulty, and upon which the tribunals of the different states have differed in opinion more than almost any other. In New-York, and in Pennsylvania, the decisions have followed the English rule, to wit, that the measure of damages, recoverable by the purchaser who is evicted, from the seller, is the value of the land at the time when the deed with warranty was executed; and interest thereon; notwithstanding

any improvements, or rise of price. See the cases of Staats v. executors of Ten Eyck, 3 Cains, 111, Pitcher v. Livingston, 4 Johnson's Rep. 1, Morris v. Phelps, 5 Johnson, 18, Bender v. Fromberger, 4 Dallas, 441; and the case of Glen's executors v. Washmood, stated by Mr. Cooper in his valuable notes to his edition of the Institutes of Justinian: though contrary to his own declared opinion in a case which came before him at Chambersburg in 1804.

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*In Massachusetts it has been decided in several cases, that the measure of damages, on covenant for breach of warranty, was the value of the land at the time of the eviction. See Caswell v. Wendell, 4 Mass. Rep. 108; and Gore v. Brasier, 3 Mass. Rep. 523. (Sed vide 2 Mass. Rep. 407, and 455, for Chief Justice Parsons' opinion.) So decided in Kirby's Con. Rep. 3; and in South Carolina, 1 Bay's Rep. 18, 19, 263, 4, 5. See the cases collected, and clearly stated in Mr. Cooper's notes to Justinian, p. 618, 619, 620. The real owner has never been held liable to pay for the improvements, when he recovered possession of his land: unless he lay by and concealed his title, in which case he ought not to recover at all. See Cooper's Justinian, 618. 2 Atk. 83. 2 Eq. Cas. abr. 357. Douglass, 22. Cooper, 473, 6 Term Reports, 554.

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1 Desaus. *437

*Case CII.

Present—Chancellors Mathews and Rutledge.

ANN GARNER and Her Children v. the Executors and Creditors of MELCHER GARNER, Deceased.

(March, 1795.)

[*Husband and Wife* ⇐33.]

A marriage settlement not recorded according to the original act, not void on account of the obscurity of the act—and the wife and children shall have the benefit of the marriage settlement, though the property had been sold, and the bonds passed to creditors of the husband, under the presumption that the deed was void.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 204; Dec. Dig. ⇐33.]

[*Reformation of Instruments* ⇐13.]

A very gross error in the deed, by an alteration made by the husband, after the deed was drawn, changing the sense materially, corrected by the court. Construction of the deed.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 55; Dec. Dig. ⇐13.]

[*Husband and Wife* ⇐29.]

[The penalties of the statute of 1785 in relation to the recording of marriage settlements do not affect settlements previously executed, if recorded within the time allowed by the act of 1792.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 167; Dec. Dig. ⇐29.]

[*Reformation of Instruments* ⇐17.]

[Cited in McDow v. Brown, 2 S. C. 111; Neely v. McFadden, Id., 177, to the point that relief will be granted against a mutual mistake of the parties as to their legal rights induced by erroneous professional advice.]

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 69-71; Dec. Dig. ⇐17.]

The complainant being about to marry Melcher Garner, and being possessed of twelve negro slaves, a marriage settlement was executed by said Melcher Garner, on the 14th July, 1768, by which he agreed, in consideration of the intended marriage, that the trustees should hold the said slaves, in trust; that Melcher Garner should receive the rents and profits of the hire and labor of the said slaves, during the complainant's life, without any account; "and then, upon the trust that if the said complainant Ann Garner should be living, that they would suffer her to hire out and work the said slaves, and the issue of the females, and receive the profits thereof, during her natural life;" and then, upon the trust that the trustees would deliver up the said negroes and their increase, to the heirs of the body of the said Ann Garner.

The bill charges, that the real intention of the parties to the deed was, that the intended husband Melcher Garner should have the annual profits of the settled property during his life; and then that the profits should go to Ann Garner; and after her death the said slaves and their increase were to be divided among the complainant's children; but that before the execution of the deed it was altered by mistake, in such manner as to produce the absurdity which now appears on its face, to wit, that after her own death she was to have the use of said slaves.

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*The bill states, that Melcher Garner died about the 13th June, 1789, having previously executed his last will and testament; and Benjamin Snipes proved the same, and qualified thereon as executor. That during the life time of the said Melcher Garner, many judgments were obtained against him. That the deed of settlement not having been recorded according to a conceived requisition of a law of this state, passed the 8th day of March, 1785, the complainant Ann Garner was led to believe that the said negroes were liable for the debts of the said Melcher Garner. And the said negroes, with other property really belonging to Melcher Garner, were sold by the executor, by permission of the ordinary, in the month of March, 1791; at which sale the complainant Ann Garner became the purchaser of all the slaves included in her marriage settlement except three, which were bought by Plowden Weston. And the said Ann, under the impression given her that the settlement was void, gave her bond to the acting executor Benjamin Snipes, for the negroes she purchased. That complainants afterwards learned, that by a decree of this court, in the case of Mrs. Lennox's marriage settlement, settlements such as the complainants were adjudged not to be comprehended in the act of the legislature; and that by a subsequent act, of the 21st of December 1793, further time was given to record such marriage settlements. That however, her settlement was recorded on the 11th July, 1792; and she thereupon applied to the executor of

her husband to deliver up her bonds, and refund the money she had paid on them; and to Plowden Weston to deliver up the three negroes he had purchased. But they have refused to comply with complainant's requests —The bill prayed for relief.

The answer of the executor of Melcher Garner admitted the facts stated in the bill of complaint; except that he is unacquainted with the manner or occasion of the alteration of the deed of settlement, which produces the absurdity stated by the complainant. The executor further stated, that he transferred the bonds of the purchasers of the estate of Melcher Garner, including the settled ne-

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*groes, and amongst others the bonds of the complainant to several of the creditors of the estate of the said Melcher Garner, to wit, to general W. Washington, James Gregorie, and John Blake. That this distribution of the bonds of the purchasers took place prior to the act of 1793, giving further time to record marriage settlements; the executor having been advised that the marriage settlement was void for want of recording within the prescribed time. That the defendant could not comply with the request of the complainant to restore her bonds, as she had actually assigned them to creditors of Melcher Garner's estate.

The answer of Plowden Weston, a creditor of Melcher Garner's estate, states, that Melcher Garner was largely indebted to him; and on the 3d October, 1787, mortgaged as a security for the payment of the said debt, (amongst others) two of the negro slaves named in the deed of settlement. That defendant searched the offices for marriage settlements or other incumbrances before he accepted said security; and finding none recorded, and being ignorant of the one since produced and set up, he considered himself secure. Defendant admitted that at the sale of the estate of Melcher Garner he became the purchaser of several of the negroes, including those mortgaged to him: And he gave his bond to the executor for the amount of his purchase, with a stipulation not to be called on for payment unless prior incumbrances were entitled to payment. That the mortgage of the negroes to him being dated on the 3d October 1787, and the sale of the estate being in March 1791, the defendant conceived the act of December 1793 was ex post facto as to his case. Defendant admits that the deed of settlement is nonsensical as it now stands, but does not know that the interlineation was made by mistake, or that it was not recorded according to the act of the 8th March, 1785, on that account.

The answer of James Gregorie and John Blake neither admits nor denies the facts alleged, and requires proofs of them. Defendants admit that the settlement, as it stood, was nonsensical and impossible. But they do

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*not admit that it was intended that the property should go in the manner charged in the bill, which is merely conjectural. Defendants admit the death of Mr. Garner, and the sale of his estate by his executor, including the settled property, and the distribution of the bonds given by the purchasers, and amongst others to them. That they were judgment creditors of Melcher Garner before his death, and as early as the year 1785; but they consented to the sale of the estate on credit (not to injure the estate) and to receive the bonds of the purchasers in payment. And Mrs. Garner being the chief purchaser at the sales, and having given her bonds and mortgages to the executor, he assigned part thereof to these defendants, who gave up the original bonds of the said Melcher Garner to the executor. That all these transactions took place with the knowledge and consent of Mrs. Ann Garner the complainant, and she acquiesced in the sale of the negroes included in the settlement; and agreed to the transfer of her bonds (given to the executor on her purchases) to these defendants and others in payment of her husband's debts—And she did not then set up any claims under said settlement. The defendants say that they were innocent and bona fide purchasers for valuable consideration, and ought not now to be disturbed in their rights, after so many years acquiescence, under pretence of an act of the legislature, which, if applicable at all, is ex post facto as to them; which was enacted long after the assignment of her bonds to the defendant.

Gen. C. C. Pinckney for complainant. Parol evidence admissible to explain a deed or to correct a mistake in it. 2 Atk. 383. 1 Ves. 457. 1 Bro. C. C. 92, 341. There was an evident mistake in the deed, owing to the alteration made by the interlineation in the deed, proved by the witnesses. One contingency failing, the next contingent estate takes immediate effect in the remainder man. Although Mrs. Garner was present at the sale, this ought not to prevent her recovery, as she was not then conusant of her rights: And there are minors interested in the property. 1 Ves. 126. The trustees are not charged with any knowledge of Garner's

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mortgaging *any of the property. See 2 Powell on Contr. 205. 1 Powell, 131. 1 Vern. 136, 325. 2 Vern. 554, 599, 150. 1 Ves. 64. 2 P. Wms. 82.

Mr. Pringle, for defendant. When an estate for life is limited to the ancestor, and to the heirs of his body, it is void as a remainder. Fearn. 342, 345. Courts of equity make no difference in the construction of legal and trust estates. 1 Ves. 133. 2 Ves. 646.

Mr. Ford, for defendant. The creditors of Garner gave up judgments and mortgages, for Mrs. Garner's bonds given voluntarily by her for her purchases. It is too late for her to set up the settlement, which neither she or her husband ever produced in his lifetime. On the contrary he mortgaged several of the negroes he got by her to Weston, and she never interfered. And she even made some payments on her bonds, for purchases of this very property long after her husband's death. This was a complete acquiescence, in sales made with her knowledge and privity. 2 Eq. Cas. abr. 684. 3 Atk. 754. See 1 P. Wms. 132. 2 P. Wms. 754.

General Pinckney in reply. Words which in a will would be construed a limitation, will in a marriage settlement be construed words of purchase; and the children take as purchasers. Fearn. 380. 1 P. Wms. 132. 2 P. Wms. 349. Heirs of the body in marriage settlements are construed as purchasers. Trusts are not construed as legal estates. Fearn. 82, 9, 95, 108, 112. In construing trusts the intention must be regarded, as in the construction of wills. See 2 Comyn, 170. 286, mistake corrected. Ambler's Reports, 251, 374. 1 Ves. 126, 457. 2 Vern. 659, 702.

M. Garner by settlement before marriage reciting that his intended wife was entitled (amongst other property) to certain negro slaves named in the deed, agreed that A. Evans, and W. C. Snipes, should be trustees; and hold the said negroes, on the following trusts; to permit him to work and employ the said negroes and receive their profits and earnings, to his own use, during the term of his intended wife's natural life; and from and after her death (in case she should then

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be living) to per*mit and suffer her, to take the earnings of said negroes to her own use during her life; and after her death in trust, to deliver up said negroes to the heirs of the body of said intended wife.†

The marriage took effect, and M. Garner is since dead, leaving his wife alive, and several children, who are complainants with her. His executors sold the whole estate, including the said negroes. The widow bought all the negroes (except three purchased by P. Weston) and gave her bond to the executors. This suit is to establish the marriage settlement, and to be relieved from the payment of the bonds. The executor in his answer admits the facts stated in the bill, but says he has assigned the bonds to the creditors of Mr. Garner, and has no control over them. P. Weston one of the defendants, answers that two of the negroes he purchased were mortgaged to him to secure a debt by Mr. Garner, in 1787; and he was ignorant of the settlement, which had not been recorded, according to law, and therefore is void as to him. But he knew of the settlement at the time of the sale. Blake and Gregory (other defendants) say they were bona fide creditors of Mr. Garner, and had judgment and execution against him; and the bonds were assigned to them by the executor: And that they are purchasers for valuable consideration, without notice of the settlement which was not recorded.

There are three questions, in this case. 1st. Whether the settlement not being recorded within the limited time, is not void as to creditors. 2d. What estate M. Garner took in the negro slaves under the settlement, whether an absolute estate or for life. 3d. If his creditors purchasing for valuable consideration without notice of the settlement are affected by it.

The first point has been determined in a case in this court, by which it was decided, that the penalties of the act which was very badly penned, did not extend to settlements made prior to the passing the act. In con-

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se*quence of that decision, the legislature, by an act in 1792, extended the time of recording old marriage settlements; and this settlement has been recorded within the extended time: Indeed before the passing of the act extending the time. This settlement therefore is not a void but a valid deed.

2d. It is contended for the creditors, that if this had been a settlement of real estate, Mr. Garner would have taken an estate tail under it, but being of personal estate, the absolute property vested in him, and became liable to his debts. Many cases were produced —They relate chiefly to trusts, under last wills; which are different from marriage settlements. 1st. Because these last are upon valuable consideration. 2d. They are to be carried into execution, even against parents. 3d. Were they to put the children completely in the power of the parents, there would be no object at all in the marriage settlements. Marriage is the highest consideration; provision for the issue is the immediate object of settlements, and is intended as an effectual provision. The issue are purchasers for a valuable consideration. In most of the cases cited, (except Jones v. ————, 1 Eq. Cas. 392, 2 P. Wms. 359,) the estate moved from the husband; here from the wife, and was only part of her property: the rest not settled. See the following cases—1 P. Wms. 132. 3 P. Wms. 32, Webb v. Webb. 2 Vern. 43, 195, Peacock v. Spooner. 2 Ves. 237, 646, 660, Garth v. Baldwin.

The deed as it now stands is nonsensical (her death for his death.) It appears to have been originally drawn correctly; but it was altered by Mr. Garner, before the marriage, and if allowed to stand in that shape, would defeat the provision for the wife. If not corrected, the deed is inoperative as to the

†The absurdity of the wording of the deed arose from some thoughtless alterations of the deed, by M. Garner, after the deed was drawn. The errors were corrected by the court.

wife. It could not be the intent of the parties to make a settlement on the wife of her own estate, from which she should derive no benefit. The court corrects errors and mistakes.—It is its duty to do so. It must be done in this case, and the deed made to speak its original language (i. e.) to give the husband a life estate, with limitation to the wife for life: Then trustees to hold the negroes

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for the use of the chil*dren. The intent is plain. The trust is executed as to the husband and wife; executory as to the children. The act to be done by the trustees was to deliver them to the children of the wife. This shews clearly that the husband and wife were to have only an usufructuary interest, and the property to be absolutely secured to the children. The court is of opinion that Melcher Garner took an estate for life with remainder to the wife for life: and the limitation over to the heirs of the body of the wife, will vest the property in them at her death. All the property being originally the wife's, and this being a case of marriage settlement, makes it a strong case in favour of the children, who are deemed purchasers for valuable consideration. And cases of marriage settlements are different from estates at law, or mere trust estates, which follow the law.

3d. Point. This case is so singular, that it is governed rather by its peculiar circumstances than by general rules. It is good law that if a person interested in an estate, suffer a disposal of it without notice of his claim to purchasers, the court will protect the purchaser; and where the trustee sells the estate without notice of the trust, the court will give cestui que trust relief only against the trustee. But there are no cases where the court refuses relief to persons ignorant of their rights; if they prosecute their claims soon after they became acquainted with them. In this case the cestui que trust applied to counsel soon after her husband's death for advice on the settlement, and was told that not being recorded according to law, it was void. The executor of M. Garner also received same advice from counsel. In consequence the property included in the settlement was sold as part of his property. The question as to the validity of the settlements in that predicament was decided in 1792, 18 months after the sale in this case, in the cause of Lenox v. Gibbes [1 Desaus. 305]. The complainant then became apprised of her rights, and instituted suit, but her bonds had been previously assigned to the creditors of her deceased husband, instead of his bonds which were given up to the executor. This is unlike all the cases cited. Mr. Garner

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mortgaged *two of the negroes to P. Weston. There is no proof that this was done with the consent or privity of the trustees or complainants. P. Weston acknowledges that he knew of the settlement before the sale, therefore he is not a purchaser without notice. The court is of opinion that there was no such fraud, concealment or negligence of complainant, as should operate to her disadvantage. She and the executor acted under professional advice, on a point not then legally adjudicated, and which proved to be erroneous. Decreed that the bonds of Ann Garner the complainant be given up to her and cancelled, and that the mortgage to P. Weston being void, the negroes shall go to complainant. Executor to apply other funds of Melcher Garner, if any, to protect creditors, to whom he had assigned Ann Garner's bond, so far as the same were given for property comprehended in the settlement. What she bought in, really the property of her husband's estate must be paid for. P. Weston to pay for the use of the negroes, and deducting taxes.

Costs to be paid out of M. Garner's estate.

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1 Desaus. 445

Case CIII.

Present—Chancellors Mathews and Rutledge.

CATHARINE MEGRATH v. Administrators of JOHN ROBERTSON and ANN ROBERTSON.

(August, 1795.)

[*Husband and Wife* ⇐94.]

A wife may become a sole dealer or trader, by permission of her husband, even without deeds: and she becomes entitled to all her earnings, as her separate estate.

[Ed. Note.—Cited in McDaniel v. Cornwell, 1 Hill, 430, 432; Ewart v. Nagel, 1 McMul. 52.

For other cases, see Husband and Wife, Cent. Dig. § 370; Dec. Dig. ⇐94.]

[*Aliens* ⇐9.]

The alien mother of a citizen, entitled under our laws to the personal estate of her daughter, who left no husband, child, or father living: And also to the real estate under our laws and by virtue of the British treaty of November, 1794.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 21 29; Dec. Dig. ⇐9.]

[*Aliens* ⇐13.]

[By the treaty of 1794 an alien mother of an American daughter may inherit her lands, under the laws of South Carolina.]

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 50; Dec. Dig. ⇐13.]

[*Husband and Wife* ⇐131.]

[Where a feme covert is permitted by her husband to trade on her own account, property brought to their residence will be presumed to belong to the husband until the contrary is shown.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 471; Dec. Dig. ⇐131.]

John Robertson and Ann his wife lived together many years in Charleston. He carried on business, and acquired real and personal property, for which he took the titles and bills of sale in his own name. His wife

also carried on a separate business, bought and sold property in her own name; and took the titles to the real estate, and the bills of sale for the personal estate, in her own name. There was no deed from the husband formally constituting the wife a sole dealer, nor any writing agreeing that the acquisitions of her industry should be her own separate property. But there was ample proof that she acted with her husband's privity, acquiescence and verbal permission; and

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she always claimed the property *acquired by her as her own. Some of the witnesses proved he acquiesced merely for peace sake, as she was of a violent temper. But the majority of respectable and well informed witnesses stated that for many years she had acted, and been considered a sole trader; was active and industrious, and she made great profits in her separate dealings, and bought property for herself. That her husband knew and acquiesced in her conduct: that he sometimes borrowed money from her, and returned it. One of her debtors offering to pay the husband, he told him that he must go and settle with her, as she acted for herself, and had the note; which was accordingly done. The husband would sometimes caution her against bidding too much for property at auctions, but she repelled his interference, and said the money was her own, and she would do as she pleased with it; to which he replied that was no reason she should ruin herself. In short the evidence was conclusive that she acted constantly, for many years as a feme sole, or as a sole trader; had a clerk to keep her accounts, and took titles in her own name, with the privity and acquiescence of her husband. But no writing could ever be produced of any agreement to that effect. John Robertson died intestate leaving his wife alive: but no children. She administered on his estate, made an inventory and sale of it. She died not long after, intestate, leaving a considerable property, real as well as personal: and the defendants administered on her estate, as well as on John Robertson's. The administrators returned an inventory of her estate, of cash and other personal estate, to the amount of £2971. But the defendants thought themselves bound to submit the point to the court whether the property thus acquired by her, should be considered as her separate estate; as there was no evidence of the existence of any deed by the husband constituting her a sole trader, or of any written agreement that she should hold and enjoy as a separate estate what she had acquired by her industry. The complainant was proved to be the mother of Mrs. Robertson, and she filed this bill to have an account of her daughter's personal estate, and to have the titles of her real estate delivered up

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to her. Claiming *as the nearest relation entitled to take according to the laws of this state, the daughter having died intestate without leaving alive either husband, children or father. The defendants submitted to the court that as Mrs. Megrath the complainant was an alien, she could not take or hold the landed estate.

Mr. Ford, for complainant contended, that the statute of 1744 (Public Laws, 190,) prescribes no particular solemnity by which a wife is to be made a sole trader: but recognizes her being such by tacit consent. And if she may be sued as a sole trader according to the provisions of the act, she may hold property to answer the debt; the contrary would be absurd. See 2 Eq. Cas. 133, 138. Lister v. Lister, 2 Vern. 68; and Slanning v. Style, 3 P. Wms. 334, 7, which is a very strong case. A tacit assent shall sometimes be set up against the wife. It ought therefore to be allowed against the husband. 1 Atk. 269. Gifts between husband and wife will be supported in equity though void at law. See 2 Atk. 271. If the purchases be supposed to have been made jointly to the benefit of the husband and wife, they survived to the wife, on the death of her husband. Choses in action survive to the wife. The husband might have disagreed and vacated the wife's right, but if he does not and dies, it survives to her. 2 P. Wms. 496.

General C. C. Pinckney, for defendants, insisted that acquisitions made by the wife enure to the husband. If a bond be given to the wife, the husband may sue alone. 2 Atk. 207. See 3 Atk. 72, and 1 Eq. Cas. abr. 61. That the rule of law being clear, as to the husband's rights, any exception must be made out by the clearest proofs, and the parol evidence however positive cannot establish the husband's agreement to give up the marital rights. There must be a written agreement; or a deed to constitute her a sole trader. The acquisition of the wife therefore in this case became the property of the husband; and the purchases being made in the name of the wife does not alter the right: For she in that case must be considered a trustee for the husband. See 1 Eq. Cas. abr. 380. 1 Bla. Com. 442, 3. 1 Bac. 290.

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*The court after taking time to deliberate, delivered the following decree:

This is a case of a new impression: the only case in the books resembling it is that of Slanning v. Stile, 3 P. Wms. 334, 337, and that is by no means as strong as this. The marital rights were and are very strong, and give absolute power to the husband over the personal property of the wife. In latter times they have been somewhat relaxed under written agreements or usage. There are three questions here. 1st. Whether John Robertson, one of the deceased, constituted his wife a sole trader. 2d. What benefit resulted to her from it? 3d. What portion of the estate of Ann Robertson (the wife of J.

Robertson) goes to the complainant who was her mother? Upon a full review of the evidence (which was very ample) relative to the acts of John Robertson and Ann his wife, it is evident that John Robertson permitted her to act a sole dealer, and to make contracts, and to purchase, and to sell on her own account, and to take titles in her own name. It is a maxim that no man shall be presumed to be ignorant of the law. There is no law here defining what is a sole dealer, or how a feme covert can be made a sole trader; nor is there in England. The custom of London authorises it: and a clause in our attachment act recognizes the right in this country. See the preamble, also the 11th section, and the act of 1712. But there is no particular mode pointed out. If the husband permits his wife to act as such, he relinquishes the control he had at common law. The case before the court made out by the proofs, is the strongest possible, next to producing a deed from the husband, authorising the wife to act as a sole trader; and establishes her power so to act. 2d. As to what benefit resulted to her from it? She became sole mistress of the property which she acquired in the character of a sole trader, free from the control of her husband. In this case he died first: she administered on his estate, and died soon after; whereupon the defendants administered on both estates. The difficulty is to discriminate the property. What was brought home to the house must be considered the hus-

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*band's unless shewn to be her's by documents, deeds, or employed in her trade; and except her wearing apparel. This must be the rule to discriminate. The inventory of her husband's estate may assist, as done on oath. As to the land, the titles were made to her of her houses; to him of his; they are conclusive. As she survived her husband, who died without children, she is entitled to the moiety of her husband's estate, under the statute of 1791, besides her separate estate as a sole trader. 3d. Complainant is entitled as mother of Ann Robertson to the whole of her personal estate, and to the real if the British treaty now pending, be ratified by our government. Decree for complainant: Let the accounts be referred to the master. Costs to be paid by defendants. †

[The treaty of 19th November 1794, commonly called Mr. Jay's treaty was then under discussion in the senate of the United States. It was soon after ratified, and became the law of the land. By the 9th article of that treaty it was agreed that "British subjects who now hold lands in the territories of the United States (and American citizens holding in Great Britain) shall continue to hold them, according to the nature and tenure of their respective estates and titles therein; and may grant, sell or devise the same," &c. It was under this treaty that Mrs. Megrath who was a British subject, was decided to be entitled to the real estate of Mrs. Robertson her daughter, who died without leaving alive husband, or children, or father. She took the estate under the regulations of our statute of 1791, which allows mothers to inherit real, as well as to take personal estate.]

†See besides Slanning v. Style, the case of Calmady v. Calmady, 11th Viner, page 181, pl. 21.

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1 Desaus. *450

*Case CIV.

Present—Chancellors Mathews and Rutledge.

The COMMISSIONERS OF PUBLIC ACCOUNTS v. GREENWOOD and Others.†

(August, 1795.)

[*Officers* ⇐130; *States* ⇐80.]

A treasurer gives bond to the state for the faithful performance of his duties: His term of office expires and he is re-elected, but gives no new bond. His first bond does not cover his acts during his second administration.

[Ed. Note.—Cited in South Carolina Society v. Johnson, 1 McCord, 46, 10 Am. Dec. 644; Treasurers of State v. Lang, 2 Bailey, 434; South Carolina Ins. Co. v. Smith, 2 Hill, 591; State ex rel. Causey v. Causey, 93 S. C. 303, 310, 76 S. E. 707.

For other cases, see Officers, Cent. Dig. § 235; Dec. Dig. ⇐130; States, Cent. Dig. § 80; Dec. Dig. ⇐80.]

[*Executors and Administrators* ⇐261.]

The state has no prerogative to be paid out of the effects of its debtor in preference to any of the citizens who have judgments, mortgages or other liens—And the act of 1789, prescribing the order for payment of the debts of deceased persons, and directing the debts due to the state to be first paid, is merely directorial to executors and administrators, and does not alter the law in relation to the rights of the state and other creditors of the deceased.

[Ed. Note.—Cited in Haynsworth v. Frierson, 11 Rich. 478; Rutledge's Adm'rs v. Hazlehurst, 1 McCord, Eq. 471; Klinck v. Keekley, 2 Hill, Eq. 256, 257; Hinton v. Kennedy, 3 S. C. 489; Baxter v. Baxter, 23 S. C. 116, 118, 119; Lockwood v. Lockwood, 68 S. C. 331, 47 S. E. 441.

For other cases, see Executors and Administrators, Cent. Dig. § 948; Dec. Dig. ⇐261.]

[*Officers* ⇐123.]

[A bond given by a commissioner for the treasury for the faithful performance of his duties, and recorded in the secretary's office, is not a debt of record, so as to bind the estates of the obligors.]

[Ed. Note. For other cases, see Officers, Cent. Dig. § 217; Dec. Dig. ⇐123.]

[This case is also cited in State ex rel. Causey v. Causey, 93 S. C. 300, 76 S. E. 707, and distinguished therefrom.]

Peter Bocquet was elected a commissioner for the treasury, and gave his bond for the faithful performance of the duties of his

†For statement and arguments of counsel in this case, see post, p. 599.

office, according to law. This bond was recorded in the secretary's office. After the expiration of Bocquet's time of service, he was re-elected commissioner of the treasury, but did not give a new bond. During his life there were several judgments against him; and he gave a mortgage of some property to Greenwood to secure a just debt. He afterwards died, in arrear to the state, and without leaving assets sufficient to pay all his debts. The state claimed priority of payment over all private creditors, on the general ground of the royal prerogative, as well as on the particular provisions of the statute of 1789 directing the order in which executors and administrators should pay the debts due by the deceased. By the provisions of that act, executors are directed to pay debts due to the state, next after funeral expenses.

The cause was fully argued, but no notes of the argument have been preserved.

Chancellor RUTLEDGE delivered the following decree of the court:

In this case there are three questions to be considered: 1st. Whether the state retained the common law prerogative of the king of an unlimited priority of payment of debts due it, before those of a citizen?

2d. Whether Bocquet's bond as a commissioner of the treasury recorded in the secretary's office is a debt on record, and bound his estate from the time he signed it, and for how long a time, if at all?

3d. How far the act of 1789 will operate so as to postpone the judgments and executions obtained against Bocquet in his lifetime, and also a mortgage given by him to the defendant Greenwood, to the debt due to the state?

There is no express clause in the constitution of the year 1778, declaratory of the in-

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tention of retaining the *prerogative now claimed on the part of the state; and it is only from the general words of the 33d clause of the constitution, which declares that all laws then in force shall be continued (unless when temporary) until altered or repealed, that we can even infer that such was the intention; because under that clause, the act of 1712, which makes the common law of force is continued: On the other hand, the idea of the state retaining this prerogative (however improper it may be) seems to be altogether a new one; the direction to executors and administrators in the law of 1789, plainly evinces it: and to shew it still more evidently, we need only refer to the constitution, which directs that the commissioners of the treasury shall give bond with approved security; and to subsequent acts of the assembly, such as the vendue act, duty act, and paper medium act, which direct that persons becoming indebted to the state, shall give bonds with security. If this idea of prerogative had prevailed, it is more than probable that no man would have become security for another, if immediately on his giving a bond, the right or prerogative of the state would so attach upon his estate as to prevent him for an unlimited time from disposing of any part of it; and no sale or judgment or execution could divest the state of its interest therein. But even if the common law prerogative was retained, yet we are of opinion it cannot affect the defendants in this case, because by the common law the king was entitled to a preference only where the debt was on record, or specialty, in cases where he and the subject stood in equal degree; which brings us to the second point. Whether this is a debt on record? That this is not a debt on record is manifest from the legal definition of an obligation by matter of record; which is said to be a writing obligatory, acknowledged before a judge or other officer having authority for that purpose, and enrolled in a court of record. This bond it is true is recorded in the secretary's office; but that does not make it a record in the legal acceptation of the word. It is not even directed by the constitution to be recorded; it was done merely for security from the chance of being lost or destroyed by fire:

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*as some other bonds to the state are particularly directed by law to be recorded. Any person having the bond of another may record it in the secretary's office, but that will not make it a record, which would bind the debtor's estate, and yet it might with equal propriety be insisted on, as in the present case. We can consider it therefore in no other light than a penal bond, on which nothing is immediately due, nor will the penalty at law be recoverable before the condition is broken; and it will even then have no binding efficacy before judgment has been regularly obtained. We are further of opinion that this bond can only be obligatory for such defalcations as may have been incurred during Bocquet's continuance in office, under his first appointment; because his being again elected by the legislature was a new act. It was a new legislature; he received a new commission; he took the oath anew; and the executive ought to have taken a new bond. So likewise on his second election, it was a new house of legislature; another governor; he had a new commission, and took the oath again. Though the same person, he was a new officer, and the constitution required all those acts to be done each time; they ought to have been done and we must consider them as done. If they were not, there is no blame imputable on the defendants. If the public sustains a loss, the censure must fall on those, whose duty it was to have taken care of the interest of the state. The neglect of doing what ought to have been done, cannot revive or give

efficacy to a bond for a longer period than it was originally intended to be binding. This case is altogether different from that of the deputy post master: He was continued in office under the original appointment by the person who first appointed him. It may be worthy of observation, that as by the present constitution the commissioners of the treasury are not obliged to give bond with security, and we do not know of any law which directs it, whether it would not be expedient for the legislature to be more explicit on this subject by passing a law declaring particularly in what cases the state shall be entitled to a preference of private creditors.

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*As to the third point, how far the act of 1789 will operate so as to postpone the executors of the defendant, and invalidate the mortgage of Bocquet to Greenwood, we must observe that this act is directory to executors and administrators in the disposing of the assets of the deceased; and therefore if they should administer them contrary to the direction of that law, and the state receives an injury, they might be liable to answer in an action for devastavit. In the present case there are no executors or administrators. This court has no right to assume the power of executor or administrator; nor if we were inclined to it, does there appear to be any personal assets over which the court could have any control; and it is only with such assets that executors would have a right to intermeddle. As the effects were all assigned in Bocquet's lifetime and not only delivered to, but actually levied on by the sheriff, the property in the goods was thereby totally divested out of Bocquet in his lifetime; nor could his executors have taken it without being liable to an action by the sheriff. He has since sold it, and is compellable to pay over the money to the creditors on those executions, for we cannot presume, that the legislature intended in the very general directions to executors respecting payment of debts due the public, (by a side blow) to overset the whole common and statute law doctrine concerning the binding efficacy of executions. A variety of cases were cited from Bunbury and Parker's Reports to shew that when an extent at the king's suit and an execution for the subject were issued, though the extent was last it should be preferred; that is upon the established principle of the common law, that when the king and the subject stand on equal ground, the one having an extent, and the other an execution, the king should have the preference. But it is indispensably necessary that the king's debts should be proved in a court of record before an extent can issue. If judgment and execution had been obtained against Bocquet on the bond in question, the cases would have applied, but on the contrary no such proceedings have been had. It was also asserted that even a simple contract debt

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due the king should *have the preference to a bond due to the subject; and further that the lands of the king's debtor are liable from the time of contracting the debt, though not of record, and a case was quoted from Parker's Reports for that purpose. Upon looking however into that case it does not warrant the assertion; they were the arguments of counsel, and the court expressly declined giving any opinion on those points, because they did not then come judicially before them. Bocquet's bond not being considered as a record, and therefore not binding on his estate, in the first instance; he had undoubtedly a right to mortgage the lands to the defendant Greenwood, subject however to any prior incumbrances; after discharging which they will be liable to satisfy Greenwood's demands. Upon the whole, the court are of opinion, and decree, that the injunction be dissolved and the bill dismissed, but without costs, upon the principle that the state pays no costs.

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1 Desaus. 454

Case CV.

Present—Chancellors Mathews and Rutledge.

ELIZA POTTS v. JOHN COGDELL.

(October, 1795.)

[*Lost Instruments* ⇐8.]

Parol evidence received to prove the existence and loss of a deed of marriage settlement; corroborated by other deeds referring to and speaking of the deed of settlement. The contents of the deed ascertained also, by reference to other deeds. Construction of the deed of settlement.

[Ed. Note. For other cases, see Lost Instruments, Cent. Dig. § 17; Dec. Dig. ⇐8.]

[*Dower* ⇐10.]

[Personalty settled, upon a marriage, to the use of the parties for life, with remainder to their issue, was converted into land by the husband after the death of the wife. *Held*, that his second wife was entitled to dower in the land, though it was, in other respects, to be treated as personalty.]

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 20; Dec. Dig. ⇐10.]

[*Evidence* ⇐182.]

[Where all the parties interested acknowledge that a deed of marriage settlement was entered into between certain parties, and a bond entered into by the husband, as also a deed from the husband to his second wife and another, refers to and speaks of such deed of settlement, there is sufficient proof of its execution to authorize the introduction of secondary evidence.]

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 602; Dec. Dig. ⇐182.]

[*Husband and Wife* ⇐35.]

[On proof of the loss of a marriage settlement, the substance of which was recited in a subsequent deed by the husband, the court revived and enforced the settlement.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 210; Dec. Dig. ⇐35.]

Chancellor MATHEWS delivered the decree of the court:

This is one of those cases in which this court is authorized to exercise that extraordinary jurisdiction vested in it, for setting up, or reviving deeds or contracts lost or mislaid on sufficient proof of their having existed. In this case it appears to be acknowledged by all the parties interested, that articles for a settlement were entered into previous to the marriage of George Cogdell the father of complainant, with his first wife: and which is also shewn by a bond entered into by George Cogdell to Joseph White referring to such articles, bearing even date with the bond, for securing £10,000 old currency, to his then intended wife Hannah Screven; and which is further shewn by a deed from George Cogdell to his second, wife and to John Cogdell conveying lands in trust for the children of the first marriage. The first question is, whether the

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*evidence offered is sufficient to substantiate the existence of the deed now attempted to be set up? We think it is; for it does not often happen, that the proof in similar cases can be so well authenticated as is done in the present case. In the last term an application being made to this court to set up a will said to be the last will of Mrs. Ann Berwick, but which was lost, (in opposition to a will produced) on an issue directed for a trial at law, the jury set up and confirmed the will which was lost, as the last will, on the positive parol evidence of one witness, of the existence and contents of such will; and on the circumstantial parol evidence of other persons; which verdict was confirmed by this court. The present case is a much stronger one, as the proof goes much further in the support of the articles of marriage settlement.

The 2d question is, what proportion and what estate the children of that marriage were entitled to by virtue of the marriage settlement? On this point we have no certain guide for our government. The bond goes no further than a provision for the wife: but the deed from George Cogdell and his second wife to John Cogdell goes to a provision, as well for the surviving child, as for the representatives of the two deceased children. We must therefore have recourse to a former decision in this court, on a point nearly similar to this, as the best possible guide for a decision in this case. We mean the case of Wragg and others v. Mathews and others; the words of the court in delivering their opinion in that case were as follows: "This release must be looked upon as drawn by the direction of Mr. Wragg, and must be considered as his exposition of the deed of 1741. It shews clearly what was his construction of that deed; and he being a principal party in the transaction, best knows what was the intention of all the parties; he certainly best knew what was his own intention. Here then is his declaration, that his daughter being the only issue of his former wife, was entitled to the provision made by the deed of 1741, for the issue of the marriage." In the principal case the deed from George Cogdell and his second wife contain

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these words: "Whereas upon the *marriage of aforesaid George Cogdell with Hannah his former wife, the sum of £10,000 being by deed duly executed was by him G. Cogdell settled upon such child or children as should be born of that marriage: And whereas the aforesaid G. Cogdell had three children by the aforesaid Hannah his wife, that is to say Elizabeth, now living, and Charles and Mary, who are dead, and whereas for the better securing the payment unto the aforesaid Elizabeth his daughter, as well as to the representatives of the aforesaid Charles and Mary, his deceased children," &c. On the same principle then, that the case we have referred to was decided, so we think ought the present, namely for want of better information, we must resort to the exposition and opinion of the principal party to the former deed, as expressed by him in the latter deed, as he must have known what was the intention of all the parties to the first deed. From hence the decision is rendered easy and unembarrassed, as we have only to pursue the words of the latter deed, which speaks plainly the meaning and intention of the first deed, which has been lost. But whether the legal representatives of Charles who arrived at full age, but who died before his father and unmarried, were to take his portion under the statute of distributions, or whether the deed being intended as a provision for the children of the marriage ought to be construed according to the usual tenor of marriage settlements, and the distribution consequently confined to the children of the marriage, may be made another question. But we think there can be no doubt but that the death of any of the children of the marriage, without children and before a division of the estate settled, vested a right of survivorship in the other child or children, and their lineal descendants, exclusively of collateral representatives, not contemplated by the deed itself; for if in this case a contrary construction was to obtain, the consequence would be that the father of Charles would have been entitled to his distributive share absolutely, which he might have given to the children of the second marriage, to the injury of the children of the first marriage; especially too as the estate flowed wholly

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from the *mother. This surely never could have been the intention of the parties to the deed: it evidently was not the construction or intention of the father, G. Cogdell, for he never made any claim to it, although he survived Charles his son several years: And

because in the latter deed, executed after the death of Charles, he recognises the right of his children to the whole £10,000 and makes that deed for the better securing that sum." Now had he conceived that he had a right to Charles's part, he would not have entered into a new engagement for securing the whole sum. As the original estate settled was money, the real estate into which it has been in part changed must still by the well known rules of law be considered as money. But as the widow has claimed her dower in these lands, to be sure we cannot deprive her of it. It is therefore ordered and decreed that the defendant, G. Cogdell, the trustee under the deed of 1792, do dispose of the lands mentioned in the said deed, on a credit of one, two and three years, reserving thereout what shall be allowed the widow of G. Cogdell for her dower; and that he do pay so much of the balance, together with the sums for which the negroes sold by him amounts to, as shall make up the sum of £10,000 secured by the marriage settlement, with interest thereon from the death of G. Cogdell, in the manner following, namely, one half to the complainant E. Potts the surviving daughter, the other half to be by him placed and kept at interest on good security, to be approved by the master, for the benefit of the children of Mrs. Johnston, the other daughter of aforesaid G. Cogdell, until they may be entitled to receive the same: deducting therefrom a reasonable sum for the value of a negro woman, carried away by R. Johnston the husband of Mrs. Johnston, belonging to the estate of G. Cogdell; and also the usual allowance of £10 sterling per annum for the hire of the said negro, from the time of her being carried away to the present time: And that the costs be paid out of the proceeds of the estate.

[On examining the record of the court, the register stated that the only proceedings of

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record in the case of Legare *v. Ash and others, (referred to by the court in the above case) to set up a will of Mrs. Ann Berwick, which was alleged to be lost, in opposition to a written will which was produced, were examinations of witnesses, and the confirmation of a verdict, on an issue directed by the court of chancery. The following are the entries:

Court of Chancery, 1st July, 1795.

Present Chancellors Mathews and Rutledge.

—Thomas Legare and Wife v. Mrs. Ash and Others.

The bill and answer being read, five witnesses were examined viva voce in open court, and their testimony reduced to writing in memoriam rei perpetuam.

Tuesday 4th August, 1795.—This court having directed an issue at law, in nature of a writ of trespass and ejectment, devastavit vel non, and general Pinckney having presented a copy of the verdict found on such issue,—It was ordered, that the same be and is hereby confirmed; and that the evidence taken in this case, in memoriam rei perpetuam, together with the said verdict, be recorded; which verdict is as follows: We find for the plaintiffs, the lands in the declaration mentioned, with costs of suit. We also find that Ann Berwick, on or about the 10th day of November, A. D. 1793, made her will to the following purport and effect, to wit: She gave and bequeathed, &c. (the verdict proceeded to set forth in detail all the devises and bequests of the will, as proved to them by the witnesses)—And that of her said last will and testament she appointed Thomas Jones, E. Rutledge and T. Legare, executors; which will we find was duly and legally executed in the presence of three credible witnesses.

13th July, 1795.

(Signed) Daniel Hall, Foreman.

We certify that on the trial of the issue in the above cause, the jury found the verdict above set forth.

(Signed) Thomas Waties,
Elihu Hale Bay.

To the Honorable the Judges of the Court of Equity.

See report of the trial of the issue above directed, by Mr. Justice Bay, 1st vol. 464; under the title of Legare and Wife v. Ashe and Others. See also the important case of Havard v. Davis, in the supreme court of Pennsylvania. 2 Binney's Report's, 406; also the case of Haines v. Haines, 2 Vernon 441, and 7 Bacon's abr. 320, title wills and testaments.]

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*Case CVI.

Present—Chancellors Mathews and Rutledge.

M'DOWEL v. TEASDALE.

(October, 1795.)

[*Equity* ⇐345.]

The bill was filed for a discovery. The defendant denied the charges, and supported his denial by his books of entry. The complainant produced only one witness in support of his charges. His testimony was positive as to the principal charge, but contained some contradiction; and his testimony was not supported by any circumstances. The court held itself bound to take the answer as true, and decreed accordingly.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 722; Dec. Dig. ⇐345.]

This bill is brought for a discovery by defendant's oath, whether it was not expressly understood by him, that a certain quantity of goods, consigned to him by complainant, were to be sold on a commission of seven and a half per cent; and whether the amount sales, if sold on a credit by defendant, were not to be guaranteed by him to complainant, and not sold at his (the complainant's) risk. The defendant in his answer positively denies

that the goods were taken by him at his risk, or account; or that he was to guarantee the payment of the amount sales; but insists they were received and to be sold by him on commissions at the sole risk of the complainants. His book in which the original entry of the transaction was made was produced, which corroborated his answer. There was only one witness produced in support of the charge in the bill, who swore that the complainant directed the goods to be sold for cash, or if on a credit, defendant must have the money ready for them when he returned; and it was also agreed, that if defendant guaranteed, he was to be allowed seven and one half per cent; he also swore that the last goods were delivered on the same terms as the former parcels were. It is the invariable law of this court that as the defendant is compelled to answer on oath the charges of the bill his answer must be taken to be true, unless contradicted by the positive testimony of two witnesses, or the testimony of one witness, with strong circumstances. The defendant having positively denied the charge against him and supported such denial by the evidence of his book containing the original entry made at the time of the agreement; and there being no proofs against the answer; and it likewise appearing on examining the book that the first parcel of goods was sold on the account and risk of the complainant, we are of opinion that the weight of evidence strongly preponderates in favour of defendant; and that he can by no means be considered as a guarantee to the

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complainant for the *goods sold, and therefore he is not liable for any loss sustained by the insolvency of the persons to whom they were sold. It was ordered and decreed, that the defendant assign over to complainant and deliver to his attorney the vouchers against the respective purchasers of the goods, on being indemnified; also that he account before the master for what monies he has received; that a commission of five per cent. be allowed on such monies; and only two and one half, for the goods sold and not paid for; that a reasonable allowance be also made for store hire; and lastly that the complainant do pay the costs of this suit.

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1 Desaus. 460

Case CVII.

Present—Chancellors Mathews and Rutledge.

JOHN REID v. JAMES SMITH, Attorney for J. Nutt.

(October, 1795.)

[*War* ⇦29.]

A creditor entitled to priority of payment out of an estate, under an act of the legislature, selects and receives in payment a bond growing out of the sales of the estate; and afterwards assigns it to a third person. The other funds of the estate are transferred to other creditors. Some doubts arising whether the bond first abovementioned would be good, the assignee filed a bill to get the benefit of the other funds of the estate. The court was of opinion that the election having been made of a particular fund, and the remainder transferred to other creditors, they could not now be disturbed.

[Ed. Note.—For other cases, see War, Cent. Dig. § 191; Dec. Dig. ⇦29.]

Chancellor MATHEWS delivered the decree of the court.

G. Dupont's estate was confiscated, and the lands sold by the commissioners of confiscated estates, and bonds were taken from the purchasers. A special act of the legislature appropriated to Jane Villeponteux, the sum of £472. 17s. 7d. out of the said estate, in preference to other creditors, under peculiar circumstances of claim; for payment of which the commissioners assigned to her Wainwright's bond. Nutt and other creditors got the bonds of other purchasers. Glover one of the purchasers of lands of the estate, got relieved from his purchase, by decree of this court; and Wainwright also applied to the court to be relieved. Jane Villeponteux meanwhile assigned the bond of Wainwright to J. Reid the complainant, who applied to the court to enjoin defendant from selling the land purchased by Glover (and which was about to be resold to pay Nutt) under an idea that the land bought by Wainwright (out of which grew the bond, which was assigned to J. Villeponteux and by her to J. Reid) would be insufficient to pay the bond, at the present reduced prices of land, if Wainwright should be released from his purchase, as Glover had been. That complainant had a lien on all the lands of the es-

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tate of G. Du*pont, for payment of his bond, under the act of the legislature giving Jane Villeponteux a priority of payment out of G. Dupont's estate. The court was of opinion, that J. Reid had no lien. The lands had been sold to different persons, and J. Villeponteux had made her election out of the bonds; and the bond she chose being assigned to her, the act of the legislature was fulfilled, and the other creditors of J. Dupont were entitled to the remainder. The court therefore dismissed so much of the bill as related to this point, but retained so much of the bill as related to Wainwright's purchase, until the final decision of the cause depending before the court, between Wainwright and the commissioners of forfeited estates.

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Case CVIII.

Present—Chancellors Mathews and Rutledge.

THE COMMISSIONERS OF PUBLIC ACCOUNTS v. HUGH ROSE, ADAM TUNNO, WILLIAM TUNNO and A. MOULTRIE.

(October, 1795.)

[*Attorney and Client* ⇐99; *Attorney General* ⇐6.]

An attorney general acting for the state, suing for a bond put in his hands for recovery, settles the debt with the agent of the debtor, by receiving houses, merchandizes, &c. which he applied to his own use; and did not pay over the proceeds to the state; but he debited himself in the account. He was then very greatly embarrassed. His releasing the debt, and giving up the bond and mortgage to the debtor, does not release the debtor, for he had no right to release the debt without actual payment to him. The original debtor was decreed to pay the debt, though he was ignorant of all these transactions, having furnished his agent with funds to purchase indents, and pay the debt.

[Ed. Note.—Cited in Noonan v. Gray's Ex'rs, 1 Bailey, 437.

For other cases, see Attorney and Client, Cent. Dig. § 200; Dec. Dig. ⇐99; Attorney General, Cent. Dig. § 7; Dec. Dig. ⇐6.]

[*Attorney and Client* ⇐76.]

[Cited in Mayer v. Blease, 4 S. C. 11, to the point that as a general rule the attorney's authority terminates with the judgment.]

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 130; Dec. Dig. ⇐76.]

[*Attorney and Client* ⇐98.]

[Payment to the attorney is payment to the party.]

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 190; Dec. Dig. ⇐98.]

[*Attorney and Client* ⇐100.]

[An attorney at law by virtue of his general authority may receive the money due on the judgment, and satisfy the same.]

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 204; Dec. Dig. ⇐100.]

[*Principal and Agent* ⇐197.]

[The obligor in a bond employed an agent, in whose hands he deposited funds for the purpose, to satisfy the bond; but the agent improperly procured the attorney of the obligee to cancel the bond, without applying the funds of the obligor. In a suit by the obligee against the obligor, in which the bond was decreed a subsisting security, it was *held* that no decree could be made against the agent, although a party to the suit, for want of privity between him and the obligee.]

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 733; Dec. Dig. ⇐197.]

This was a bill filed on behalf of the estate, to recover a debt originally due by Hugh Rose. The bill charged that Hugh Rose was bound, together with J. B. Fon, as his security, in a bond bearing date the 17th December, 1783, in the penal sum of £49,200. 10s. with condition for the payment of the sum of £24,600. 5s. in specie or indents, with interest, to the commissioners of the treasury, for the use of the state, on or before the 17th day of December, 1788: and that the said Hugh Rose to secure the payment thereof, mortgaged several tracts of land to the said commissioners. That the said debt being unpaid, the said bond was placed sometime in April, 1789, in the hands of A. Moultrie, the attorney general, to sue for and recover the principal and interest due on said bond, according to the condition thereof; but that he did not pursue any measures at law or in equity to recover the said debt. That the commissioners requiring an account from him, he rendered in an account, by which he debited himself in the sum of £26,000 on account

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of the said bond, *and as assumed by him. That the commissioners required and obtained from the said A. Moultrie, according to the custom of the office, the original bond and mortgage, but the seals and signatures of the parties were torn off, and the following receipts endorsed. "Received 9th June, 1790, £6,400 in indents in part of this bond. (Signed) A. Moultrie." "Received 26th July, 1790, £13,000 in indents in part of the within bond. (Signed) A. Moultrie." That not being satisfied on this subject, the commissioners questioned the said A. Moultrie as to the mode of settlement of said bond, and of the cancelling thereof; and he candidly disclosed to them such particulars, as satisfied them, upon the advice of the present attorney general, that the cancelling the said bond, and the entry of satisfaction on the mortgage, would not under the circumstances attending the transaction, be deemed sufficient in a court of equity to release the parties therefrom, or bar the state of its right to revive and set up the same in full force. The bill charges that the defendant Hugh Rose, employed A. and W. Tunno as his agents, and supplied them with funds, to purchase indents, then in a state of depreciation, and to apply the same to the payment of his said bond, and that the said agents in pursuance thereof purchased large sums in indents (said to be to the amount of £31,000) on account of the said Hugh Rose, to be applied to pay said bond. But that indents rising in value rapidly on the assumption of the state debts by congress, the said agents were induced to fund or dispose of the said indents, at a great profit, and to resort to some other method of settling said bond. That no part of the payment of £6,400 expressed in the receipt of the 9th June, 1790, was actually paid in indents; but was made up by discounting debts of the said A. Moultrie, or some other way. That of the sum of £13,000, expressed in the receipt of the 26th July, 1790, no part was paid in indents. But that two houses in Charleston were accepted by the said A. Moultrie, in lieu of the said indents, at a certain rate and valuation: and the agents paid £3,548 in unfundable indents; and finally gave their bond for £12,000 the

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computed balance due on said bond of *Hugh Rose to the said A. Moultrie; and prevailed

on the said A. Moultrie to give them a written receipt in full discharge of the said H. Rose, against his said bond, which was cancelled, and to enter satisfaction on the mortgage. That the said agents in their account with the said H. Rose charged him with the amount, as paid in indents at a certain rate. And the said agents afterwards took up their said bond of £12,000 by paying some indents, and by settling sundry debts due by the said A. Moultrie, at a discount; and by delivering him sundry goods, wares and merchandizes, which were applied to his own uses, and of which the said agents could not be ignorant, as they well knew he was in a state of embarrassment. That the commissioners of public accounts not considering such a mode of settlement at all binding or obligatory on the state, applied to the said H. Rose and A. Tunno, to satisfy and settle the said bond debt, according to law. But they having refused to do so, the complainants pray relief on behalf of the state: and that the said bond and mortgage should be revived and set up, and the defendants obliged to satisfy the same.

The defendant Hugh Rose in his answer admitted the execution of the bond and mortgage as stated in the bill; and that he appointed A. and W. Tunno, merchants in Charleston, to purchase indents for him, in order to pay off the said debt, for which he was to furnish funds. That some time after, A. Tunno, after various previous communications, informed the defendant that he had purchased indents for him to the amount of £31,000 and hoped shortly to procure the balance. They were then selling at seven or eight for one. After some time he delivered to the defendant, his own and his surety's names taken from the bond, and the attorney general's receipt, dated 18th July, 1790, for £35,936 17s. 2d. in principal indents, in full of Mr. Hugh Rose's and J. B. Pon's bond to the state, and satisfaction was also entered on the mortgage. That soon after A. Tunno furnished this defendant with his indent account, in which he charges him for £35,936. 17s. 2d. in indents, purchased on account of the defendant; £4,559 10s. sterling (payable

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in paper *medium,) and the defendant solemnly declared that he believed that the attorney general had actually received indents to the amount of £35,936 17s. 2d. in satisfaction of said debt: That he had no information that indents had not been paid him, and that he never knew that his bond had not been paid off in indents, till he received a letter from the commissioners informing him of it. The defendant submitted that he could not be implicated in the transactions that took place between the said Adam Tunno, and the attorney general, and he pleads his discharge, fairly obtained by him.

The answer of Adam Tunno admits that Hugh Rose gave the bond stated in the bill: which was put in suit by A. Moultrie the attorney general, and upon payment of the principal and interest, the said bond was cancelled, and satisfaction entered on the mortgage, by A. Moultrie the attorney general, acting on behalf of the state. That this defendant made the payments to the said A. Moultrie with good faith; and they could as well have been made in indents as in any other way: and that the said A. Moultrie, having received the payments, was alone accountable to the state; and the legislature directed suit to be brought against said Moultrie, on which he confessed judgment and is accountable. That defendant meant no fraud against the state, but supposed that the said A. Moultrie was fully authorized to make the settlement he did. That the defendant Hugh Rose was entirely unacquainted with the mode of settlement made by this defendant with A. Moultrie, and this defendant admits that the said A. Moultrie took off the seals and signatures of the debtors, and gave the receipts and entered the satisfaction stated; which the defendant relies upon as a full and sufficient discharge. That defendant was employed by Hugh Rose to purchase indents to pay off his bond, and advanced some funds for that purpose, but not sufficient to enable him to pay off the bond. That he settled the debt partly in indents, and partly in other ways satisfactory to the said Moultrie; and he sold part of the indents, but never funded any. That he settled with said A. Moultrie

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by paying some of his debts, at *his particular request, at the current rate of indents, and without any gain to defendant; being satisfied that the said A. Moultrie had full power to represent the state, and give sufficient discharges. That some of the other payments were made by goods furnished said A. Moultrie at his desire, at fair cash prices, and receipts given for indents at the current price of eight for one. That the settlement for the other sums receipted took place by the sale of houses in the same way; the houses being worth the sums allowed for them in indents, at the instance of the said A. Moultrie. This defendant admits that he and his brother William gave their bond to the said Alexander on account of the state for the balance due on H. Rose's bond, which he thought was perfectly fair and just; and he afterwards took up the said bond, by payments according to law; and never paid by taking up any of said Moultrie's debts at a discount. Defendant denies that he knew that it was not in A. Moultrie's power to settle the amount of this debt to the public; and this defendant never informed said H. Rose of his mode of settling with A. Moultrie; and this defendant avers he made no profit by these transactions, but was an actual loser, as appears by his statement. That the state would not have been benefited by the payment of the whole debt in indents, as

the sums actually paid the attorney general in indents were applied by him to his own use, and not accounted for.

The defendant A. Moultrie admitted that A. Tunno, acting as the agent of Mr. H. Rose, settled with him the debt due on bond by H. Rose to the public, which he held as attorney general, by various arrangements, partly by the purchase of houses, some merchandizes, &c. and this defendant assumed to pay the debt to the state, according to the tenor of the bond. That all the settlements were with Mr. Tunno, and not at all with Mr. H. Rose. He was much pressed and urged by Mr. Tunno, and finally yielded and made the arrangements desired of him: being fully convinced that his resources would enable him to settle the debt to the public which he had assumed, and in which he has been unhappily disappointed.

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*At the hearing of this cause Mr. Trezevant argued for the state, that the attorney of the state had no right to settle the debt, and give discharges in the manner he did. That the principle is a broad and general one. An attorney cannot withdraw the action of his client, but it must be by a retraxit by the client himself. A factor cannot pledge the goods of his principal for his own debt. See Wood's Institutes, 55, 6. 2 Strange, 1164. See 3 Bacon, 562. Salk. 442. Raym. 928. 2 Shower, 139. 8 Co. 58. It was decided in the case of Sarrazin v. Nelson that neither the plaintiff's attorney, nor the sheriff have a right to discharge the debtor, unless the money is actually paid to one or the other. Tunno must have known the situation of Moultrie, as there were many judgments and mortgages on his property; and Moultrie must be considered the agent of Tunno, for as he paid Moultrie no indents, he trusted to him to procure them and satisfy the public demand, which could be satisfied in no other way, and the discharge was of no validity, till the debt was effectually paid.

Mr. Marshall, for defendants, insisted that the court could not set aside such a release, unless shewn to have been obtained by fraud, and there was no proof of that. He cited 4 Burr. 2046. Strange. 1182, Cowp. 255.

General C. C. Pinckney and Mr. Edward Rutledge for defendants. The legislature having directed a suit to be instituted against Moultrie for his default, and having recovered a verdict against him, cannot have a double remedy; especially against Mr. Rose, who has had no share in these transactions, and who furnished the funds necessary to purchase the indents to pay the bond. Tunno might have sold his houses for indents, and paid them to Moultrie. If he had done so there would have been an end of the business, as to Tunno and Rose, even if Moultrie had never paid over the indents to the state. His transferring the houses and other articles direct to Moutrie cannot make any difference. Moultrie assumed the debt on himself, cancelled the bond and mortgage, and made himself debtor to the state; which should look to him. If the bond was il-

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legally cancelled there was a reme*dy at law, according to a decision of lord Mansfield, reported in Durnford and East; and the suit should have been brought at law. Cases quoted, 3 Bacon, 698. 3 Wilson, 345, 2 Bla. rep. 866. 3 Wilson, 374. 1 Salk. 86.

Mr. Pringle, (attorney general,) for complainants. When the bond and mortgage were cancelled, not a cent of money or indents had been paid on the bond. The payments were in merchandizes and houses, delivered and conveyed to Moultrie himself, who applied them to his own use. For the balance Tunno gave his bond, and that had been settled and taken up chiefly in the same way. Tunno could not be allowed the benefit of the commutation act: for whoever claimed that, was required by law to take an oath that he had not the indents previous to the passing the law: and Tunno admits by his answer that he had purchased indents for Rose to pay the bond to the amount of £21,000. Had Tunno paid money to Moultrie equivalent to the current price of indents, this might have answered, and the release of the bond might have been supported. But having paid neither money nor indents, according to the tenor of the bond, but lands and goods, it must be considered as no payment. If Tunno trusted to Moultrie to satisfy the public, and he has not done so, he must look to Moultrie, but the public must be paid by their original debtors: For as attorney for the state, Moultrie had no more right to release the public debt, but in consideration of actual payment, than a common attorney had to release the debt of his client without payment. Tunno must have known that Moultrie was deeply involved; It was notorious: and that the kind of settlements he was making with him put the public debt in jeopardy. What is done by the agent is virtually the act of the principal, and he is liable: If therefore Tunno has acted improperly as the agent of Rose, the latter must be accountable. At the time the state ordered a suit against Moultrie and recovered a verdict against him, the legislature and its public officers knew nothing of the mode in which this debt had been settled; but it was supposed that the debt of Rose had been paid in indents, as it

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ought to have been: and as it was represented by Moultrie, who debited himself in his account for indents. Therefore no inference can be drawn of the state intending to waive its claim against Rose and Tunno. Quoted 1 Burr. 128. 3 Viner. 303. 1 Durnford and East. 757.

After the court had deliberated, it delivered the following decree:

The importance of this case is occasioned more by the magnitude of the debt, than any real difficulty or intricacy in the subject.—It must be determined on two points:

Whether the defendant Hugh Rose has complied with the conditions of his bond, which was to pay £24,600 5s. with interest, in specie or indents, to the commissioners of the treasury, or their successors in office, in trust for the use of the state, on the 17th December 1788?

If he did not, whether the defendant Moultrie, in whose hands the bond was placed by the commissioners for the purpose of suing the same, and recovering the debt, could legally cancel and release it without actually receiving payment in specie or indents, according to the condition thereof?

That the condition of the bond was not complied with cannot be denied: however, there is no fraud imputable to the defendant Mr. Rose in the transaction, his conduct was fair and upright in every point of view. He positively swears, that when he received his own and his security's name, which had been torn off the bond by the defendant Mr. Moultrie, and was sent him by his agent the defendant Mr. Tunno, he conscientiously believed the debt had been actually paid in indents, and that the account which he afterwards received and settled with Tunno confirmed him in his belief. The defendants Tunno and Moultrie both acknowledge that only a small part of the debt was paid in indents, and that the remainder was satisfied by his (Tunno's) assuming payment of a number of demands against Moultrie; by the sale of two houses to him, and in various other ways.

The first point being thus disposed of, the second remains only to be determined, viz.

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Whether the defendant *Moultrie, who acted as an attorney at law to sue for the debt, could legally release it without actual receipt of the indents or specie? The cases of master and servant, &c. cited by the counsel for the state, although in some degree similar, are not immediately applicable to the present. Nor does the case of persons, appointed by letter of attorney, apply altogether, because they are generally vested with power to receive, compound, or compromise with debtors; but the authority of an attorney at law is materially different: and we cannot consider the attorney general in any other point of view, when suing for the debts due the state. He is to sue for and recover a debt. After judgment and execution his authority was at an end. The judgment and execution evince it: the latter directing the sheriff to bring the money into court at a certain day, to be paid to the plaintiff; and it was formerly doubted whether payment to the attorney, was payment to the party; though it is now settled to be so. The cases in Salkeld and Blackstone, cited by defendant's counsel, are certainly good law, but they are confined merely to the acts of the attorney in the course of the proceedings in the cause, and do not relate to his receipt of his client's debt. And in a case in Salkeld, 88, it is expressly declared by the court, that if an attorney suffer a judgment against his client, and he is not responsible, which means of ability to satisfy his client in damages, if the judgment be irregular; the court will set aside the judgment; for otherwise the defendant would have no remedy, and any one might be undone by that means. From the whole train of authorities, it is evident that he must actually receive the money, and that an ideal payment, or the receipt of any thing else in lieu of it, will not bind his client. It cannot be supposed that the defendant Tunno, on a moment's reflection, could have imagined the defendant Moultrie was authorized to settle the debt in the manner he proposed and did settle it; or that he could totally alter the state of the debt, and become the obligor instead of Rose: the idea is too absurd. Tunno, it is plain, was not authorized to make the negotiation he did; it was an unwarrant-

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table speculation, *between him and Moultrie, on Rose and the state. Suppose it was a case between two individuals, it is reduced then to this single point, on whom in justice and equity ought the loss to fall? On the plaintiff, whose attorney released the debt without recovering the money? Or the defendant Rose, whose agent was in possession of funds to pay the debt; but instead thereof speculated with them for his own advantage, and settled the debt in a manner which he was not authorized to do by his principal? Most certainly the loss must be the defendant Rose's, according to the maxim which invariably prevails in courts of law as well as equity, that the principal is civilly responsible for the acts of his agent: And though there is not any fraud imputed to the defendant Tunno, his irregular conduct must affect his principal. In the case of Latham and Sarrazin, lately determined in the court of common pleas, it was clearly settled, that an attorney can do no act incompatible with the nature and end of his authority: and that if he was to give a discharge or remit the debt without receiving it, his client would not be bound by it. The defendant Tunno having acted contrary to the trust or confidence reposed in him, the defendant Rose must seek redress against him, for whatever damages he may sustain. And as on the one hand, the state would have been bound by the defendant Moultrie's act, if he had actually received the specie or indents for Rose's debt; so on the other hand, as he has not received the specie or indents, Rose shall not be released from payment, although his bond has been cancelled. Creditors would be placed in

a perilous situation indeed, if by the combination of an attorney with the debtor or his agent, a receipt without payment of the money should be deemed sufficiently valid to discharge the debtor from his obligation. It is undoubtedly a hard case on the defendant Rose; but it is a hardship which every one is liable to, who reposes so unlimited a confidence in another as he did in the defendant Tunno; who though a party in this suit, yet as there was no privity of contract between the state and him, cannot be decreed to pay the debt.

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*It is therefore ordered and decreed, that it be referred to the master to ascertain the sum either in indents or specie that has been actually paid to the defendant Moultrie on account of the defendant Rose's bond, and to report the balance, which is still owing and unpaid: That the bond notwithstanding the receipts thereon, shall be considered a subsisting contract, and the defendant and his security still liable for the payment of what shall be reported due. Also, that the mortgage given by the said defendant Rose as an additional security be deemed and held as still binding, notwithstanding the acknowledgement of satisfaction thereof, the same having been illegally vacated, without a valuable consideration. And lastly, that the defendant H. Rose do pay the costs of complainant, and the costs of the defendants shall be paid by them respectively.

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1 Desaus. 471

Case CIX.

Present—Chancellors Mathews and Rutledge.

MARY LOOCOCK v. WILLIAM CLARKSON, A. L. CLARKSON, and ARCHIBALD BROWN, Executors of Aaron Loocock.

(July, 1796.)

[*Wills* ⊂⊃810.]

A testator bequeathed to his wife an annuity of £300 for life, and also several specific legacies, in lieu of dower. By a codicil he made additional bequests to his wife. The rest of his estate, after several pecuniary legacies to others, he devised and bequeathed to his two nephews, partly specifically, and partly as residuary legatees: one of them was a favorite nephew, brought up as his son, and who had devoted himself to his uncle's affairs for many years. The testator left a large real and personal estate; but so much in debt that the pecuniary legacies could not be paid: And if the annuities for the wife should be raised, it would trench on the legacies to the nephews. The wife was decreed not to be liable to abate with the nephews: and the annuity was directed to be raised by them and secured to her. The husband when dying abroad, gave his wife an order for £100 to pay her expenses home. Decreed that she should be paid that amount, by the executor.

[Ed. Note.—Cited in Cogdell's Ex'rs v. Widow, Heirs and Devisees, 3 Desaus. 389.

For other cases, see Wills, Cent. Dig. § 2106; Dec. Dig. ⊂⊃810.]

Mr. Aaron Loocock being in possession of a considerable estate, real as well as personal, made his last will and testament on the 14th day of April, 1791. Wherein amongst other things, he directed his just debts to be paid; and then, he bequeathed to his wife Mary Loocock, the annual sum of £300 during her natural life, in order that she might live in quiet, and easy circumstances. He also bequeathed to her, sundry negro slaves, about 23 in number, and his plate, furniture, carriages, horses, liquors, &c. And he devised to her the use of his plantation, in St. James's Parish; and the use, and occupation of his house in Charleston, for life. All of which was to be in lieu and bar of dower. And the testator bequeathed, as a mark of his affection for his wife, £1,000 to be paid to whomever she

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should appoint, if she died before the *testator. He also bequeathed, £1,000 apiece, to his two sisters, to be remitted to them as soon as possible. The testator then devised to his nephew, William Clarkson, his plantation, called Middleborough, near the Great Raft, on the Wateree river, and he bequeathed his said nephew the remainder of his slaves, with some stipulated exceptions; and he bequeathed to his nephew A. L. Clarkson, sundry slaves by name, and a plantation, and £1,000. The testator bequeathed to two nieces in England, £1,000 apiece, with directions to his executor to be very particular in securing these legacies. And he bequeathed other pecuniary legacies to several persons. The surplus of his estate, real and personal, he directed to be sold, and the proceeds, after payment of his debts, he bequeathed to his nephews W. Clarkson and A. L. Clarkson, his residuary legatees. And he appointed his said nephews, his brother in law, A. Brown, and others, to be his executors. The testator made a codicil to his will, on the 13th day of November, 1793, being then at New-York, by which after confirming the legacies to his wife, he bequeathed her some additional slaves. The testator also gave his said wife an order on W. Leight, of New-York, for £100 to bear her expenses home, which she delivered to Mr. W. Clarkson, soon after the death of her husband; and which she believes has been paid to him. The testator died about the 11th February, 1794, leaving the said will and codicil in force, and the defendant W. Clarkson proved and qualified thereon as executor, and A. Brown and A. L. Clarkson also qualified thereon; and they possessed themselves of the estate, and particularly of the estates bequeathed to the two Clarksons. But they have not made any provision for the regular payment of the annuity to the said Mrs. Loocock, the widow. The widow claimed a preference, over all the legatees, as a purchaser, because what was bequeathed her,

was in lieu and bar of dower, in great landed estate: which provision she was willing to accept if the annuity was secured to her, and the other legacies paid, and delivered to her. But the executors not considering her claims entitled to a preference, she filed her bill for relief.

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*The executors contended, that as the debts were much larger than had been anticipated, and would exhaust the funds intended for the payment of the debts; and as none of the pecuniary legacies could be paid; and the specific legatees would be obliged to abate, that the widow was bound to abate proportionably with them. That in all events the specific legacies to the defendant W. Clarkson, ought not to be obliged to contribute to the annuity, as the testator had brought him up as his child, (being a favorite nephew,) and had promised to provide for him, as his child; and he had devoted the best part of his life to his uncle's service, in his counting house, unrewarded. His uncle feeling his services to be so indispensable to him in the management of his affairs, would not permit him to go into any kind of business: as he had abundant opportunities to do, with advantage. And he remained in his uncle's service, devoted exclusively to his business, without any reward but a maintenance, till his death, when his nephew was 30 years of age. And the nephew under these circumstances considered himself not less a purchaser for valuable consideration than the complainant.

It was insisted that the annuity of the complainant stood legally on the footing of the pecuniary legacies, and must abate with them—and that at all events she could not be on a better footing than the specific legatees. And that the lands devised specifically could not be touched to pay debts, till the whole personal estate should be exhausted.

The defendant stated that he never received the payment of the order on Mr. Laight, having destroyed it when delivered to him by the complainant, as he had carried abundant funds to New York for the use of his uncle: and he paid the expenses at New York and supplied the complainant with money there.

Mr. D. Deas, Mr. E. Rutledge and general C. C. Pinckney contended for the complainant, that a woman is entitled to dower even against the claim of creditors, previous to her marriage. See 1 Eq. Cases abr. 218. 1. 2. 220. 8. 1 P. Wms. 693. 730. Wives are

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preferred. *See Cooper v. Williams, Prec. in Chanc. 71. In all cases where a devise to the wife is in lieu of dower, it is preferred to all other claims. See Burridge v. Bradyll, 1 P. Wms. 127. 2 Eq. Cas. abr. 552. pl. 5. This case is not shaken by Hinton and Pinke, so far as relates to the wife being a purchaser of the annuity by releasing her dower; but only so far as the decree related to the annuity being a pecuniary legacy. See also Lewin v. Lewin, 2 Ves. senior 415. Blower v. Morret, 2 Ves. senior 420. Davenhill v. Fletcher, Ambler, 244. Swinburne, 277, 8. 2 Vern. 477. 3 Atk. 369. 2 P. Wms. 701. When a legacy is given in lieu of dower it is not liable to abate as the other legacies are. The gift of the £100 was a donatio causa mortis. And this can only be avoided by creditors, or by a wife, or by those who have such an interest in his estate as he cannot dispose of. It takes effect before a legacy. In devising to Clarkson the testator does not say it is in lieu of what he owed him; though it would be a satisfaction, if he owed him any thing. Lands are liable in this country for simple contract debts. By Stat. 5. Geo. II. And the act for the abolition of the rights of primogeniture has placed real and personal estate nearly on a footing. And equitas sequitur legem: There is no reason now for saying that real estate is less a fund for payment of debts than the personal estate. The hæres factus is not favored. See 4 Burns, 244, 5, 6. 282. Talb. 53. The annuity is not an absolute gift to complainant. It is only for life—Yet is in lieu of dower.

Mr. Desaussure and Mr. Ford argued for the defendants, that even if the wife's annuity was entitled to a preference over the pecuniary legacies, it does not follow that she is entitled to such preference over the specific. And in this case, the fund will be so exhausted that the specific legatees will be obliged to abate. And there are no decisions that the annuity to the wife has ever been decreed to be paid in preference to specific legacies. The cases shew that an annuitant is not considered as a specific, but as a pecuniary legatee. 3 Atk. 693. 2 Comyns 190, 259, 235. 2 Eq. Cas. abr. 555. See 1 P. Wms. 544. The annuity is not bound

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to be made good at all events: *it is not charged on any particular fund, and therefore comes out of the general estate; and is liable to abate, by the very words of lord Hardwicke, in 3 Atk. 693. So in Blower v. Morret, 2 Vesey, 420. So in Lewin v. Lewin, 2 Vesey, 415. If an annuity is not specific, but pecuniary, then it abates even with pecuniary legacies; and is postponed to specific legacies. 2 Vern. 688. 2 Vesey, 623. 1 Vern. 31. See 1 P. Wms 540.

Mr. Clarkson is a specific legatee as to the personal estate, and a specific devisee of the real estate devised him. 2 Vern. 688. and 1 Eq. Cas. abr. 298. Fonb. on Eq. 374. 2 Eq. Cas. abr. 555, note. Indeed any devisee of land is a specific devisee. See 1 P. Wms. 678. 2. Eq. Cas. abr. 556. 2 Com. 190. Mr. Clarkson's equity is as strong as Mrs. Loocock's. The will of the testator treats him as his favored nephew and his adopted son. Mrs. Loocock has elected the annuity and

legacies in preference to her dower—and she takes them with their precise legal qualities and characteristics, as any other legatee would do. Mr. Clarkson is not a volunteer. He states his equity to the provision made for him by the will, upon oath in his answer, and the facts are conceded to him. The devises to him then are a recompense, and ought not to be postponed to any other legatee. If the complainant loses part of her annuity, he will lose part of his legacies by the debts. Their equity is equal and their claims at least on an equal footing.

Chancellor MATTHEWS delivered the decree of the Court.

This is one of those cases which admit of a great deal of argument, but which is ultimately resolved into a very narrow compass. Very elaborate arguments have been accordingly gone into; the result of which has been to reduce the case to a single point, viz. whether the bequests to the complainant, by the will of her late husband A. Loocock, either pecuniary or specific, are liable to abate in proportion with the other pecuniary or specific legacies, on a deficiency of assets, to pay both debts and legacies? And after all the industry and researches of counsel, it is admitted on all hands, that there is not a

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case in the *books, which is assimilated to the present, in all its material parts. We concede to this assertion; for upon the strictest examination of all the cases that have been referred to, we find that they treat upon the general doctrine of, and the distinctions taken between, pecuniary and specific legacies, except the cases of Blower and Morret, 2 Vez. 420, and Burridge and Bradyll, 1 P. Wms. 127, in which the point of dower is included, and on which point those cases were decided. In the case of Luthins and Leigh, Talbot, 53, although the bequest in that case, is in lieu of dower, yet the decision does not rest on that point, but turns on that of placing the legatee on the footing of a bond creditor, so as to constitute a lien on the real estate, where they have exhausted the personal assets in payment of their demands. In these cases the bequests have been pecuniary; and had they not been given in satisfaction of dower, whereby the legatee was contemplated as a purchaser of such legacy, the decisions would have been as they uniformly are, that is, to consider them as mere pecuniary legacies; and consequently subject to abate on failure of assets. But in the case before us, the annuity is a general charge on the testator's whole estate. There is no sum specified to be laid out in the purchase of an annuity—there is no particular fund pointed out by the testator, from whence the annuity is to be drawn. The words of the will are "I give and devise and bequeath unto my dear and affectionate wife Mary Loocock the annual sum of 300*l* sterling, each and every year, during the term of her natural life, in order that she may live in quiet and easy circumstances."

The technical words, devise and bequeath, we well know the meaning of; and from the use made of them by the testator, we are to presume he also understood their meaning; for in the different clauses of his will, he regularly makes use of the word devise, when lands are the object of his bounty, and when a personal thing he uses the word bequeath; therefore as he has used both words in the clause, respecting the annuity to his wife, a fair deduction may be made, that by the

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generality of the *terms made use of by him, he meant to charge his whole estate, and render it responsible for the payment of the annuity. Here the rule of construction of wills presents itself, and must influence the decision of this point; that is, what was the testator's intention? When this is ascertained, and it does not militate against the rules of law, it must prevail. There never has been a case presented to this court for consideration, in which the intention of the testator has been more clearly manifested. Who is the first object of his bounty? His wife. And is it not right that she should be so? He had no child. Who then so naturally, so justly, and so consistently with every law, divine and human, ought to have a claim on his benevolence as his wife? One with whom he had lived in harmony and conjugal felicity for upwards of thirty years. A man's will is supposed to be the last act of his life. In that of the testator, Mr. Loocock, he mentions his wife in the most endearing terms; and so anxious did he then appear for her future felicity, that he expressly says, that the annuity is given her to render those days in which she is to remain in this world, (when he himself shall be no more) easy and comfortable. And who so proper a judge of what would be adequate to this purpose, as he was? That adequacy he has himself fixed; and it would be a very ungracious thing then in this court to strip her of that means of quiet and comfort intended by the testator; and thereby oblige her to taste of the bitter cup of indigence in the wane of life; a period when human nature requires all the comforts of ease and tranquillity.

That the complainant was the first object of the testator's bounty and munificence, appears by his will; but she is also the last, which is shewn by his codicil. By the latter, so far from thinking that he had done too much for her, he increases what he had before given her, by giving her an absolute estate in a part in which he had before given her only a life estate; and she is here the sole object of his bounty. And it is proper here to mention, that this was done upwards of two years after he had made his will, in which time he had full leisure to consider not

only of what he had before done for his wife,

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but *also of the situation of his affairs. The most natural conclusion therefore must be, that he did not think his liberal intentions were liable to be defeated, nor is it now pretended that they will be so, as to the defendants. But it is however contended that one of the defendants, Wm. Clarkson, was equally the object of his bounty with his wife; the testator having taken him from his parents in is early youth, educated him and brought him up to business, in the mercantile line; that he had spent the best years of his life in the testator's service; and that he had always promised to reward him with a large proportion of his estate at his death. That he was equally the object of the testator's bounty, no part of his will can justify. That he was one of the principal objects of his bounty we will readily admit; nor has it been by any means shewn that he will not be immediately so. It is true he might not receive that prompt and extensive benefit out of the testator's estate, which he might have expected, owing to there having appeared to be larger debts against his estate, than he had calculated upon; and the property left by him being of a more depreciated value than he had estimated it at. But the effect of this mistake of the testator will be, not the disappointment of the defendant, but of others, who might have expected to have shared some part of his bounty. As it is represented by defendants in their answer, that not one shilling of the testator's pecuniary bequests can be paid, the consequence will be, that so large a sum as 3570*l.* intended by him for other persons, will be appropriated to the benefit of defendants, by paying so much of the debts of the testator. These advantages do not stop here; for upon the death of the complainant every thing given her, except the few negroes contained in the codicil, and some furniture and stock of cattle, will fall into the residuum of the estate, and become the property of one, or the other of the defendants. Where then arises the great hardship, that has been so loudly complained of? We can by no means think the complaint well founded. Hence the testator's intentions as to the complainant, admit of no doubt. It remains to examine whether they

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are in any respect in*consistent with any principle of law. So far from it, that they are warranted by the adjudged cases of Blower and Morret, and Burridge and Bradyll, as far as those cases correspond with the present case. If those cases then induced the decisions made by the court, on how much stronger ground shall we stand in determining in favor of the complainant in the principal case. In those cases the bequests are accompanied by no special words. They are simply for sums of money, to be paid out of a particular fund or to be laid out in the purchase of an annuity. But as they were given in satisfaction of the wife's dower, the court considered the legacies not only as specific, but that the legatees were fair purchasers; and therefore not liable to abate, with other legacies of the same description. How much stronger then is the case before us? The words annexed to the legacy are nearly tantamount to a positive injunction, that it shall be paid in preference to any other; otherwise the testator's intentions cannot be complied with. The charge appears to have been intended to be on his whole estate: and in lieu of dower, out of a very large real estate: which probably might be equal in value to the legacy given. Besides, the sum she would be entitled to, out of lands already sold, to which she never had renounced her dower, and those which are unsold, would have been a vested interest in her, at her own disposal, whereas she takes nothing by the will, except the trifle before mentioned; but a contingent interest, depending on her life. As to the orders for 100*l.* given to the complainant by her husband a few days previous to his death, to bear her expenses to this state, and by her afterwards given up to the defendant Wm. Clarkson—that point having been conceded by the defendant's counsel, it is unnecessary for us to make any particular observations on it. On the whole, we are clearly of opinion that the claim of the complainant is a well founded one, and ought to be complied with.

It is therefore decreed, that the executors of the testator A. Loocock, do, under the direction of the master, give such security for the regular payment of the annuity of £300 left her by her late husband Aaron Loocock,

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as *shall be approved by him; that they deliver over to her, such parts of the testator's estate as is assigned her by his will; and that they return her the sum of £100 given her by her husband to bear her expenses to this state after his death; first deducting therefrom, the amount of what was advanced her by the defendant Wm. Clarkson for that purpose. And that the costs of this suit be paid out of the estate of A. Loocock.

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1 Desaus. 480

Case CX.

Present—Chancellors Mathews and Rutledge.

NEUFVILLE v. W. B. MITCHELL and J. MITCHELL.

(March, 1796.)

[*Specific Performance* ⊂=121.]

The complainant filed his bill for specific performance of an agreement with the defendant for the sale of certain lands and negroes, at stipulated prices, to be paid at certain fixed periods. The agreements were very loose and informal; and there were two memoranda stating different instalments. The defendant in

his answer swears positively that the memorandum fixing the longest periods for payment, was the basis of the agreement actually made. The answer connected with that memorandum and not contradicted by proofs, is to be relied upon, and the payments decreed to be made accordingly. The land and the negroes being proved to be as good as any in that part of the country; and there being no proof of any misrepresentation or unfairness on the part of the complainant; and the defendant being well acquainted with the property, and having time and opportunity to examine and deliberate; the full price stipulated in the memorandum of agreement, decreed to be paid, and the securities given, notwithstanding the alleged deterioration.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 394; Dec. Dig. ⟸121.]

Chancellor RUTLEDGE delivered the decree of the court:

Complainant's bill states that he was applied to by defendant, W. B. Mitchell on his own and his brother the defendant I. Mitchell's account, to become purchasers of the plantation in bill mentioned, and a considerable number of negroes; that complainant sold them the plantation for £9400 and 137 negroes for £8905. They agreed to pay the sum of £8905 with interest from April, 1794, in three equal annual instalments; and £9400 in six annual installments. They proposed to give bonds for the purchase money, and mortgages not only of the above-mentioned property, but also of 100 other negroes; and a plantation of the said John Mitchell as a security for the payment thereof—That the said W. B. Mitchell took possession of the said plantation and negroes—That he and the defendant John Mitchell have invariably exercised acts of ownership over the property ever since, and are now in actual possession of it; and uniformly refuse to fulfil their part of the contract. The bill therefore prays a specific performance of the agreement and payment to complainant of what he is entitled to receive from them. The defendants in their answer admit the purchase of the lands and negroes; that the land was to be paid for in six annual instalments; but insist that the negroes were to be paid for in five annual installments; and refer

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*to exhibit A. to prove it. They also admit the agreement to make the mortgages; but insist they were to be made in such mode only as is set forth in the answer. And they admit the possession of the property and exercising acts of ownership over it. The answer of defendant, W. B. Mitchell, then states various other matters, such as loss of crop by freshets, against which he asserts complainant warranted; and that several negroes died with the whooping cough for which complainant was liable; and that many of them were diseased and not taskable; all of which were causes for abatement or reduction in the price of the property. The importance of this case arises more from the magnitude of the debt than any intricacy in the subject. The questions for the determination of the court are two. What was the time stipulated for payment of the negroes, and whether any and what allowance ought to be made on account of the losses, &c. mentioned in defendant W. B. Mitchell's answer. As to the first point respecting the time agreed upon for payment of the negroes. In all cases when a bill is brought for discovery and to compel specific performance of an agreement, the complainant being deficient in proof, defendant's answer must be held as true, so far as respects the agreement; unless contradicted by two witnesses or one witness, and some strong corroborating circumstances. In this case the defendant, W. B. Mitchell has positively denied that he agreed to pay for the negroes in three years, but that the time agreed upon was five years; and to corroborate his answer he refers to an exhibit filed with it being, a list of negroes delivered him by complainant, wherein the terms of payment for the said negroes are specified; in which list it is mentioned that the amount of one third of the purchase money of 144 negroes with interest to 1st April 1795 is £3775. 4s. and immediately under it is said, one fifth of the principal with interest of the negroes is £2588 from which circumstance, and because on the same paper the terms of payment for the land are altered from five to six years, the defendant has sworn positively that the agreement was five and not three years. It

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must here be observed that a list of the *negroes actually sold and delivered to the defendants is filed with the bill; and on that paper the terms of payment are said to be three years for the negroes, and six years for the land. Whether such a list was ever delivered to the defendant has not appeared; neither of the lists are dated. That referred to by defendant's answer is signed by complainant, the other is not, though both are in his hand writing; so that the court might make choice of either, if the defendant had not sworn so positively that the installments agreed on were five years. The defendant has likewise sworn that £4000 and no more was to be paid for the first instalment, in which he is confirmed by complainant's own memorandum on the list exhibited with his bill. That sum however is rather more than the instalment of one fifth of the purchase money of the negroes with interest, and a sixth of the land; at the same time that it is £1300 less than a third part. This business has been very loosely conducted. There appears to have been various propositions on the subject. All the papers are in complainant's hand writing. The court can only determine on what has been positively sworn to, which is that the agreement was for five years' instalment; and the list referred to by the answer, seems to warrant the conclusion. The complainant perhaps may think it hard to be kept longer out of his money than

he intended or thought he had stipulated for; but it is the unavoidable consequence of his own improvident conduct, in parting with the possession of so large and valuable a property without taking the precaution which every prudent man should do, of reducing the agreement to writing and completing his contract at once. The second point for determination is whether any deduction is to be made on account of the injury the defendants have sustained by the loss of crop and the death of negroes. If this question had depended and was to be determined solely on defendant's answer without proof, the complainant would have been in a very unfortunate situation. For the defendant, W. B. Mitchell has sworn that the complainant warranted the land to be perfectly free from all freshes and the negroes free from all dis-

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*eases. The defendant's answer in this particular cannot be taken as sufficient evidence against complainant to charge him with such a warranty. If there had been one, it is probable he had it inserted in the deeds, which his own counsel drew; and those deeds must have been produced to shew what was the agreement. That has not been done, and therefore the court must conclude there was not such a warranty. Indeed it is not reasonable to suppose the complainant would have been so rash as to warrant against all freshes, when it is a matter notorious that there are very few swamp plantations that can be said to be above all freshes. A variety of witnesses have been examined to prove this land liable to freshes, and the negroes unsound, &c. &c. The substance of their testimony however respecting the land is that the land is of the first quality; that it would be returned as such on oath to the tax collectors; that it is as good as any on the river; and it has the best banks of any plantation on the river one only excepted; that very good crops are usually made on it; that it is not generally subject to freshes; that it was overflowed in 1786; the banks were then bad; they have been made entirely new since, and no fresh has gone over them from that period till the year 1794. Mr. Hamilton declares he had sold a plantation opposite, containing only 220 acres for £4000. The land in question is 550 acres and was sold for £9400. That the soil of Hamilton's tract was by no means so good, and the banks very inferior to those of the plantation in question; and that the land is not in the least injured by the fresh. Col. M'Pherson has offered the same price for the land and negroes, which was given by defendant; and that since the fresh of 1794, he offered defendant, W. B. Mitchell £500 for the bargain. With respect to the negroes all the witnesses swear that they are a prime gang, are as orderly as most negroes and as good as any for work; there are more workers than are usually found in so large a number. There are some who are not altogether sound; but yet generally do their tasks when they work. As to those children that died with the whooping cough; from the evidence of Mrs. Strain it appears

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that one child died the *day it was landed; and none of the others were then apparently infected with it; five or six had it afterwards and died; they were from two to three years old. To rebut her testimony, Palmer, the complainant's overseer at Rocky Point, swore the child had not the disease when it was sent from thence; and the negroes would not have been sent to defendant if he had not sent his boat for them. From this summary view of the evidence then, it is manifest that it is not so hard a bargain as it has been represented to be. The land is equal in value to any tide swamp to the southward, as far as Savannah river; that it is not generally subject to freshes; and the banks are the best but one on the river. Indeed defendant's own counsel candidly acknowledged that it was a very valuable plantation. The negroes are a prime gang, and as valuable as any one consisting of such a number; and it is well known there will always be some indifferent ones among so large a number; and the same price has been since offered for this property. It is to be observed that in this case the application to purchase was made by the defendant to complainant and not offered for sale by complainant to defendant; nor is there the slightest imputation of any unfair conduct on complainant's part. The contract was not hastily entered into; a month having elapsed from the first offer to the conclusion of the agreement; so that the defendant had full time for investigation, to deliberate and consult with his friends upon the business. He saw or might have seen all the negroes before he purchased. He picked them out from different gangs. If therefore he made a bad choice, he has no one to blame but himself. On this point the court considering the whole evidence that has been offered, are clearly of opinion that there is no such deterioration of the property, as should induce a deduction or abatement from the purchase money, except as to one negro who was under Dr. O. Driscoll's care, for a complaint in her nose, which was of a nature not always visible. Had there appeared any thing like fraud, circumvention or surprise in this transaction, on the part of complainant; if the contract bore the semblance of unfairness, in-

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justice, unreasonable*ness, or uncertainty in any part of it, the court would undoubtedly have refused to lend its aid to the completion of it. But as the principal parts of the agreement are admitted, as it is acknowledged that the offer to purchase was made by the defendant; that they are in the full possession and enjoyment of the whole property, and have been so for two years past;

as defendant, W. B. Mitchell was in possession of a plantation nearly adjoining the one now in controversy, that he must have known the situation of the land he was about to purchase, with respect to its liability to freshes full as well as the complainant, and therefore had no need of information from him on that subject; as the defendant himself saw and made choice of the negroes he bought—as exorbitancy of price is not made a ground in his answer for refusal to fulfil the agreement, (and if it was the repeated offer of colonel M'Pherson is sufficient proof to the contrary) and above all as the defendants themselves are not disposed to relinquish their bargain, hard as it has been represented to be by their counsel; the court cannot hesitate to decree a specific performance of this agreement.

It is therefore ordered and decreed that the complainant do forthwith make, execute and deliver to the defendant good and sufficient conveyances in trust for the land and negroes agreed by him to be sold as in bill mentioned. That the said defendant do thereupon pay to the said complainant, one fifth part of the purchase money for the said negroes with instalments from the first of April, 1794, to the first of April, 1795—that they do also pay to the complainant one sixth part of the purchase money of the land; that they do likewise pay to complainant interest on the principal sums of such fifth and sixth parts of the purchase money from first of April, 1795; and that it be referred to the master to ascertain the same. It is also ordered and decreed, that the defendants, W. B. Mitchell and J. Mitchell, under the direction of the master, do forthwith give bonds to complainant for the balance of the purchase money payable with interest at such times as they ought respectively to become due, pursuant to their agreement; and that for securing

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payment of the *said purchase money with interest, they do, in the terms of their said agreement (as sworn to by defendant, W. B. Mitchell in his answer) make and execute, under the direction of the master, good and sufficient mortgages of all the lands and negroes in the said answer particularly mentioned and enumerated; and lastly that the defendant do pay the costs of this suit.

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1 Desaus. 486

Case CXI.

Present—Chancellor Mathews and Rutledge.

OSBORNE v. BREMAR.

(July, 1796.)

[*Specific Performance* ⟸99.]

The complainant sold several parcels of land adjoining to each other, at public auction: and the defendant become the purchaser of them, though each tract was put up separately. The complainant delayed several years in executing the conveyances, though importuned by the defendant. Afterwards the defendant discovered that the title of one of the tracts, a principal one, was not in the vendor: and he refused to complete the purchase, alleging that this tract was the principal object of the purchase.—The court decreed that as the tracts were put up to sale separately, and there was no proof of the purchaser's buying chiefly with a view to that particular tract, there was no ground to vacate the contract. Also that the delay in executing the conveyances, should not prevent a specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 302; Dec. Dig. ⟸99.]

[*Specific Performance* ⟸130.]

The court decreed a specific performance, deducting interest on account of the delay of the complainant.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 124, 125; Dec. Dig. ⟸130.]

The object of complainant's bill is to compel defendant to complete his contract for several tracts of land which he bought at sheriff's sales in January, 1793. The defendant in his answer admits the purchase, and that he was ready and willing to comply with it for a considerable time, until he discovered that he had been deceived in his purchase. He now refuses to stand to his contract, and insists to be relieved from it altogether, upon the grounds of deception, misrepresentation, and concealment; and because of the laches of the complainant in not making titles for near three years after the sale; although repeatedly applied to for that purpose by the defendant and his friends. He also states in his answer that the principal object which he had in view was the purchase of the tract called True Blue; and being disappointed in getting that tract, he ought not to be compelled to take the others, which he bought only in consequence of his intended purchase of True Blue.

We must take a view of the evidence produced, to see how far the defendant's answer is supported by it. Mr. Baily, the first witness examined, proved that the complainant applied to him in April or May, 1795, to draw the conveyances. He found some difficulty in deducing the title: the deeds were however drawn and delivered to the complainant in June following. The defendant frequently told him he would not accept them.

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*Mr. Theus, the treasurer, proved that True Blue had been mortgaged by J. Courturier, jun. to the public in 1786, and the mortgage being forfeited, the land was sold in April, 1792, and bought in for the public, ten months before the sale of it by the sheriff as the estate of J. Courturier, the father of the mortgagee.

Mr. Marshall proved his demanding in the spring of 1795, in defendant's name, conveyances from the complainant, who did not then make them, but assigned no reason for

not doing it; that defendant was ready to settle, and the money was in the bank.

Mr. Ravenell proved that the defendant thought he had a good bargain; that he went with defendant to see the land very soon after his purchase, and he was then satisfied with his bargain, although the dwelling-house was out of repair, and there was no fence on the land in the swamp, because it had lately been carried off by a freshet.

It was contended that as the complainant could not make a good title to True Blue; and as that was the principal object of the purchase, defendant therefore should not be obliged to take the other tracts. It must be observed that there is no proof of this; the tracts were sold separately; and it does not seem probable that it was the only inducement, because there were upwards of 200 acres of swamp to the two other tracts alleged to have been purchased on account of True Blue.

From this summary view of the evidence, it is clear there was no deception, misrepresentation, or concealment used by the complainant to induce the defendant to make the purchase. The deception, misrepresentation, or concealment, if any, came from another quarter. And that the circumstance of the house being out of repair; and that the want of fences did not operate on the defendant's mind, to induce him to reject his purchase, is evident from Mr. Ravenell's testimony, who swears that the defendant was satisfied with his bargain, after he had taken a view of the premises; and that he continued to be so, appears from his continually demanding

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titles per*sonally and by his friends for two years and a half after his purchase. Whatever may have been the objects of the defendant in the purchase, they are matters existing in his own breast; they were never imparted to the complainant, nor made a part of the contract. It is not pretended that any conversation on that subject ever took place between him and the complainant. As to the point of concealment, that has never been proved; nor has it appeared that the circumstance of True Blue's having been mortgaged to the public, and afterwards sold to satisfy the mortgage, was known to the complainant at the time of the sale: on the contrary it has been discovered by defendant himself only within a very few months past. The complainant was certainly guilty of great laches in not making titles at an earlier period; but that is not sufficient reason to induce the court to rescind the contract, because the defendant had it in his power to compel complainant to make titles, by filing a bill in this court for that purpose.

Upon consideration of the whole evidence in this case, the court are of opinion the defendant has not supported the three strong grounds of defence, which he set up, viz. deception, misrepresentation and concealment; either of which might have been sufficient to vacate his contract. It is not pretended that there is any deficiency in the quantity of land, or that the quality is different from that for which it was sold; nor can we presume there will be any difficulty in locating it. With respect to the True Blue tract, the sheriff to be sure cannot make titles for that, from the circumstances before mentioned; but that will be no impediment respecting the other tracts, as they are independent of True Blue, and were sold separately.

It is therefore ordered and decreed, that the complainant do forthwith make, execute, and deliver to the defendant good and sufficient conveyances for the other tracts in bill mentioned; and that the defendant do thereupon pay to the complainant the amount of the principal of the purchase money for the same; and as it is owing to the complainant's

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own neglect that the contract has not *been before complied with, it is further decreed, that the defendant be released from the payment of interest on said purchase money, until the time of tendering the titles. Lastly that the costs of suit be paid by defendant.

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1 Desaus. 489

Case CXII.

Present—Chancellors Mathews and Rutledge.

TOBIAS BOWLES, and SUSANNAH, His Wife, and Others, v. CHARLES, THOMAS, and GLEN DRAYTON, Executors of John Drayton.

(September, 1796.)

[*Interest* ⟸17; *Wills* ⟸734.]

A testator bequeathed the bulk of a large estate to his sons, and made them executors. He also bequeathed a legacy of £3000 sterling to his daughter, to be paid on her day of marriage, or on her attaining 21 years of age. The interest to be paid annually. If she died under age, or without issue, the legacy was given over to the sons. The sons qualified as executors, and possessed themselves of the whole estate. The court had by several orders allowed part of the interest for her maintenance from infancy. She married at 18 years of age; and is not yet of age. She and her husband filed a bill for the legacy. The court decreed that the legacy should be paid: with interest, on the annual arrears of interest.

[Ed. Note.—Cited in Black v. Blakely, 2 McCord, Eq. 10; Wright v. Wright, Id. 201; Myers v. Myers, Id., 266, 16 Am. Dec. 648.

For other cases, see Interest, Cent. Dig. § 30; Dec. Dig. ⟸17; Wills, Cent. Dig. § 1853; Dec. Dig. ⟸734.]

[*Executors and Administrators* ⟸303.]

[Where a large legacy became payable on a contingency, the executors were allowed to pay it by installments.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1229; Dec. Dig. ⟸303.]

The bill stated that John Drayton being seized and possessed of a large real and per-

sonal estate, made and executed his last will on the 31st day of May, 1779, in and by which he, amongst other things gave and bequeathed to his daughter, Susannah Drayton, the sum of 3000*l.* sterling money to be paid her by his executors out of his estate, on or at the day of her marriage, or when she should attain the age of twenty-one years, and that the lawful interest of the said sum should be annually paid and applied for her use, behoof, maintenance and education—That shortly after, the said testator died, leaving his said will in full force, and leaving the said legatee alive, then an infant of two years—That Charles, Thomas and Glen Drayton, the sons, executors, and principal devisees and legatees of the testator, proved the will and qualified thereon as executors, and took possession of the estate, to the amount of 100,000*l.* sterling. That on the 10th of March, 1795, the said Susannah Drayton being of the age of eighteen years, intermarried with the complainant, T. Bowles, and a marriage settlement was executed, securing her property to their use, and the use of their issue, if any. That on or about the 20th of March, 1785, the court of chancery, on application made, ordered and decreed that the sum of £60. sterling should be paid out of the interest of the said legacy (to commence from the 22d June, 1779) for the maintenance of the said Susan-

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nah, which allowance was in*creased on the —— day of September, 1790, to £150. per annum. That there is due to the complainants the sum of £5687. calculating interest on said legacy according to the usage of the court of chancery. That demands have been frequently made for the payment of said legacy and interest, without success. The bill prays relief.

The defendants admitted all the material facts charged in the bill, but denied that so large a sum as 5687*l.* was due to the complainants on account of the legacy; for they insisted that compound interest was not demandable on principle, or on the usage of the court. They admitted that the complainants had applied for payment of the legacy, and they averred that they had offered in payment, property to a considerable amount at a fair valuation. The defendants pray the court to grant them a reasonable time to raise the portion of the complainant, Susannah, as one of the contingencies on which it was to be raised, to wit, the day of marriage was in itself so uncertain, as to leave the defendants unprepared to meet the demand: and the other contingency, to wit, her attaining 21 years of age has not yet happened: and the defendants said they were induced to hope for this indulgence, as in the event of her dying under age and without issue, the said legacy is, by a limitation in the testator's will, to revert to and be equally divided among the defendants.

There were several questions raised in this case, but the only two fully discussed and decided upon, and material to notice were the two following:

1. Whether the arrears of the interest, on the legacy of 3000*l.* directed by the will of the testator to be paid annually, should be calculated and paid with interest thereon, for the detention of the money.

2. Whether the complainants are entitled to have the legacy raised immediately.

Mr. Lee, Mr. Goodwin, Mr. Ford, and Mr. Desaussure for the complainants, argued that on the former applications to the court for an allowance for the maintenance of Miss Susannah Drayton, the master had reported what was due, as interest on the leg-

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acy; and that *wherever the master states an account, interest is allowed by the law and the usage of the court, on the balance stated, at least from that time. See 2 Eq. Cases abr. 529, 530. 14 Vin. 457, 1 P. Wms. 453, 652, 478, 480. 1 Bro. P. C. 202, 566. 2 Powell on Mortg. 227. 2 Fonb. 188, 9, 423. But independent of the master's report, interest ought to be allowed on the arrears of interest due on the legacy. The intention of the testator is explicit, that the interest of the legacy should be paid annually, and applied to the use, behoof, maintenance and support of his daughter Susannah, the legatee. Those are the very words of the will, which cannot be otherwise satisfied. If less than the amount of the annual interest was sufficient to maintain Susannah, then the balance of the annual interest ought to have been placed out to interest or vested beneficially for her use and behoof. The testator must have known that the interest on 3000*l.* sterling must have far exceeded the wants of an infant, and would for many years. He therefore intended an accumulation. The executors were bound to obtain that, and in doing so, run no risk, on taking proper securities. But if they were apprehensive of any risk, they should have applied to the court for instructions and authority, at the time when the application was made to the court for an annual allowance out of the interest for the support of Miss Susannah Drayton. That allowance was always considerably below the amount of the annual interest of the legacy, expressly directed to be paid annually. And they were bound by the will to put such balance out to accumulate for the advantage of the legatee. If the executors have not done so, they are bound themselves to make it good to the legatee. But this case is much stronger than the common case of executors without any property in the estate: for here the executors are the devisees and legatees of the great bulk of a very large estate, out of which this very moderate legacy is carved for the benefit of their sister. If they have not raised and put out the inter-

est for the benefit of their sister, they have had personally the benefit of it, and are more strongly bound to make it good to her. The

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court in allowing £60. per *annum at first, and afterwards £150. per annum out of the interest on the legacy of £3000. well knew that there would be a balance of interest due annually on the legacy. And it must have perceived by the will of the testator, that the whole of the interest was to be paid annually, or improved for the use of the legatee. By leaving the balance of the interest in the hands of the executors, who were also the devisees and legatees of the great bulk of the estate; (to whom it was a convenience) the court must have considered them liable to pay interest on it, else it was giving a great advantage to the executors and owners of the estate, to the prejudice of the minor, which cannot be decorously attributed to the court; especially when it is recollected that it is the peculiar province of this court to protect and guard the interest of minors. The court therefore when it ordered no more than a part of the annual interest on the legacy to be raised and applied to the support of Miss Susannah Drayton, must have relied upon the executors pursuing the will of the testator, and putting the balance of such annual interest to the use of the legatee, by obtaining or by allowing interest upon it, if they retained it in their own hands. If this expectation of the court has not been attended to, the court will feel itself bound to compel the executors to perform the will and do justice, by paying interest themselves on the arrears. Even in cases not so strong as this the court has made executors pay interest, for money retained in their hands without absolute necessity. See 6 Bro. P. C. 319, 3 Bro. C. C. 73, 433, 107. 1 Bro. C. C. 359, 430. 2 Fonb. 184 to 188, 376,7. 1 Eq. Cas. abr. 238, 287. 2 Bro. 430. 2 Eq. Cas. abr. 740. 1 P. Wms. 783. 2 P. Wms. 21, 252. 3 P. Wms. 126. See 1 Vern. 251. 2 Vesey sen. 170. Talbot 2. Indeed compound interest is allowed in many cases where it is reasonable, without coming under any particular head or class of cases. See 1 Bro. C. C. 440,3. and the circumstances of this case make it most reasonable, to be allowed. The testator having directed the interest to be paid annually, though the payment of the principal is postponed to a distant and even an uncertain period and event, this may be properly con-

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sidered an *annuity; and an annuity bears interest. See 1 Salk. 156. 1 P. Wms. 542. 3 Atk. 579. 1 Brown's P. C. 202, 556, 1 Ves. 428,9. It is also an established equity that indulgence entitles the party at whose expense it is given, to remuneration. 2 Pow. on Mort. 220. Now the permitting the executors to retain the money in their own hands, was a great indulgence. Money was then scarce and difficult to be raised; and even now at the end of seventeen years, they ask in their answer, for time to raise the money. The complainant's counsel contended that the troubles and calamities of the war, ought not to bar the claim of interest; as was insisted by the defendant's counsel. There is no such general rule of equity. On the contrary this court had in many cases allowed interest during the war, on legacies; and made executors accountable for crops, where no accounts were rendered, by charging them £10. per annum, for the working slaves. See Mayrant's case v. executors of Nelson, and other cases. Under very extraordinary circumstances of national calamity, extending to all, by which estates are made wholly unproductive, the court of equity may possibly be induced to qualify or restrict the payment of interest; but such circumstances should be proved to have existed, and to have produced that effect. No proof had been given in the cause, to shew that the great estate in the executors and devisees hands had been made wholly unproductive by the war, or in what degree: and the court would not presume it, to the prejudice of a minor daughter and legatee. The complainant's counsel contended that they are entitled to have the money raised immediately. They grounded this on the very words of the will. That directs that the legacy of 3000*l.* sterling, should be paid to his daughter Susannah, by his executors, on the day of her marriage, or when she should arrive at the age of twenty-one years. The testator had a right to prescribe the time, and he has done so. His daughter is married, and is entitled to payment of her legacy, according to the will. It was objected that the executors ought not to be bound to raise the legacy until the daughter attained twenty-one years of age;

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because in the event of her *dying under age, and without issue, there is a limitation over of the legacy to others: or that at any rate a reasonable time ought to be allowed to raise so large a sum of money. To this the counsel for complainants replied that the testator knew very well that he had made a limitation over of the legacy, in case his daughter should die under age, and without issue: nevertheless he chose to direct the payment to her on her marriage, which has taken place; and his will is the law on this point. See 1 Wilson 140. Besides there are cases which shew that such a legacy is sufficiently vested, notwithstanding such subsequent limitation. See 1 Vern. 462. 2 P. Wms. 612. 2 Vesey sen. 263. 1 Bro. C. C. 105, 300. 2 Bro. C. C. 3. With respect to the demand for time to raise the legacy, there is no just ground for it: the executors knew that they were to pay the legacy when the daughter married, or attained twenty-one years of age. She was married on the 10th March, 1795; and

it was the duty of the executors to have prepared to pay the legacy, in sterling money, as the testator directed; instead of which the executors have offered to pay in unproductive property at a valuation. For the time when portions are to be raised, see 2 P. Wms. 612. 2 Vesey, sen. 263. 2 Bro. C. C. 3. 2 Eq. Cas. abr. 638. 1 Bro. C. C. 103.

On the part of the defendant, it was contended by Mr. T. Parker, and Mr. E. Rutledge, that the claim of compound interest was not supported by the decided cases. None of them went so far as this demand, which went on (according to the calculation filed with the bill) adding the annual interest to the principal and forming a new principal every year, bearing interest, and thus forming a most enormous accumulation. That interest is a matter of discretion with the court; and it has been refused in times of public calamity. See 2 Eq. Cas. abr. 611. 1 Bro. P. C. 526. That the testator had carved out large portions for his two daughters, £3000. apiece, amounting to £6000. and the debts were £6000. That during and for some years after the war the estate though large could not meet its exigencies, and raise the annuity, or amount of annual interest on

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the legacies; therefore compound *interest ought not to be allowed. That the executors had offered to deposit bonds with Mrs. Drayton, the mother of the legatees to pay for those legacies, but she refused; and indeed the court refused to allow it, and obliged the defendants to keep the legacies in their own hands. All the cases for the allowance of compound interest go upon the executors occasioning improper delays. But here they were willing to pay in bonds. The executors could not invest the legacy. There were no banks, no public funds at that time. Besides the cases in which compound interest has been allowed are where maintenance was given as the means of subsistence to the children. But in the case under consideration, enough was paid out of the interest to maintain the legatee. The circumstances of the estate would not permit more to be raised for a long time. Again, to whom was the money to be paid? Not surely to the minor legatees. Money could not have been put out to interest, and the interest regularly obtained, so as to be put out again annually, and thus produce a compound interest. If compound interest is allowed, it must be on the ground that the executors have not done their duty, according to the will. Yet it is not proved that they could have done better. As to the other point, the raising the legacy immediately, the counsel contended that would be improper; because Mrs. Bowles, the legatee, will not be of age till December, 1797; and if she dies before that period without issue, there is a limitation over in the will, which will carry the legacy to the defendants themselves. They ought not therefore to be obliged to raise so large a sum, at a great sacrifice, when ultimately it may not be payable to the complainants. Again the time of marriage was uncertain. The executors therefore could not be expected to be prepared to pay the legacy so immediately after the happening of an uncertain event. A reasonable time ought therefore to be allowed the executors to raise the money.

Chancellor RUTLEDGE afterwards delivered the following decree of the court:

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*There are two questions in this case—

1st. Whether interest is to be allowed on the arrears of interest, due on a legacy, bequeathed by a father to his daughter.

2d. Whether the portion, bequeathed to the daughter should be now raised.

The cases in the books say that this point rests in the discretion of the court, where such interest is not expressly given. It depends therefore on circumstances whether the court will allow it. The case of Mayrant and Davis was cited to shew that the court would not allow more than simple interest. But in that case the expenses of the legatees were nearly equal to the interest of the legacy, and therefore there was no fund to accumulate. There are many cases in the books which shew the allowance of interest on the arrears of annuity, particularly when given to a wife or child. And this case has been assimilated to an annuity, because the interest of the portion is expressly directed by the will of the father, to be annually paid and applied to the maintenance, education, use and behoof of his daughter. It was plainly the father's intention that the whole interest should be applied to the use and benefit of the daughter; but as she was very young it was not possible she could expend so much. What was to become of the residue? Surely not to lie in executor's hands. But it was asked to whom was it to be paid, as the infants could not receive it and give discharges? The answer is that if the executors had the money, and had applied to this court, they would have been directed what to do and how to invest the balance. But it was at their own request the court suffered it to remain in their own hands, and did not order the interest to be raised annually, and the surplus vested for the benefit of the minor: it was an indulgence granted to the executors because the estate was much in debt. The executors therefore, who are also legatees, come with an ill grace, under these circumstances, and on the above pretence, to refuse the allowance of interest, on the arrears of the annual interest arising on the legacy or

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por*tion; especially as they have held and enjoyed the estate of the testator. Interest must be allowed.

Decree. The master to make a statement

of the account, allowing interest on the yearly balance of interest, deducting the years of the war, and until 1785, before which no interest on arrears, was legally demanded.

On the second point, the court does not see the smallest reason for not raising the portion itself. Seventeen years have elapsed since the testator's death, and not a penny is raised. Defendants have had great indulgence. The suggestion of the doubt whether complainant would ever be entitled to receive her legacy, is not of sufficient weight to induce the court to delay the payment. One of the events, that of marriage has occurred upwards of two years. It is time the portion was raised. But as the sum is considerable, the court will direct that it shall be raised by instalments.

Decreed that defendants pay to complainants on the 1st day of March next, one half of the principal and interest, bequeathed to his wife, by her father, which the master shall report to be now due, with interest thereon: and the remaining moiety shall be paid on the 1st of March, 1798, with interest. Costs to be paid out of the estate of the testator.

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1 Desaus. 497

Case CXIII.

Present—Chancellors Mathews and Rutledge.

JACOB DEVEAUX and Wife, ELIZABETH, v. BARNWELL, Executor of John Barnwell.

(July, 1796.)

[*Powers* ⊂⊃41; *Wills* ⊂⊃551, 781.]

A testator bequeathed to his wife the enjoyment of his estate, with power to dispose thereof by deed or will; and that what she left undisposed of, at her death, should be sold, and the money divided among all his children. Two of the daughters died in the testator's life time, leaving children. The widow of testator made a gift of part of the estate to one of the daughters (who is the complainant) for life, with remainder to her children. She died, leaving the rest of the estate undisposed of. The complainant claimed a share of the undisposed property, as well as what they received by gift. It was decreed that she was not entitled to both; but must make her election. The children of the two daughters who died in their father's lifetime, were let in to shares of the undisposed estate.

[Ed. Note.—Cited in Addison v. Addison, 9 Rich. Eq. 67.

For other cases, see Powers, Cent. Dig. § 156; Dec. Dig. ⊂⊃41; Wills, Cent. Dig. §§ 1187, 2016; Dec. Dig. ⊂⊃551, 781.]

Chancellor MATTHEWS delivered the decree of the court:

The question in this case arises on the will of J. Barnwell. The words necessary to be adverted to are, "Whatever my wife shall leave when she dies, not willed sold or given, and delivered before good witnesses, whether house, lots, horses, stock, plate, furniture, &c. I order to be sold and the money divided

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amongst all my *children." It seems that Mrs. Barnwell, the wife of the testator, did make a disposition of part of the estate, by deed to Mrs. E. C. Deveaux (one of the testator's children) and her children. It is contended by the complainants, that they are entitled to take what was so given by the mother, and also to an equal share with the rest of the children, of the estate left by the testator to his wife, and not disposed of by her. The first question then is whether the complainants are entitled to take both what is given to Mrs. Deveaux under the instrument of her mother, and an equal share with the other children under the will of her father. It appears that it was the intention of the testator to divide that part of his estate, which his wife might not dispose of, equally among all his children; but it does not appear that he intended to give any child a double portion, which would be the effect of this claim. It appears that the provision made by the mother for Mrs. E. Deveaux and her children, out of the testator's estate, was made from providential motives, to secure to them, what E. Deveaux would be entitled to at her death, on account of the embarrassed state of Mr. Deveaux the husband. But it is contended for the complainant, that the provision made for Mrs. Deveaux by her mother, ought not to be considered as a satisfaction of what she claims under her father's will; because what is given her is only for life, with remainder to her children; and being a less estate ought not be deemed in satisfaction. This is extraordinary. Old Mr. Barnwell gave an absolute estate to his wife, with power to dispose of the same, as she pleased, even to the exclusion of complainant; and what she did not dispose of, was to go equally among the children. Mrs. Deveaux cannot therefore claim under both the deed of the mother, and the will of the father. She may take her choice; but to take both would be highly unwarrantable. The second question under this will arises thus: two of the testator's children died after the making his will, and in his life time; both of them leaving children. Old Mrs. Barnwell, (wife of testator) made no disposition as to them. The question then is, can these grandchil-

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dren come in under the will *of the grandfather, for their parent's share of the estate so undisposed of by the grandmother? (See the words of the will above.) The rule, that the intention of the testator, if not inconsistent with some rules of law must prevail is not to be rigidly adhered to in all cases: formerly words of survivorship were construed into joint tenancy. In the case of Elliott and al. v. the Executors of B. Smith, determined in our own courts, the words of survivorship were as strong as could be. The words were, "but in case any of my children should die

before the time appointed for the payment of their portions, then the share of such child or children, so dying, shall be equally divided, among my surviving children." It was decided that the limitation over was not confined to the surviving children at the time of the contingency, but at the death of testator; and that such children as survived him, and the representatives of the deceased, were equally entitled on the contingency happening. In the case of Drayton v. Drayton, the court went further: the limitation over was on the death of John to his surviving brothers. W. H. one of the brothers did survive the testator, but died before John; yet his representatives were let in to a distributive share of the estate of John; so that the survivorship was confined to the mere survivorship of the testator. In the case of Sealy v. Executors of Ball, [1 Desaus. 137,] it was decided that as no time was appointed by the will for the legacy vesting, that marriage was a proper period for securing what might otherwise be considered as a joint tenancy. Thus where the intention of the testator is to make an equal distribution of his estate among his children, and where such intention is founded in reason and justice, and not contrary to some rule of law or the principles of equity, courts of equity will carry them into effect. In the case before the court, the intent is manifestly to divide the estate not disposed of by the wife, among all the testator's children. At the time of making his will all of them were alive; but two of them died before the testator, leaving issue. The testator never republished his will (though he lived some time after) nor made a new one. It is a strong presumption that he

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meant that his grand*children should stand in the place of their parents. To exclude them would be to defeat his expressed intent to provide equally for his children. And though a will is not consummate till the death of the testator, it is in many respects inchoate from the execution. This construction may not quadrate with strict rules; yet it is not repugnant to any rule, and it is well warranted. Suppose a testator should leave by his will all his estate, to be equally divided among his children, and one of them dies a few days before him, leaving a large family, depending on the bounty of the grandfather, and he dies without altering his will; ought the grandchildren to be left destitute, and the large estate to go wholly from them; perhaps to one child of testator, and he without a family? In such a case, the court would be disposed to say with lord chancellor Macclesfield, "if there is no precedent it is time to make one."

It is decreed, that complainants have their option, to take under the will of the father, or under the deed of the mother; and that the children of the two daughters, who died in the testator's life time, take their parents shares respectively, of the estate left by the grandfather, and that the costs be paid out of the estate.

Mr. Pringle for complainant; Mr. Desaussure and Mr. Ford for defendant.

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1 Desaus. 500

Case CXIV.

Present—Chancellors Mathews and Rutledge.

JAMES STUART, Devisee and Legatee of Dr. James Carson, v. WM. CARSON, Executor of James Carson.

HARTLY and Wife, Legatee of Dr. James Carson, v. WM. CARSON and JAMES STUART, Executors of Dr. James Carson.

(September, 1796.)

[*Wills* ⇐S32.]

Specific legacies to a step-son are exempted from contributing to the payment of debts of the testator; more especially as the legacies were given in lieu of other claims, which he had on the testator.

[Ed. Note. For other cases, see Wills, Cent. Dig. §§ 2139 2155; Dec. Dig. ⇐S32.]

[*Wills* ⇐S09.]

Legacies to a wife, partly specific and partly general, are exempt from contributing to the payment of debts; because given in lieu of dower, and accepted in lieu of some other claims on the testator's estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2105; Dec. Dig. ⇐S09.]

[*Wills* ⇐S36.]

The debts are to be paid out of the residuary personal estate. If that is insufficient, then the debts to be paid out of the real estate devised to the testator's daughter, and on her death, under age and without issue, to the testator's brother.

[Ed. Note.—Cited in Hull v. Hull, 3 Rich. Eq. 92.

For other cases, see Wills, Cent. Dig. § 2151; Dec. Dig. ⇐S36.]

[*Executors and Administrators* ⇐274.]

[In marshaling assets for the payment of debts, the distinction between real and personal property is still recognized.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1061–1073; Dec. Dig. ⇐274.]

[*Executors and Administrators* ⇐291.]

[An executor, in possession of the personal estate of the testator, has possession of a legacy given by the will, sufficient to vest such legacy, without a formal act for that purpose.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1153; Dec. Dig. ⇐291.]

[*Executors and Administrators* ⇐272.]

[Cited in Dunlap v. Dunlap, 4 Desaus. 325, to the point that the act of 1791 does not place real and personal property on the same level.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1052–1057, 1059, 1065, 1068; Dec. Dig. ⇐272.]

The bills in these cases were filed to obtain settlements and accounts of the estate of the late Dr. James Carson, who has devised and bequeathed considerable legacies to the com-

plainants. As the bill filed by James Stuart

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*brought out the whole case, it is unnecessary to give a full statement of both cases.

The bill filed by James Stuart charged, that complainant's mother was possessed of considerable estates, and intermarried with Dr. James Carson, who thereby acquired the property which she possessed. That during the coverture he acquired in her right considerable property under the will of her deceased brother, Lewis Reeves. No part was ever settled on her. That Dr. Carson being possessed of a large estate, real and personal, made his will on the 22d of August, 1777, which is set forth in the bill. That the executrix and executors thereof qualified in the following order: William Ladson on the 3d October, 1777, Ann Carson (complainant's mother) 11th September, 1778, William Carson, the defendant on the 9th August, 1780, under the board of police, and complainant on the 1st day of March, 1783. That during the war the complainant (then of tender years) is not informed of the particulars of William Ladson and Ann Carson's administration; but believes they did little more than keep the estate together as well as they could, except selling the lands on Lady's Island called St. Quintin's which was sold by William Ladson, and a considerable part of the purchase money paid in depreciated currency. Complainant charges, that some part of the purchase money came to the hands of the defendant. That during the joint lives of Mr. Ladson and Mrs. Carson, he chiefly acted—after his death she acted solely till her death, being about nine months. That upon, or soon after the surrender of Charleston to the British, William Carson took into possession all the real and personal estate, and during the British usurpation (between two and three years) continued to hold, manage and dispose thereof—sold most of the personal estate, consisting of furniture and plate, both in Charleston and on John's Island. That he also made and sold considerable crops and proceeds of the estate, of all which he has not rendered proper accounts. That he sold the household furniture, although one half thereof was specifically bequeathed to Ann Carson, on whose

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personal estate de*fendant took out letters of administration; and he ought to have sold the same (one half) as her property; but he acted irregularly, making no discrimination between the estates. That he never made or returned any inventory or appraisement of either estate, by reason whereof complainant is necessarily in the dark, as well as to the particulars of Mr. Ladson and Mrs. Carson's administration, and of that of the defendant under the board of police, as of the particulars, value and amount of the estate, and the sales thereof. That though complainant's said mother was entitled to one third of the negroes, to be elected by her out of the house negroes, she made no such election, owing to the troubles of the times; and no division was made. And complainant contends that the right still remains in her representatives unimpaired. That she died on the 18th May, 1780, leaving her son, the complainant, and her daughter, Eliza Gibbs Carson, her legal representatives, who were entitled to divide Mrs. Carson's interest between them. That about the time of the evacuation of Charleston, the defendant went to England, and took Miss Carson, then very young, along with him; and returned to his state, with Miss Carson in the year 1790; and she died in the month of July, 1794, under age, intestate and unmarried. By reason whereof and under the act of the legislature of 19th February, 1791, the complainant is entitled to the whole property of his said half sister, and to the whole property of Mrs. Carson his mother. That in consequence also of the death of Miss Carson, "unmarried and before arriving to the age of 21 years," the limitation over of the personal estate bequeathed to her by her father the testator, has taken effect, whereby one third of the residue of the personal estate was to go to Mrs. "Ann Carson, her executors, administrators and assigns forever"—and complainant submits that he is entitled to the same. By these various means complainant, as he contends and submits, is entitled to one third of the negroes of the estate, with the right of choosing from amongst the house servants, together with the rents and profits, from the year 1780. Also to one half of the furniture,

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plate, and kitchen fur*niture, with interest on the sales thereof. And lastly, one third of the residuary estate bequeathed to Miss Carson, with the rents and profits from the time of her death. Of all which complainant hath given notice to defendant, and requested a discovery and account of the estate, and a settlement, as well of that of Dr. Carson as of Mrs. Carson—And that he will discover all papers, documents and vouchers of each estate, which came to his hands after the death of Mr. Ladson and Mrs. Carson, and disclose the particulars of their administration; and that he would co-operate with complainant in hastening the affairs of the estate to a final close—All which he refuses, and will not agree to have a division made.

The bill prays that defendant may come to a full account, discovery and settlement of both estates. That complainant may have delivered over to him whatever he is entitled to in his own right, in that of his mother, and in that of his sister, Miss Carson. That the funds which the testator intended for the payment of his debts may be ascertained, and applied thereto. That defendant may be restrained in the mean time from selling the estate.† That complainant may have such

†An injunction was accordingly granted.

further and other relief as the court shall judge proper and equitable.

To this bill the defendant, William Carson put in the following answer:

The answer of William Carson, one of the executors of Doctor James Carson, (deceased, defendant to the bill of complaint of Doctor James Stuart) stated, that the defendant denied that the testator, Dr. James Carson obtained a considerable property by his intermarriage with the complainant's mother, Mrs. Stuart:—But admits, that on the death of her brother, Lewis Reeves, he acquired some beneficiary interest by his will in favor of his sister. Defendant admits that his brother, the testator was possessed of a considerable real and personal estate, and made such last will and testament, as is set forth in the complainant's bill, whereby he gave to the complainant a far more considerable es-

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tate than that *which he acquired by the will of Mr. Reeves, in favor of Mrs. Carson. Defendant admits that he left this state, on political considerations, soon after the death of his brother, the testator, without having intermeddled with the estate, and leaving the whole in the possession of the executrix and the executor, Mr. William Ladson, recommending to them not to sell the plantation on Lady's Island for less than 3000*l.* sterling, having himself offered to give that sum for it. That the defendant returned to this state in the year 1780; and that Mr. Ladson was then dead; and Mrs. Carson, the executrix soon after died; and Dr. James Stuart was then under age. That under these circumstances, defendant qualified on the will of his brother, Dr. James Carson, before the officer appointed by the existing powers, to grant probates, whereby he was enabled to protect the property of the estate; and he considered the oath as obligatory as if taken under the best authority. That to the best of his recollection defendant administered on Mrs. Carson's estate (the widow of Dr. James Carson) and took possession of some paper money, furniture and plate—sold the same to the best advantage, and credited the estate therewith in his accounts. But he denies that he possessed himself of all the papers of Mrs. Carson; but avers that some of the titles of the lands, and he belives most of her valuable papers were carried off on her death, and are now, to the best of defendant's belief in complainant's possession. Defendant admits that till the close of the year 1782, he managed the estate of the testator, of which he kept as accurate an account as the nature and circumstances of the times could admit. That of those transactions and all others respecting his brother's estate, subsequent thereto, (down to the month of last) he has rendered an account to the ordinary, and filed a copy with his answer to a bill already filed against him, in this court, to which he prays leave to refer the court: and prays leave to postpone the exhibiting his subsequent accounts until he can properly arrange them and submit them to the ordinary; after which they may be made part of his answer. That defendant about the year 1782, transmitted to complainant an

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account of *all his transactions respecting the estate, from the death of Mrs. Carson, to the close of the said year. And also from time to time whilst in Europe, this defendant transmitted to complainant the accounts of monies expended on the education of defendant's niece, and of monies received from the estate of the testator, as remittances. Defendant admits that his niece departed this life at the time mentioned in the bill, under age, and unmarried. That complainant is her brother of the half-blood, and would be entitled to a share of the residue of the personal estate, if such estate be more than sufficient to pay the debts due therefrom, which this defendant does not believe to be the case. That with regard to the various claims of the complainant, defendant submits them to the decision of the court, confident that it will protect him in his rights. Defendant refers to exhibit A. for an account of the negroes, and other personal estate in his possession, belonging to the estate. Defendant begs leave to require on his part, that complainant, while he seeks a discovery of accounts from the defendant, will himself render an account of all his own transactions, and of those of his agents during the time that he managed the estate, and also an account of all his mother's transactions as far as the same ever came to his knowledge. That he will moreover produce all the titles and papers in his possession and control, belonging to said estate. And that he will set forth the profits which were made by the negroes bequeathed to him by the testator on the event of his arriving at the age of twenty-one; and which this defendant has been informed and believes were separated and worked apart as distinct property for considerable time previous to his coming of age. And defendant prays to be dismissed.

The provisions and dispositions of Dr. James Carson's will were as follows: He directed all his debts to be paid as soon as might be, after his decease. For which purpose he directed the plantation on St. Quintin's to be sold; and if it proved insufficient then the remainder of his debts to be paid out of the rest of his estate, not specifically devised. The testator bequeathed to his wife,

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Ann *Carson, his carriage and horses, one half of all his furniture, plate, &c. one third of all his negroes, with a right of electing some of them from among his house servants. Also the use of his town house, and of his plantation during widowhood, in lieu of dower. He directed his stepson, James Stuart to be educated at his expense until he at-

tained twenty-one years of age. Then he devises to him the plantation on Lady's Island, Cain Island, and Farrington's Neck; and he bequeathed to him thirty enumerated negroes, with cattle, sheep, &c. &c. Then followed a clause making void all the above devises to his wife and James Stuart, in case they should set up any claim upon the estate in right of his grandmother or uncle; or for dower or jointure; and in that case orders their portions to sink into the residuum of the estate. All the rest and residue of his estate, the testator devised and bequeathed to his daughter, Eliza Gibbes Carson, at twenty-one years of age, or on her day of marriage, which should first happen. But if she died before, he devised all his lands not before specifically bequeathed to his brother, William Carson, and the residue of his personal estate to be divided into three equal parts; one third of which he bequeathed to his brother, William Carson; another third to his wife, Mrs. Ann Carson; and the remaining third (in moieties) to William Ladson and Thomas Ladson. St. Quintin's was sold, but proved to be insufficient to pay the debts. Miss Eliza Gibbes Carson, having died under age, and unmarried, the limitations over took effect.

Doctor James Stuart claimed under the will as follows: The lands devised to him by the will; the negroes bequeathed specifically to him; the third part of the testator's negro slaves bequeathed to Dr. Stuart's mother, Mrs. Carson; with the rents, issues and profits, since her death in the year 1780. Also one half of the furniture and plate, with interest from the time when these were sold. And finally, in right of his half sister, Miss Carson, (under the devise over to his mother) one third of the residue of the personal estate, with rents and profits from the death of Miss

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Carson. Dr. Stuart contends that *none of these several interests are liable to be affected by the debts of the testator; but that some other portion of the estate should be applied to that purpose.

Mr. William Carson contended that he had a right to have his lands protected by the personal estate against the payment of debts.

The complainant, James Hartly, who had married the only daughter of Thomas Ladson, (one of the contingent legatees) claimed the legacy to which his wife's father was entitled under the will.

The principal question in this case being out of what fund the debts were to be paid, it was contended by Mr. Ford, Mr. Desaussure and general Pinckney, for the complainant, Dr. Stuart, that the lands and negroes devised and bequeathed to Dr. Stuart, were not bound to contribute to the payment of debts, until all other funds had failed; because they were specific devises; and specific devises are not liable by law to contribute; and because the testator expressly designated St. Quintin's plantation as the first fund to pay debts; and on failure of that (as had happened) then the rest of his estate not specifically devised. Thus the rule of law, and the testator's intention unite to exempt the property given to Dr. Stuart. It was also contended that the property bequeathed to Mrs. Carson, the widow was not bound to contribute to the payment of debts, because part of it was specific, to wit, the carriage, horses, furniture, plate, &c. and because it was given her in lieu of dower which assimilated it to Mrs. Loocock's case, lately decided by this court; and placed her on the footing of a purchaser. But her case, as well as Dr. Stuart's, was stronger, on this ground; for they had claims on Mr. Carson, the testator's estate, derived from Mr. Lewis Reeves, the brother of Mrs. Carson, which the testator refers to in his will, and requires to be given up, to entitle them to take under his will. This they have done, and therefore stand emphatically on the footing of purchasers. And this is the stronger with regard to the legacy of negroes bequeathed to Dr. Stuart; the greater part of whom were negroes which had been be-

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queathed to him by his uncle, Mr. *Reeves, which came into the hands of Dr. Carson, on his marrying Dr. Stuart's mother, and were retained till his death. The debts then remaining unpaid after the sale of St. Quintin's, must be paid out of the residuary estate. That was devised and bequeathed to Miss Carson, and upon the event of her death under age and unmarried, the real estate was devised to the defendant, William Carson; and the personal estate to be divided into three equal parts; one third to William Carson, one third to Mrs. Carson, to which Dr. Stuart is entitled, and the remaining third to Mr. William Ladson and Mr. Thomas Ladson. With respect to the third of the personal estate bequeathed to Mrs. Carson, in the event of the death of the testator's daughter, that ought not to be made to contribute to the payment of the debts; because all that was given to her by the will directly, or by way of remainder, was in bar of dower, and as a substitute for her claims on her brother's estate, she having survived her husband. That the debts therefore ought to be paid out of the real and personal estate devised and bequeathed to Mr. William Carson, and to the two Ladsons, who were volunteers, unless the court should be of opinion that the testator meant that the land devised to William Carson should bear the whole debts, as he expressly directs the residue of his debts should be paid out of the estate not specifically devised. That these words, estate and devise, are technical words which apply to land. And that at all events the land so

devised was bound to bear its proportion of the debts, together with W. Carson's third of the personal estate, and the third bequeathed to the Ladsons; for that seems to have been the intention of the testator, whose bequests in favor of some of the legatees might and would probably be defeated, unless the land was made to bear its proportion of the debts. And that the court would have less difficulty in giving this construction, since the act abolishing the rights of primogeniture had placed lands on the same footing with personal estate. That the old doctrine in favor of heirs could not now be supported: and if it could Mr. William Carson was a mere devisee, and could claim only

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in that *character; for he was only half brother of Dr. William Carson, and could not be his heir at law. The cases cited for the complainant were from 2 Eq. Cas. abr. 370, 555, (in a note) 556. 1 Atk. 416. 2 Fonbl. 374. 1 Eq. Cas. abr. 298. 2 Vern. 688. 1 P. Wms. 127. 2 Vesey 415, 420. Ambler, 244. 2 Comyns, 208. 1 Eq. Cas. abr. 197. 3 Atk. 525. 2 Atk. 624. 1 P. Wms. 403. 2 P. Wms. 336. 2 Vern. 718. Ambler, 581. Talbot's cases, 202, and Loocock's case decided in this court.

Mr. Lee and Mr. Pringle contended for the complainant, Hartley, that the defendant, William Carson being only half brother of Dr. James Carson, was not the hæres natus; nor was he hæres factus under the will; for the devise is not of a particular tract of land but of his lands generally. The act of George II. passed in 1732 made lands liable for payment of debts in this country. And the statute of Wm. III. against fraudulent devises made lands liable to specialty debts, the heir being thereby expressly bound. The testator manifestly intended to benefit his wife and the other legatees under the contingent bequests, as well as his half brother. And where there appears an intention to exonerate the personal estate, or put it on an equal footing with the real, the land must be liable. The cases cited were from 2 Eq. Cas. abr. 497, 493. 2 P. Wms. 664, 233. 1 P. Wms. 730. 2 Atk. 624. 2 Vern. 477. Talbot, 53. 3 P. Wms. 326.

Mr. Frederick Rutledge and Mr. E. Rutledge for the defendant, William Carson, contended that the personal estate was the proper fund for the payment of debts, unless the real estate is expressly charged therewith, or words are used in the will strongly implying such intent. And the statute of George II. makes lands liable only on the failure of personal estate. And that Miss Carson was entitled to have her maintenance out of that part of the estate given to her mother, one half of which came to her on the death of her mother. The cases cited were 2 P. Wms. 366. 1 P. Wms. 264. 2 Vesey, 313. 1 Wilson, 82, 1 Brown's Par. Cases, 132, 1 Bro. C. C. 454.

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*Chancellor MATHEWS delivered the decree of the court:

These cases having been heard together must be decreed accordingly.

There are three points for the consideration of the court.

1st. Whether the legacy to Dr. Stuart is liable for the payment of any part of the debts of the testator?

2d. Whether the legacy to Mrs. Carson, the wife is in like manner liable?

3d. Whether the residuary estate, both real and personal, given in the first instance to Eliza G. Carson, is equally liable for the payment of such debts as the fund appointed for that purpose was incompetent to discharge? Or whether the personal estate alone is first liable?

It having been conceded by the defendant's counsel on his behalf, that the legacy to Dr. Stuart could not be charged, it is unnecessary for us to comment on the first point.

As to the second point, we cannot hesitate a moment on the propriety of placing this part of the case on the same footing as that of Mrs. Loocock, in the case of Loocock and Clarkson. Indeed the case before us has a preferable claim to a similar decision; as this legacy is all that is given to the wife, out of a large estate; whereas in the case of Mrs. Loocock, there were several other parts of her husband's estates given to her by his will, either absolutely or for life, independent of the annuity. And further, in the present case, the legacy to the wife is not only in lieu and satisfaction of dower, but of any "claim by virtue of any deed, or by any other way or means whatever." It is unnecessary for us to dilate on this point, as we gave our reasons so fully in the case of Loocock and Clarkson, and so recently as the last term. It is sufficient at present to say that the legacy to Mrs. Carson being in the nature of a fair purchase, cannot be charged with the payment of any part of the debts of the testator. There are however two other questions which arise out of this point, viz. whether on the death of Mrs. Carson intestate, her legacy, never having been reduced into possession,

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did not then become liable for its propor*tion of the debts: or, if not liable, whether the share of E. G. Carson, the daughter of the testator, being an unincumbered part of the estate which came to her, ought not first to be applied towards her maintenance and education? As to the legacy of Mrs. Carson never having been reduced into possession, we cannot admit this to have been the fact; because her being an executrix and residing on the plantation where the negroes were, and as the law authorises an executor to take his own legacy, without the formality of a delivery, as in the case of a legatee only, we must consider this as such an actual possession as would vest the legacy in her, and conse-

quently would descend to her representatives, who were her two children, Dr. Stuart and E. G. Carson: and on the death of the latter intestate, vested wholly in Dr. Stuart, her surviving brother of the half blood. And as to the share of E. G. Carson being applied towards her maintenance and education during her life, we can by no means think this either a legal or a reasonable demand; because such never could have been the intention of the testator, as he left her a very large portion of his estate, the income of which we might fairly presume was more than adequate to those purposes. As the testator then never contemplated this contingency as a possible fund, out of which his daughter was to receive any part of her support, and as that part of her father's estate, (except what is given to her uncle) will in consequence of her death go to strangers to her blood; we think it but reasonable that this inconsiderable part of the estate which she had the power of disposing of, ought to go to the person nearest in blood to her; and to whom in all probability she would have given it had she made a will; that is, to her brother, Dr. James Stuart. We think therefore it ought not to be charged with the incumbrances which have been contended for.

As to the third point, a doctrine altogether novel, has been attempted to be maintained at the bar. Having taken a view of the consequences which resulted from the feudal tenures in England, the counsel have analogically reasoned, that the abolition of the

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rights of primogeniture *in this country ought to induce this court to direct its decisions on the same principles which governed the courts in their decisions in that country under similar circumstances. We cannot think the comparison a well founded one, as there is not that striking analogy which can render it so. For although the courts in that country had in a great degree got rid of the feudal tenures, yet there still remained considerable barriers to protect real estate against the claims of creditors; and it was only in cases where the occupant of the real estate had by deed expressly bound the heir, that the creditor could have any lien on the land; and not even then in many instances, as the personal estate was commonly made the fund for payment of debts, in exoneration of the real estate, although bound by the act of the occupant. Courts of equity first broke through this barrier for the relief of creditors by marshalling assets, thereby subjecting the real estate to the payment of simple contract debts, when the heir had the benefit of the personal estate for the payment of the bond debts. The English courts have also since the above period examined with a strict eye the wills of persons; and in every case where they could lay hold of such words as could be construed into a strong presumption of the testator's intention to charge his real estate with payment of debts or legacies, they have carried such intention into effect in all cases where creditors were concerned, who are always favored by a court of equity. In cases where real estates have been expressly charged, they have been made to contribute as a matter of course. Thus it appears to have been a struggle between the courts and the heir at law in that country; the one to bring the real estate within the reach of creditors, and the other to cover it against their claims. The rule there respecting the marshalling of assets has also been made the practice in this country; but with regard to every other matter in the payment of debts, the laws of this state have so expressly charged the real estate with the payment of every species of debt, that the courts of justice have never been driven to the necessity of exercising their ingenuity to

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find out words in a will which they *might construe into a charge on the real estate for payment of debts. As to the act of this state abolishing the rights of primogeniture, that merely relates to cases of intestacy; and consequently has left the laws for the administration of the assets of estates just where they were. It would therefore be too bold an undertaking for this court to level the laws and practice of this country, that have heretofore obtained in the mode of payment of debts, to what might be conceived to be the principle of that law; namely, to place real and personal estates precisely on the same level in all cases. We do not conceive this to have been the spirit of that law. To be sure in cases where the law is silent, or doubtful, we must be governed by principle; but we are not reduced to this dilemma in the case before us; because although the law on which we are now commenting is silent as to this matter, yet there were and still are existing laws to direct us in our decisions. From the view we have thus taken of the circumstances which have followed from the riddance in a great measure of feudal tenures in England which bound their real estates, and of the laws and practice of this country, we think there is very little if any analogy between them. We shall now return to the will by which our decisions must be governed. The clause directing the payment of the debts of the testator is in these words: "I direct my executrix and executors to sell my tract of land on Lady's Island, containing 1500 acres, known by the name of St. Quintins, for the payment of my just debts and funeral expenses; but should the said tract of land prove insufficient for the purpose of paying them, the remainder of my debts to be paid out of the rest of my estate not specially devised hereafter." It has been contended by the counsel on the part of the defendant, that this is such a charge on the testator's whole estate, real as well as personal, as ought to make them equally liable for payment of such debts, as the fund appropriated for that pur-

pose was inadequate to satisfy. There are many instances in which persons in making their wills, do not come up fully to the objects they have in view, which renders the

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interference of this *court necessary to supply those defects. This appears to us to be one of those cases; for by charging his estate generally with payment of his debts, the testator has caused such a clashing in the interests of the legatees of his will, as has rendered it necessary for them to call on this court to say out of what part of his estate his debts are to be paid. This we think will be made sufficiently clear by comparing the last mentioned clause of the will with the clauses which dispose of his estate, real and personal, in the event of the death of his daughter before her arrival at either of the periods limited for her taking the estate intended for her. The material words in the first clause are, "the remainder of my debts to be paid out of my estate not specifically devised hereafter." The words of the clause which are afterwards made use of in the disposition of the real estate are "I give, devise and bequeath all my real estate not before specifically devised, to my brother, William Carson, his heirs and assigns for ever." It appears then to have been the testator's intention to charge that part of his estate with payment of his debts, which was not afterwards specifically devised; the after devise of all his real estate to his brother, William Carson, is such a specific devise as must exempt it from such a charge; consequently the residue of testator's debts, must be paid out of such part of his estate, as is not specifically devised. But as the whole of his real estate is specifically devised, the debts must be paid out of such of the personal estate as remains, after assignment of the legacies to Dr. Stuart in his own right and in right of his mother and sister; but if such remainder should prove insufficient for the purpose, then the balance must be paid out of the specific devise of the real estate to William Carson.

It is therefore decreed that the legacy to Dr. Stuart be forthwith delivered to him. That commissioners be appointed to divide the negroes of the testator's estate into three equal parts; and that one of those shares be assigned to Dr. Stuart, in right of his mother, and another in right of his sister. That he be allowed at the rate of 10*l.* per annum for every working hand which he became

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*entitled to in right of his mother, and the like sum for those he inherited in right of his sister, unto the time of their delivery to him. That he be allowed the amount of the one half of the sales of the plate and the furniture, and the full amount of the sales of the carriages and horses, with interest from the time of the sale until paid. As to the residue of the personal estate which the several claimants might be entitled to after payment of the debts, we will reserve our opinion, until the debts are satisfied, as it has been represented that the whole of this part of the personal estate will be inadequate to that purpose. And as all the parties are actors in these suits, that each do pay his own costs.

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1 Desaus. 515

Case CXV.

Present—Chancellors Mathews and Rutledge.

MARY EVANS, GEORGE EVANS, and Others, Children and Legatees of George Evans, Deceased, v. the Executors of GEORGE EVANS, Deceased.

(September, 1796.)

[*Powers* ⟸20.]

Ex'ors selling estate without necessity, and without authority, and even against the implied intent of the testator, are so far responsible, that they shall be accountable for any bad debts, arising from the sales.

[Ed. Note.—Cited in Johnson's Adm'rs v. Johnson's Ex'rs, 2 Hill, Eq. 293, 29 Am. Dec. 72.

For other cases, see Powers, Cent. Dig. § 62; Dec. Dig. ⟸20.]

[*Executors and Administrators* ⟸265.]

An executor having money of the estate in his hands, and being also a bond creditor of the estate, was bound to apply the money at the time to the extinguishment of the bond debts.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1012; Dec. Dig. ⟸265.]

The complainants filed a bill against the executors of their father's estate, for an account and settlement of the same; and for the recovery of their legacies under his will. Their bill charged, that their father being seized and possessed of a considerable real and personal estate, made his last will and testament, in and by which he devised and bequeathed certain specific legacies to the complainants; and then directed certain parts of his real and personal estate to be sold for the good of the estate, (meaning doubtless for the payment of his debts.) And he concluded by bequeathing the remainder of his estate, (consisting chiefly of his furniture, and about eighty negro slaves) to the complainants, to be equally divided among them: and directed that the sons should receive their legacies at twenty-one years of age, and the daughters at the same age, or on the day of marriage. The testator died on the 17th November, 1778, leaving his said will in full force. Three of the executors, Richard

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*Walter, Benjamin Waring, and Thomas Waring, proved the will and qualified thereon. The fourth, John Glaze did not qualify.

The bill charged, that within a few months after the testator's death, to wit, in January and February, 1779, the executors sold the whole personal estate of the testator (except

the property specifically bequeathed) including his negro slaves, without any necessity to do so on account of debts, with the amount of which they must have been unacquainted, contrary to the manifest intention of the testator: without having returned an inventory and appraisement of the estate; and without any decree of this court to authorize the sale. That there were only two of the children of age at the time of the sale, one of whom was not consulted; and the other was induced, by great persuasion of the executors, to consent thereto; but upon condition that the debts of the estate should be immediately paid; which has not been done fully to this day. That the executors having made these unnecessary and illegal sales in depreciated money, neglected to take security in many instances from the purchasers, whereby several debts are lost; and also omitted to pay many debts due by the testator; though to pay the debts, was the pretext for the sale; and though by such sales they were put in possession of funds much greater than enough to have paid the debts; part of which they loaned out to insolvent persons without security, and part they placed in the state treasury; and they have kept the residue in their own hands unaccounted for. That some of the debts which might and ought to have been paid off during the war, from these funds, have been paid since the war, in specie, to the great loss of the estate. That Richard Walter, one of the qualified executors, had two bond debts due him by the testator; and funds of the estate came into his hands much more than sufficient to pay them off, but he has never credited them on the bonds: and since his death his executors have brought suit against the estate and obtained judgment thereon, without having rendered any satisfactory account of the funds which came into his hands. That none of the executors

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have rendered satis*factory accounts, but they are confused, inexplicable and unjust.

The complainants charge, that no necessity existed for the sale of the estate bequeathed to complainants, because the property directed to be sold, and one crop were sufficient, or nearly so, to have paid the debts of the estate. The complainants submit that the executors had no right to speculate on the property of the legatees, and to convert one species of property into another, without the authority of this court: and that no more of the personal property bequeathed, should have been sold, than was necessary to pay the debts. That though there is no express prohibition of sales in the testator's will, it is strongly implied; for he directs certain specified parts of his estate to be sold; and he directs part of his stock of horses and cattle to be kept for the use of his plantation; and he directed a division of the property to be made among his children. All this shews plainly his intention that the slaves should not be sold.

Complainants insist, that as the executors ought to have paid off debts with the monies received from the sales, and in many cases did not do so, but kept the paper money in their hands, or applied it to their own use, they are not at liberty to claim any benefit from its perishing by depreciation in their hands. The bill prays relief.

The answer of Benjamin and Thomas Waring, two of the qualified executors, admits that George Evans made his last will and testament as stated, and died leaving the same in full force; and that he left the property stated. That they qualified on the will, and made the sale of the estate as alleged by complainants. And that though no express power to sell is given by the will, the defendants were justified in selling, under the circumstances of the estate and of the country; and they acted on the advice of legal counsel. That the estate was considerably indebted, which the executors well knew, though they did not know the precise amount, or the particulars. The defendants sold without the authority of the court of chancery; but in

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those times of trouble, the court seldom *met, and did very little business. Defendants believe there was an inventory and appraisement; and cannot account for its being mislaid. The defendants insist that the complainant, George Evans, who was of age, approved and consented to the sale, unqualifiedly; and Mary Evans, who was also of age, did not oppose it. That the reasons which induced the executors to sell were the largeness of the debts, and the want of good lands to plant; the testator having devised his good lands exclusively to his eldest son; and his other lands being poor, worn out, and incapable of producing crops; and were situated twenty-four miles from a navigable river, on the Four-hole creek. The defendants deny that any losses were sustained by the executors not taking security from the purchasers of the negroes. The defendants aver that they paid off all the debts of the estate which came to their knowledge, except those to their co-executor, Mr. Walter; and he having received monies of the estate, they supposed he had applied the same to the payment of that debt: and defendants placed 9000*l.* currency in the treasury, and loaned part of the balance to Mr. Morton Waring, who is perfectly solvent. That one of the executors sold his own estate at that time for the current money; which is evidence that he thought it better to sell than to keep property in such times. Defendants are ready to account and settle with complainants as to the affairs of the estate; and file their account with their answer.

The executors of Mr. Walter, executor of George Evans, admit the principal facts, as to the will and death of Mr. George Evans. They believe that he meddled very little with the affairs, and received but a small part of

the funds of the estate. That he did receive some money, and his executors are ready to account for the same. They admit that he held bonds of the testator, and that since the peace judgment has been obtained thereon.

The cause came to a hearing, and Mr. Edward Perry proved, that the land of the testator at the Four-holes, was capable of producing rice, indigo and corn. That the distance of transportation was of no great im-

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portance. *That he was security for Mr. George Evans, and applied to one of the executors to pay the debt, which was not done; and he has been since sued for the debt.

Mr. Parker, Mr. Holmes and Mr. Pringle for the complainants contended that the sale of the negro slaves by the executors, was contrary to the intention of the testator, and was not warranted by law. And that having made sale of the estate, they are liable for the debts. That two executors joining in a receipt, they are each liable for payment as to creditors. Formerly they were not so liable as to legatees; but only the executors who actually received the money: but by the later decisions, this distinction is done away. That the sale was not only without authority, but unnecessary and improvident. The extent of the debts was not fully known. And the sales of the property directed to be sold by the testator were equal, or nearly so, to the payment of the debts: and actually exceeded the amount of the debts paid by the executors. As the executors sold under the pretence of paying debts, why were they not paid? Instead of doing so they loaned money to others, and put money in the treasury, which has been depreciated. As they did not pay the debts when they could, they are each liable for the amount. See 2 Eq. Cas. abr. 456, 742. 1 Bro. C. C. 114. 3 Atk. 584.

Mr. Ward, Mr. E. Rutledge and General Pinckney for the defendants, argued, that executors had the power of selling personal estates, at their discretion; and no blame is imputable to them for doing so. That in this case there really existed a necessity to sell; for the sale of the articles directed by the will to be sold, did not amount to a sum sufficient to pay the debts. The depreciation of the paper money is not attributable to the executors. Congress as late as Sept. 1779, promised to redeem the paper money at its nominal value. If it had done so, there would not have been any difficulty; for the money placed in the treasury would have been good money, and would have obviated all difficulties. To apply rigid rules to the conduct of executors, under such difficult circumstances as the times produced, would be

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unjust: and would *be to make them responsible for events beyond their knowledge or control. They will account for what they received, on account of the estate, at its intrinsic value, as established by the laws fixing the depreciation.

The court took time to deliberate, and afterwards Chancellor RUTLEDGE delivered the decree of the court:

There is not the smallest reason to charge the defendants with any fraud or unfair conduct in this business. From a review of their accounts it is obvious that if the stock, &c. had not been sold, it would have been absolutely necessary to have disposed of a great number of the negroes, for it is evident the debts could never have been discharged with the annual income of the estate: especially as there were a number of children to be maintained and educated out of it. The stock, &c. being sold, and debts to a large amount paid off, a sale therefore of the negroes became less necessary; and the executors could not on any principle whatever be justified in making it in the extensive manner they did, because they were not only not authorised by their testator, but it was expressly against his direction. As they were all consenting and joined in the sale, they must all be responsible for the debts; but not one for the separate act of the other. Consequently if any bad debts have been made, they must be all answerable for the loss. The case of Smith and Bonsall v. executor of G. Smith, [1 Desaus. 304,] determined in this court, is directly in point; for the executor in that case disposed of the estate expressly against his testator's directions, and when there was not an absolute necessity for doing it; and the court held him responsible for any bad debts. As it appears from the accounts of the executor, Walter, that he had a large sum of money belonging to the estate in his hands, and the estate was indebted to him on several bonds, that money must be applied to the extinguishment of those bonds, the balance being depreciated, and applied towards payment of one of the other bonds. We have no doubt the defendants thought they were doing right, especially as it is said they acted by the advice of counsel; but they set out on a mistaken principle by supposing the estate inadequate to the payment

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*of its debts. This court however always discountenances the acts of executors, which are done directly contrary to the directions of their testator. It must be referred back to the master, to ascertain what was the net amount of the sales; what debts have been paid; and whether any, and to what amount are still unsatisfied; what funds of the estate remain in the executors' hands; and the amount of the bad debts, if there are any.

1 Desaus. 521

Case CXVI.

Present—Chancellors Mathews and Rutledge.

WILLIAM PERRONNEAU v. the Executors of HENRY PERRONNEAU, Deceased.

(September, 1796.)

[*Wills* ⊂⊃728.]

Devise of the whole estate to executors, to collect the funds and remit the whole to executors residing in England to be invested there; and to pay £300. per annum to the testator's wife for life. Legacies of £5000. to relations in England. After the death of the wife, the whole estate to testator's nephew W. P. if he survives testator's wife. If not, then to his children: If he leaves no children, then to his brothers and sisters. The estate is very large. W. P. has several children, and is in very narrow circumstances. Though the bequest is not vested in W. P. the court, under the circumstances decreed that a maintenance should be allowed to his family out of the estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1766; Dec. Dig. ⊂⊃728.]

[*Trusts* ⊂⊃217.]

The court also decreed that upon great change of circumstances, no more of the estate should be remitted to England than sufficient to pay the annuity and the legacies there.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 304; Dec. Dig. ⊂⊃217.]

The bill states that Henry Perronneau, formerly of Charleston, being seized and possessed of a considerable estate, real and personal, in Carolina and England, and having no issue, did on the 9th day of July, 1786, make his will, which is set forth at length in the bill; by which after all his debts and funeral expenses were paid, he devised his estate as follows:—He gave to his wife Ann, all his household furniture, &c. plate, books, beds, bed and table linen, &c. He also gave her an annuity of 300*l.* during her natural life, and charged his whole estate with the payment of it, in lieu of dower. He also directed all his Carolina debts to be collected by his executors there, and remitted to his executors in England to be invested in government securities. He gave to his brother-in-law, Dr. Alexander Garden, £2,500. to be paid on the death of his wife; but if he should die first, then the said legacy to go to his nephew Alexander Garden, his niece Juliett, and his niece Harriott Benson, to be equally divided. He gave to Robert Cooper £2,500. to be paid on the death of his wife; but if R. C. should die before his wife, then he gives the legacy to Cooper's children: If there should be default of child, then he gives it to Ann and Eliza Cooper. He gave to his servant John Champneys £300. to be paid on the death of his wife. He also

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gives him his wearing ap*parel. He gives to each of his executors 100*l.* Then follows this clause—"All the rest and residue of my worldly estate, whatsoever and wheresoever I do hereby give, devise and bequeath unto my nephew William Perronneau, son of my brother Arthur Perronneau, deceased, immediately after the death of my said wife; but in case of his death before her, then on such event or contingency, I do hereby give devise, and bequeath the same and every part thereof to the child or children of my said nephew William Perronneau, lawfully to be begotten, as shall be living at the time of his death, to be equally divided between them as tenants in common—if more than one, as soon as possible after the decease of my wife: and in case my said nephew shall happen to depart this life without leaving any children or child lawfully begotten living at the time of his death, then and on such event or contingency, I do hereby give, devise, and bequeath the said surplus and residue of my said worldly estate after the death of my said wife unto the other children of my said deceased brother Arthur Perronneau, as tenants in common of like equality of estate; but if there shall be no children or child of my said brother living at the time of the death of my said wife, then and on such event and contingency, I do hereby give, devise and bequeath the same and every part thereof unto such of their children lawfully begotten as may be living at the death of my said wife, to be equally divided between them as tenants in common, if more than one." Lastly, he appointed Dr. Alexander Garden, Robert Cooper, Robert W. Powell, and John Hopton, of Westminster; John Savage, of Brompton; Benjamin Savage, of London; Rawlins Lowndes, Isaac Motte, and Edward Penman, of South-Carolina, executors of his said will.—That the testator died on the ——— day of November, 1786, leaving the will of force, and without issue. That Messrs. Lowndes, Motte, and Penman, proved the will, and qualified as executors, and took possession of the Carolina estate—That the estate was very large; being much more than adequate to raising and securing the annuity to the widow—That the testator at

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the time of making his will *was under strong impressions of the instability of the American governments, and the insecurity of property from the then unfortunate and unsettled state of public affairs—it was the reason of his directing the funds of his estate to be remitted to England. Complainant is well assured that his uncle was actuated by the strongest desire to secure the legacies to the objects of his bounty, and particularly complainant who was the favored object. But complainant submits that great changes have taken place in public affairs since his death; since which the present government hath been erected, and has happily secured peace abroad and security at home; while wars and revolutions new in their principles and boundless in their extent, disturb the nations of Europe, and

threaten the funds of Great-Britain: that it would therefore be more likely to effect the chief views of testator, if after remitting as much as would secure the annuity, the residue were retained in this country, and placed out under the directions of this court for the benefit of complainant and his family, who are chiefly interested, and are anxious it should remain in this country under the jurisdiction of the court. That at the time testator died, complainant was a youth, and lived at no expense to himself in the household of his mother; but since, hath intermarried and become burthened with a numerous family, which hath become exceedingly distressed in consequence of the failure of some of those resources of his mother upon which he had in a great measure depended, whilst the large residuary estate of the testator is locked up from him. The executors not deeming themselves at liberty to extend any relief to complainant, either by the payment of interest, annuity, maintenance or in any other way without the sanction of court. Whereas complainant humbly submits he is entitled to demand the interest on the residuary estate, as well as to have the amount of the same secured to him, after securing the said pecuniary legacies and the annuity prior to the same being transported into a foreign country beyond the reach and jurisdiction of the court. That complainant hath applied to the executors of said estate to have the re-

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siduary estate *and the interest thereon secured to him in manner aforesaid, after securing the legacies and annuity aforesaid; but the said executors have hitherto refused him his reasonable request; alleging that complainant is not entitled to any maintenance out of the said estate; nor to have the same secured or retained in this country. The bill therefore prays a discovery and statement of the estate, of the monies remitted to England, of the debts due, and that after remitting to England so much as will pay the widow's annuity, and secure the legatees residing there, that complainant may receive the residue of the interest in whole or in part, and that the residuary estate may be secured for the benefit of complainant and his children, by placing the same at interest in this country, and within the jurisdiction of this court, or otherwise, as this court may direct; and that the remittance of the estate into a foreign country may be suspended: and that the complainant may have such further relief as the nature of the case may require.

The answer of the defendants admits all the facts alleged in the bill; but submits that the legacy to Mr. W. Perronneau not being vested, he is not entitled to any allowance for maintenance out of the estate; and submits that point to the court. Also, that the testator having directed the debts due to him to be collected and remitted to England, the executors are bound to obey his will; and that the court has no power to control the performance of his will.

The brother and two of the sisters of Mr. William Perronneau, to whom the estate was devised and bequeathed over on the event of his dying before Mrs. Ann. Perronneau, the wife of the testator, and without issue, delivered a written declaration that they had no objection to his success in the application to the court for relief in the case stated by his bill; and they also stated that they knew that to be the wish of their sister Mrs. Wm. Hayne, and her husband, who were absent, and did not sign the declaration. At the hearing of the cause, Mr. Ford and Mr. Desaussure, argued for the complainant. They stated that there were two objects in the bill:

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*1st. To obtain an allowance out of the interest of the estate, by way of maintenance for an infant family, entitled to a large estate hereafter, but in danger of suffering at present.

2d. To obtain the detention of the estate in this country within the jurisdiction of the court, for the benefit of the persons chiefly interested in it; or if it must be remitted according to the directions of the will, to require security from the executors abroad, to whose care the estate is to be committed.

The application is opposed on the grounds, that the legacy to Mr. Perronneau is not vested, but devised over to his children, on his dying before the testator's wife; and to his brothers and sisters, if he died without leaving children. Also, that a father is not entitled to maintenance for his children out of their fortunes; and that the will of the testator directing the estate to be remitted to England, must be obeyed; and the executors are not bound to give security.

It was contended for the complainant that the sole object of the testator, in postponing the legatees to his wife's death, was to keep his estate together, to secure his wife her annuity at all events; and not to make a distinction between a vested and contingent legacy. But she can be made safe without such a hardship on the complainant, his nephew, and the favorite object of his bounty, next to his wife. And the court will be anxious under such circumstances to give relief. 1 Wilson. 140. 4 Burr. 2246, 3 Bro. C. C. 404. 1 Bro. P. C. 288. 3 Bro. P. C. 337. Wherever the court can find a slender twig to take hold of, they will do so to give relief in such hard cases. Few of the decided cases form exact precedents. Lord Chancellor Hardwicke said, that when and to whom interest was to be allowed, depended so much on particular circumstances; on the relation of parties; on the penning of wills; that hardly one case could be cited that would be a precedent for another, and the court has found means to escape from the operation of

harsh and strict cases on small circumstances. 1 P. Wms. 783. 2 P. Wms. 21, 2.

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*2 Vern. 152. 2 Bro. C. C. 75. 1 Bro. C. C. 119, 298. 3 Bro. C. C. 471, 90. 3 Bro. P. C. 337.

In many cases it has been decided that the devise over does not make any objection to such a claim as the present. 2 P. Wms. 21, 2, 419, 504. 1 Bro. C. C. 82, 104.

In general, where the court refuses to give aid, it is where the contest is between the immediate legatee and remainder men. But here the application is by the first legatee, for maintenance for his children, who are the first in remainder; and the remoter remainder men consent to the measure. The complainant has no estate of his own, out of which he can maintain and educate his children. He depends on his mother, and her means have been greatly impaired by fire, by insolvency of debtors and other circumstances. No injury can result to others from granting the application—not to the widow because the court can and will order remittances sufficient to raise her annuity of £300 per annum during her life—not to the pecuniary legatees in England, because after remitting enough to secure them, there remains a very large estate, out of which the application of the complainant may be granted; and indeed there are funds enough of the estate already in England to secure them.

The case in 2 Atkins, 41, was of the administrator of the party applying for intermediate interest after the death had happened, and the limitation over, vested. So in 3 Atk. 508, and in 1 Atk. 505. The court looks at the spirit and equity of the cases and doctrines; not the letter of them. In Loocock and Clarkson, the court protected the annuity of the widow against specific devisees and legatees, though no case had ever gone so far before. The distinction between a legacy at 21, or payable at 21, on which many of the cases have been founded, has been questioned by eminent judges. Lord Chancellor King said, the distinction does not deserve to be countenanced, 2 P. Wms. 612: and Lord Keeper Wright said it was a distinction without a difference. 2 Vern. 417, 424. There are two strong cases in favor of the complainant. In the case of Claxton v. Claxton, 2 Vern. 152, the court suffered the devisee to perform the

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condition, even out of the property de*vised, before the estate in contingent remainders, was to vest. In 2 P. Wms. it was declared by the master of the rolls to have been the practice to allow maintenance even in the case of legacies that were not vested.

Another objection has been made, to wit, that the court does not usually allow a father to have maintenance for his children, out of an estate devised to them aliunde; yet this depends upon the ability of the parent to maintain them.

In Hughs v. Hughs, 1 Bro. C. C. 387, the Lord Chancellor ordered maintenance on the ground of the inability of the parent; though he thought the fund was intended to accumulate.

See too 3 Bro. C. C. 416, 4 Bro. C. C. 223. Maintenance is so much regarded, that the principal is sometimes allowed to be broken in upon. 1 Vernon, 255. 2 P. Wms. 22.

We come now to the consideration of the second great point made in the case.

It is contended for the complainant that the estate should be detained in the hands of the executors in this country; or that the executors resident in England, who require the money to be remitted to them, should give security for the repayment of it to the legatee here on the death of the widow of the testator.

It is true that the will of the testator directs that his whole estate should be converted into money, and remitted to his executors in England, to be invested in government stock, for the benefit of his legatees.

Now it is manifest that this regulation was founded on peculiar circumstances. The testator was a man of sense and probity, but he had adhered to the cause of the mother country, in the struggle which terminated in the independence of the colonies. He was obliged to leave his country, and he was amerced for his political error.—This soured his mind—the distresses brought upon this country by the war; the total want of a national government; the derangement of the finances of the state governments; the interference between debtor and creditor, by state laws, and the consequent breach of contracts,

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*and depreciation of property, all tended to induce a belief in many, and an apprehension in all, that the new republics were about to become scenes of discord and anarchy. In the minds of those who had been hostile to the revolution, this belief was deeply fixed.

In this frame of mind, the testator sat down to draw his will in the year 1786; and it is not to be wondered that he was desirous to withdraw all his property from a country devoted to ruin in his estimation; not only for the benefit of his wife and his English legatees, but his favorite nephew and residuary legatee, though he resided in this country. The testator died soon after without one circumstance in the political situation of this country being altered. It is now ten years since his death. The United States have formed a strong national government; public and private credit are re-established; internal tranquillity is firmly settled, and peace is maintained with all the belligerents during the arduous struggle which is desolating and exhausting the European nations. England has taken an active part in this

wide spreading war: and she has incurred a vast debt in addition to her former burthens; and the revolutionary fervor has spread among her people, and threatens internal convulsions. Under these circumstances, so totally different from those which existed at the time that the testator made his will, there can be little doubt that the testator, if living, would have altered his will; and would have directed that at least so much of his estate should have been left in this country as was intended for the legatees residing here: and what he would probably have done, it seems reasonable for the court to do. It is not asking the court to vary the rights of a single party. It is merely to make such a variation in the arrangement of the funds as will be most beneficial and secure for those interested: which the court is in the habit of doing, even to the sale of real estates, where it is beneficial to the devisees and legatees.

There is already considerable property in England.—Let so much be remitted in addition as will secure the annuity to the widow; and as will pay the legacies to Dr. Garden and Mr. Cooper, who reside in England.

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amount*ing to £5,000. The remainder of the estate, which is very large, is bequeathed to the complainant, and on his death to his children; they are natives, and permanent residents in this country. There is no good reason for obliging them to seek their legacies hereafter in a foreign country, where they are strangers, and might have great difficulties, and be put to great expense in the recovery of their rights, if the executors in England should resist their claims, or even put them to the proof of them. And it should be remembered that interest is two per cent. higher in this country than in England. But if the court should feel itself so bound by the positive direction of the will, as to be obliged to permit the removal of the funds of the estate out of this country into a foreign country, it would be quite reasonable to direct that before the removal took place, the executors residing abroad, who insist on the exact fulfilment of the will, and require the remittances to be made to them, should be directed to give security for the repayment of the money to the legatees in this country, on the event happening, which shall entitle them to it. There are many cases in which the court requires security of executors, even without absolute proof of waste or insolvency. See 2 Eq. Cas. abr. 552. 7. 3 P. Wms. 300. 1 Vesey, 282. Ambl. 273, 2 Atk. 58. 1 Bro. C. C. 181, 2. 3 Bro. C. C. 45, 337. Now the removal of the fund out of the jurisdiction of the court, which may be of the greatest prejudice and delay to the complainant, when all the causes which induced the testator to make such an arrangement are totally changed, is surely a reasonable ground to require security.

Mr. T. Lowndes and Mr. Rutledge for the defendants stated, that the executors of the testator Mr. Henry Perronneau, residing in this country, were very sensible of the hard situation in which the complainant was placed, and were willing to do every thing favorable to him which was in their power, or which the court should feel itself at liberty to authorize. But it was their duty to bring to the view of the court the legal grounds of objection to the complainant's application; especially as the executor in England had

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been consulted, *and had positively required that the application should be resisted, and the estate remitted to them in England, according to the will of the testator. It is admitted that the interest and income of the estate greatly exceed the annuity of £300 bequeathed to Mrs. Perronneau. This surplus income must accumulate for the benefit of the residuary legatee in remainder, unless the court should feel itself free to allow some portion of it to the complainant. This is not a vested legacy—the rule is that where the time is annexed to the legacy itself, and not to the payment of it, it is not a vested but a contingent legacy. The devise over to Mr. Perronneau's children, on the event of his dying before the widow of the testator, prevents the legacy vesting in him, and the devise over to his brothers and sisters, in the event of his dying before the widow, and without leaving any children, prevents the legacy vesting in them. It is a contingent legacy. See 3 Bacon, 478, 486, on vested and contingent legacies. It must be a vested legacy, or the devise over must take effect.—2 Atk. 41. See 3 Atk. 114. 1 Vesey. 111. Where a real estate is devised over, on a contingency, the intermediate rents and profits go to the heir at law. And where there is a bequest of the residue of personal estate, on a contingency, the interest accumulates till the event happens, and the estate becomes vested for the benefit of the ultimate legatee who happens to take. 1 Atk. 505. 2 Atk. 41. 3 Atk. 58. Atk. 473. Green v. Elkins. 1 Vesey, 490. 2 Vesey, 521. The cases cited by the complainant's counsel, are cases of vested legacies. But even if it had been vested, the court will not allow maintenance, unless where the legacy is the gift of the parent. For if the parent be living, it is his duty to maintain his child, and to allow any legacy derived aliunde to accumulate for the benefit of the child. On the other point, for retaining the funds of the estate in this country, the defendant's counsel said, that the defendants residing here were willing to acquiesce in any decree of the court on the subject; but the executors abroad opposed it, and they were bound to state to the court, that the will of the testator gave express directions to remit his

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whole estate to En*gland, and vest it there.

That whatever were the inducements to the testator's making such a provision, when his principal legatee, the residuary legatee of a large estate resided here, his will should be obeyed. It was conceded indeed that the circumstances of a country might be so altered as to induce the court to restrict the transmission of funds to it in such a case as this. Such as a desperate civil war, or a foreign war, during which the enemy mastered the country. But there must be extreme circumstances to justify a departure from the will of the testator. Who can say that the change of circumstances, justly described by the complainant's counsel, would have induced a change in the testator's mind, attached as he was to Great Britain, and doubtful as he was of any good issues from American Independence? Great Britain was engaged in foreign war, and has greatly increased her national debt; but she pays her interest regularly, and raises new loans at her pleasure; and many politicians have already been deceived in predicting the downfall of her financial system, from the accumulation of her debts. This hardly made out a case for the interference of the court. It was not an extreme one.

The court took time to deliberate, and afterwards delivered the following decree:

There are two points in this cause.

First. Whether the legacy to the complainant is a vested legacy, or a mere contingent interest, subject to be defeated on failure of the condition annexed to it.

Second. Whether this court ought to exercise those extraordinary powers with which it is vested to overrule the dispositions made by testator in his will.

As to the first point, we cannot consider the legacy to the complainant as a vested legacy, consistently with those established and strict rules, which are laid down in the books; for there is not annexed to it either certainty as to the time of payment, or the person to take. The time of payment is not till the death of testator's wife, which is uncertain; and then it is on condition that the complainant survives her; if not, it goes over to his children; and if he leaves no

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child, then to his brothers *and sisters; but if they should all die before the testator's wife, then to their children. As this therefore is not a vested legacy, in which case the complainant would be entitled to the interest arising thereon, we must consider the case on its own intrinsic merits; and notwithstanding this objection, determine whether we can, without a violation of the essence and true principles on which those rules are founded, extend some relief to the distressed objects now before us, praying for the interposition of this court, for that purpose. It is notorious, that courts of equity have of late very much relaxed their rigid rules of construction, and have conformed their decisions more to the circumstances of the cases immediately before them, than to former precedents, where they have been considered as partaking more of the strict rules of common law, than the more liberal rules of the court of equity. The following observation by one of the most enlightened judges that ever sat on the chancery bench, we think a striking and just one, namely, "in cases of this kind," he says, "how far a legatee who is not entitled to the payment of his legacy immediately, shall have interest in the mean time, depends upon particular circumstances. Some upon relationship, some upon the necessities of legatees, and most of them upon the particular penning of wills; and there is hardly one case which can be cited, that is a precedent for another." With respect however to the case before us, we are not without a precedent to direct our judgment; for the case of Woodberry v. the executors of Collins, is as nearly assimilated to the present, as two cases can be. The words of Collin's will are, "I give to my granddaughter, Mary Woodberry the following negroes, namely, Big Jack and 1000*l.* which money to be made by my said negroes before they shall be divided; but should my said granddaughter Mary Woodberry, depart this life before she arrived at the age of twenty-one years, and shall have no issue, then in that case my will is, that aforesaid negroes Big Jack, &c. and the 1000*l.* should be divided between the following persons, Dr. M'Grejor and others." According to strict rules this is no vested leg-

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acy; for she *can only be entitled to it under the condition annexed to it, namely, her attaining twenty-one years of age; on failure of which, it is limited over to others. It is not a gift by a parent who is bound to maintain his child, and out of whose legacy this court would allow interest, if not so directed by the parent. But by the same rules it is considered as a gift by a stranger. Yet the court on a representation, that the father of the infant was incapable of giving her either maintenance or education, made a reasonable allowance out of the legacy for those purposes. What is the case before us? The complainant or his children, will at a future day, be entitled to a considerable estate; but until that day arrives, they must remain in such a state of penury as to want almost all the necessaries of life, and consequently every means of education; unless this court can extend to them some present means for those purposes out of this large estate in expectancy. And why should not this reasonable application be complied with? Because, it is said, this is not a vested legacy, and therefore the interest must be made an accumulatory fund, until the period arrives when the legatee would be entitled to the legacy. We think ourselves warranted

on every principle of sound justice, and of precedents, to extend such relief as the nature of the case will bear us out in administering. It will here be proper to state this part of the case more at large than we have as yet done. The testator, Henry Perronneau gives to his wife an annuity of £300 to other persons legacies to the amount of £6200 payable on the death of his wife; the rest of his estate he gives, devises and bequeaths to the complainant if he survives the testator's wife; if not, to his children. The estate is represented to be nearly £20,000 in value. It will require £7500 to be placed in the funds directed by testator, to raise the annuity of £300. The balance will probably produce an interest of £600 or £700 per annum. If then an allowance is made for the relief of the complainant's family, out of this latter fund, where is the possible injury which can arise to any one? We can see none. The widow of the testator can receive none; the other legatees can receive

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*none; their legacies being pecuniary must be paid with the last farthing of the estate: the residuary legatees can take nothing until the pecuniary legatees are satisfied. As to the possibility that the present complainant may die before he comes into possession of the estate, and therefore what may now be allowed may ultimately prejudice his children, can by no means be a sound objection; for his application is not on his own account, but principally for the support of those very children, who might possibly be entitled to this estate. Can this work an injury to them? Every rational mind must contemplate it in the reverse. But should they come here at a future day and say so, they would come with so ill a grace, as never would entitle them to be countenanced by this court. Besides the relief to be given can and will be so modelled by this court, that it shall appear that they were the peculiar objects contemplated by us, at the moment of granting that aid, which is prayed for their particular benefit.

As to the second point, whether this court will restrain the executor in this country from doing that which by the will of the testator he is directed to do? A great variety of precedents will warrant us in doing so. The first and most striking one is that of Baker v. the executors of B. Elliot. In that case, although the will of B. Elliot expressly mentions that no part of his lands should be sold, yet it being represented by his executors that the estate was so much in debt as to exhaust the whole income in payment of interest alone, that the personal estate was first liable for payment of his debts, particularly the negroes, and without them the lands would become unproductive and a burthen. That in such event the minor, his only child would be deprived of the means of support or education; that if on the contrary this court would authorise a sale of a part of the lands, reserving so much thereof as would be sufficient to work the negroes, the minor would have a competent support therefrom, which would be evidently for his advantage. The court directed a sale of the lands on these grounds: That could the testator have foreseen the very material alterations the circumstances of this country had under-

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*gone, since the making of his will (it having been made in 1778) and since his death, he never would have inserted such prohibitions in his will. That it was not only for the advantage of the minor that this court should interfere, but to save his estate from ruin. We did therefore interfere and directed a sale of so much of the lands as was sufficient to pay the debts and legacies, in lieu of the negroes, which would otherwise have been sold. Since that decision this court have made several others of a similar nature. If then in these cases we have restricted the dispositions of testators, where such restrictions have tended to the benefit of those who were intended to have been benefited by the testator himself, but who would instead of being benefited, be materially injured by a rigid adherence to the disposal made by the testator; surely then this is a case which calls on us, in as peremptory terms for our interference, as any which has yet come before us. We have nothing to do with what were the testator's political principles; we are to consider him like any other man setting down to perform what is always supposed to be one of the last acts of his life; in taking a minute view of the situation of his affairs, and of those who are the objects of his affection and bounty, he disposes of his estate in such manner, as in his best judgment will be most beneficial for those who are at a future day to enjoy it; but if before that day arrives, the circumstances of that country where he had directed his property to be fixed, had undergone so material an alteration, as to render it at least hazardous to fulfil such his directions; and which it was impossible for him to have foreseen, is there not the highest degree of probability that had he been now alive, he would have altered that disposition, and sought for some more certain fund to place his money in? We must conclude that he, as every other prudent man, would have done so. Ought we not then to do that, which it is morally certain the testator himself, under these circumstances would have done? We certainly ought; and the court is well warranted in this decision, because a material benefit will be thereby rendered to one party, and no possible injury

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done to the *other. Who and where are the persons that are to take the residuary estate after the death of testator's widow, and pay-

ment of the pecuniary legacies? They are complainant or his children; natives and citizens of this state, who reside and will most probably end their days here. The defendant and the greatest part of his testator's estate being here under the immediate control of this court, it would be extremely unwise and impolitic to permit him to remove the whole of the property to another country, totally out of the jurisdiction of this court. If a sum of money sufficient to raise the annuity for the widow is remitted to the executors in England, to be vested in government securities, it is all she can in justice require: and as the legatees are not entitled to payment till the widow's death; in that event there will be more than sufficient in that country to discharge all their demands on the estate: to go beyond that would be reducing the residuary legatee, at a future day, on the death of the widow, to the necessity of crossing the Atlantic, to recover his property, at a certain great expense and risk, and perhaps an infinite loss of time; if the executors on that side of the water should be disposed to contest his right, which it is not improbable they would, from the disposition they shew to get the whole property into their possession.

In order therefore that the respective rights and claims of the parties may be justly and equitably preserved and protected, we do order and decree, that the defendant (as soon as he can possibly collect the debts due his testator) remit to the executors in England, to be by them vested in government securities, so much money as (in addition to what they already possess) shall be sufficient to secure to the testator's widow the annuity bequeathed to her. It is further ordered, that the defendant do and shall hereafter retain and keep in his custody and power, all such other monies belonging to his testator's estate as he may receive; and from time to time place the same at interest in the funds of this, or the United States, or other good security, for the benefit of complainant or such other persons as

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shall, on the event *of the widow's death, become entitled thereto; paying thereon to complainant such sum or sums of money as shall be at any time allowed and directed by the court for the maintenance and education of his children. And the master is hereby directed to enquire and report what may be an adequate allowance for the present maintenance and education of the complainant's children. Also that the complainant do annually account before the master for the sum of money so to be allowed; and to be at liberty to apply to the court by petition for an additional allowance, as his family may increase in number and years. And lastly, that the costs be paid out of the estate.

1 Desaus. 537

Case CXVII.

Present—Chancellors Mathews and Rutledge.

DICKINSON v. LEGARE and Others.

(July, 1797.)

[*Interest* ⇐18, 39.]

Interest allowed on a stated account from the day it is signed.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 34, 87; Dec. Dig. ⇐18, 39.]

[*Partnership* ⇐161.]

A co-partner going abroad, and giving his own bond for a debt of the co-partnership, can affect only his own private property.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 240; Dec. Dig. ⇐161.]

[*Partnership* ⇐151.]

An assignment of the co-partnership funds by one of the partners, when abroad, without the knowledge or consent of the partners at home, is illegal and void. But such assignee (though he also took the private bond of the assignor) may come in with other creditors pari passu, on the copartnership effects, for the balance of his debt.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 267; Dec. Dig. ⇐151.]

[*Interest* ⇐55.]

Interest stopped during the war; but revived from the treaty of peace.

[Ed. Note.—Cited in Davis v. Wright, 2 Hill, 569.

For other cases, see Interest, Cent. Dig. § 128; Dec. Dig. ⇐55.]

[*Payment* ⇐24.]

[A bond given by one partner for a firm debt, though only binding that partner, is not an extinguishment of the debt against the partnership.]

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 29; Dec. Dig. ⇐24.]

[This case is also cited in Woddrop v. Ward, 3 Desaus. 207, on the relative rights of partnership and individual creditors in property of firm or members thereof.]

Chancellor MATTHEWS delivered the decree of the court:

The argument in this case was taken up first on the master's report, to which an exception was taken by defendant's counsel, as to an allowance of interest on an account stated by Dupont, Brewton and Co. between them and complainant, from the date of the last article in that account; and it was contended that interest ought to be allowed from the time only, that the law of this state allows it, on open accounts, viz. from March, 1784. On that part of the report specially stated by the master, respecting a quantity of salt, it was insisted by complainant's counsel, that it was such a credit as ought to be allowed him; and by the counsel for the defendant, that it ought not. The argument was next gone into on the pleadings at large, and three points were made, viz. 1st. That the bond given by Dupont to Nutt, one of the defendants in this cause, could be binding only on the private estate of Dupont; and that it having been given for a partnership

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debt, on an open account, the former *being a higher security than the latter, it is in extinguishment of the debt of the partnership. 2d. That the assignment made by Dupont to Nutt of the partnership funds, during the life of Jones, another of the partners, without his privity or consent, was illegal and null and void, and 3d. That the accounts exhibited by Nutt against the partnership of Dupont, Brewton & Co. contains charges to a large amount for compound interest, and interest during the war, which ought not to be allowed. We will first observe on the exception to the master's report, and are of opinion that it is not a well founded one; because it has been the uniform practice of this court, to allow interest on a stated account, from the day on which it is signed; and this account comes fully within this rule. As to the credit given complainant for the salt, it being no more than a conditional one, that is when the money was received, for which it sold, it was incumbent on complainant to shew that it had been received; his failing to do so, must deprive him of any benefit as to that sum. Before we proceed to observe on the second argument in the cause, it will be proper to state the case at large. The copartnership of Dupont, Brewton & Co. was largely indebted to Nutt, one of the defendants, a merchant in England, previous to the war between the United States of America and Great Britain. Dupont during the war went from this country, bound on a voyage to France, was taken by a British ship of war, and carried to England. Whilst there he was prevailed on by Nutt to give him the bond in question; also a general assignment of the whole of the partnership funds; and this without the privity or consent of Jones, the other surviving partner who was at the time in Georgia. Nutt at the close of the war, through his agent here and by virtue of the said bond, procured an act of the legislature to authorise him to receive from the treasury the securities for money which had been taken for the sale of Dupont's private estate, under the confiscation act of this state, in trust for himself and the other creditors of Dupont. He accordingly did so, and by virtue of the assignment has also possessed himself of the

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partnership books and other *papers; and he insists that he was well warranted in acting as he has done, and ought not now to be disturbed in the enjoyment of those advantages thus obtained. On the contrary it is contended by complainant, that the assignment was illegal, for two reasons, viz. circumstanced as Dupont was, he could not be considered as a free agent, because his refusal to execute what was required of him, would have subjected him to confinement in goal in a foreign country, he being completely in the power of a large and urgent creditor; and because the assignment was made without the privity or consent of his copartner Jones. Having thus stated this part of the case, we will proceed with our observations on these three points that have been made. As to the first point, the bond in question being the individual bond of Dupont, never can attach itself in the first instance on the partnership concerns; but must be considered as binding on the private estate of Dupont alone. Indeed the defendant Nutt himself has so considered it; as by virtue of that bond he applied for and obtained an act of the legislature for possessing himself of that estate, in trust for himself and the other creditors of Dupont; and has accordingly possessed himself of all the securities for which the estate was sold. If the court do not so determine it, they must see it in the light of an imposition on the legislature, that by calling it the private debt of Dupont, thereby acquiring a right to receive from Dupont's private estate, to the injury probably of his private creditors, which he could not legally or equitably be entitled to, until their demands were all previously satisfied. Whether the bond under these circumstances is to be considered as an extinguishment of the partnership debt, we will consider in another branch of the cause. As to the second point, it is one of the first impression; no case analogous to it has yet come under the view of this court; the books from which we usually draw our information furnish no precedent; because, as it has been very properly observed by defendant's counsel, all the decisions contained in them respecting the rights and conduct of merchants, are bottomed on a

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distinct peculiar code of laws, *which have been established for regulating mercantile proceedings, and have no manner of relation to the conduct of merchants in this country. Thus circumstanced, we must consider this part of the case as standing alone, and decide it on its own intrinsic merits, according to the best of our judgment. To sanction the conduct of Dupont in this instance, we think would be attended with very mischievous consequences indeed. It would be cutting by the roots every degree of confidence between man and man in the mercantile line; no one would consider himself safe for a day, if his partner has the power by the stroke of a pen, without his knowledge or consent to reduce him to a state of ruin. For let us view for a moment how far this mischief is capable of being carried: Suppose A. B. and C. are partners in flourishing trade, in good credit, and in the ordinary course of mercantile dealings, not only competent to the discharge of their debts, but have made profit on their trade—A. by collusion with one or more of the creditors might assign over not only the whole books and securities for money, but stock in trade also of the co-partnership; the creditor might make a forced sale of the lat-

ter, which by bringing into market a larger quantity of goods than there is any immediate demand for, they must be bought in by speculators at a very inferior price, and thus what in a regular course of trade would have been more than adequate to the discharge of the whole partnership debts, is swallowed up by one or two creditors, to the ruin of responsible, innocent persons, and perhaps many of the other creditors. The mischief would not end here. So extraordinary a conduct in one partner, might induce a general belief that the others could not have been altogether innocent; the probable consequence would be, that neither of those persons ever could engage in trade again with any prospect of advantage. On the contrary, how often has it happened that when men have merely been unfortunate in trade, and have failed, with the characters of honest men, that even their creditors have joined in re-establishing them in business. Further, would not this be opening a door for the grossest

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frauds to be prac*ticed? Might not one or two creditors by bribery, induce a man otherwise disposed to be honest, to an act of this kind? Again, suppose another partner to make a similar assignment to another creditor, what a scene of confusion and litigation must necessarily spring out of such a clashing of claims; for who is to determine which of the assignments is to be preferred? It is unnecessary to trace the evil tendency of such power in one partner over the funds of the partnership, to any greater extent; those already pointed out are of such magnitude as to induce every reflecting and honest mind to revolt at the idea of placing within the reach of any one man, so arbitrary, so immoral, and so dangerous a power over the property, the integrity and future welfare of others. But when we view this matter in its public relation, we find ourselves loudly called on to check the evil in its birth; for as a mercantile country, its prosperity will greatly depend on the integrity of its mercantile transactions. To give the smallest countenance then to such an act as that now the subject of our consideration, would be giving a deep wound indeed to the commerce of this country. We are therefore of opinion that the assignment made by Dupont to Nutt, without the privity or consent of the other partner, Jones, independent of the unfavorable situation he was then in, was unwarranted by any law, or usage of merchants, is inequitable and nefarious, and must be set aside. We however think that Nutt ought not to be excluded from coming in as a general creditor on the partnership funds, for so much of his debt as remains unsatisfied by the private estate of Dupont, pari passu, with the other partnership creditors. As to the third point. We must here conform our decision to that of the case of Higginson v. Air [1 Desaus. 427.]; it ought therefore to be referred to the master to report the balance due to Nutt by Dupont, Brewton & Co.

It is therefore decreed, that the report of the master be confirmed, except as to the article respecting the salt, which not being supported by proper evidence must be disallowed. That the assignment made by Dupont to Nutt be set aside. That Nutt be

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however allowed to *come in as a general creditor on the partnership funds of Dupont, Brewton & Co. pari passu with the other creditors, for so much of his debt as remains unsatisfied out of Dupont's private estate. That the account of Nutt be referred to the master, to state what is due thereon, allowing him the usual interest from the close of his account, until the commencement of the war in April, 1775, and simple interest from the date of the treaty of peace, in 1783: That the balance of £2244 17s. reported to be due to complainant, be admitted in the like order of payment out of the aforesaid funds, with interest on such balance till paid; and that each party pay his own costs.

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1 Desaus. 542

Case CXVIII.

Present—Chancellors Mathews and **Rutledge.**

SNOW and Others v. CALLUM, Executor of Snow.

(July, 1797.)

[*Executors and Administrators* ⟸497.]

Travelling expenses and overseer's wages not allowed to an executor.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2118; Dec. Dig. ⟸497.]

[*Wills* ⟸848.]

Specific legatees bound to contribute proportionably to the payment of testator's debts, on failure of other assets.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2145; Dec. Dig. ⟸848.]

[*Slaves* ⟸22.]

A bequest of freedom to a female slave and her issue, after ten years from testator's death —the children are free, though the mother died within the ten years.

[Ed. Note.—For other cases, see Slaves, Cent. Dig. §§ 92–111; Dec. Dig. ⟸22.]

[This case is also cited in Logan v. Logan, 1 McCord, Eq. 5; Jones v. Jones, 39 S. C. 253, 17 S. E. 587, 802, regarding right of executor to allowance for money paid.]

Chancellor RUTLEDGE delivered the decree of the court.

Upon considering the master's report, and on examination of the defendant's accounts, the court are of opinion that the charges for traveling expenses and overseers wages, which he has allowed to the executor, should be struck out, as they are not warranted by the act of assembly, which regulates the al-

lowance therein given to executors: and this court has uniformly in such cases referred them for recovery of such charges to their actions at law, on a quantum meruit. The account must therefore go back again to the master to be new stated. There can be no doubt on the will of George Snow: that the limitations over are too remote: a variety of cases having been determined on that point in this court. David Snow, the first taker therefore had a good right to dispose of the property bequeathed him by his father; subject however to a contribution out of his legacy in proportion with the other specific legatees to the payment of his father's debts, on a deficiency of other assets of the estate; and as it is alleged that the whole of the legacies of some of the specific legatees, and

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parts of others have *been sold, and the money applied to the payment of the testator G. Snow's debts; it must be referred back to the master to ascertain the fact, and report specially thereon, and the sums to be paid by those legatees who have hitherto contributed nothing or but little out of their respective legacies towards reimbursing or indemnifying those whose legacies have been disposed of in the manner above mentioned. With respect to the bequest of freedom to the woman slave, Minda and her increase, after ten years from testator's death, his intention is so plain that there can be no doubt but the children were emancipated, though their mother died within the ten years.

NOTE.—The refusal to allow the executors the charge for overseer's wages, is not a prohibition to employ overseers where required, but to prevent their charging overseer's wages for their own services, on the plantation. The statute being express that executors and administrators shall have no other compensation for all their services to the estate, than two and a half per cent. on monies received, and the same sum on monies paid on account of the estate, except in cases of interest money. If an executor claims more for extra services, he must make up an issue, and try it before a jury.

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1 Desaus. 543

Case CXIX.

Present—Chancellors Mathews and Rutledge.

JAMES JACKS and Wife v. GEORGE HENDERSON.

(September, 1797.)

[*Wills* ⇐80, 81.]

A native of Scotland, enjoying some estate there, being about to come to Carolina, to take possession of an estate there, executed a paper, which has some characteristics of a deed, and some of a will, which was recorded in Scotland by his proctor. This paper had reference to his intended voyage, and the accidents it exposed him to, as the inducements to its execution, in order to prevent disputes in case of his death. He arrived safe in Carolina, lived a number of years, married a lady of some fortune, and died without leaving issue. The court was of opinion that even if the paper was to be considered as a will, the dispositions of it were merely provisional and contingent: and the contingency (to wit, his death before he arrived in Carolina) not having happened, the dispositions of the estate cannot take effect, at least, not to the prejudice of the wife and her rights.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 200, 201; Dec. Dig. ⇐80, 81.]

The bill states that in the year 1789, the complainant Ann, intermarried with George Wilson, then lately from Great Britain. That she was possessed of a number of negro slaves and other property, of which said Wilson possessed himself, and appropriated to his own use. That sometime in the year 1791, the said Wilson died intestate, leaving no issue or relation in the state. That said Ann being then under age, John Withers, her brother, administered on George Wilson's estate, duly returned an inventory and appraisement, and with permission from the ordinary, sold the same at public auction, and said Ann purchased thereat negroes and other property to the amount of 912*l.* 7*s.* 6*d.*

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for which, accord*ing to the conditions of sale, said Ann was to give a bond and mortgage: but said administrator having choses in action of said estate to a considerable amount, more than sufficient to pay its debts, and leave a large balance; and knowing that according to law, the said Ann was entitled to one half of the residue, never demanded her bond and mortgage, being willing to leave the same in her hands as part of her distributive share, and accordingly delivered the same to her, debiting her for the amount. That affairs continued thus until the defendant arrived from Great Britain, and produced a writing said to be signed by said George Wilson, under which he pretended to claim said Wilson's whole estate. That said administrator suspecting the authenticity of such paper, applied to counsel, and received for answer, that no court would permit the widow of said Wilson to be ousted of her distributive share, by a paper of so doubtful a complexion; whereupon the said administrator gave defendant notice he would contest his claim. That all he wished was to secure his sister Ann one half of the personalty of said Wilson, and her dower in the real estate. That if the defendant would agree to settle all matters by an equal division of the estate after payment of debts, he would release to him his administratorship. That defendant consented to his offer, and agreed to convey and secure to said Ann one half of the personal estate of said Wilson, and to put her in the same situation as if said Wilson had died intestate: whereupon in order to bind himself to said agreement, said Henderson entered into a certain bond to that effect. That in pursuance of said agreement, the said administrator released to said Henderson the administrator-

ship, and made no opposition to his proving said paper as a will, as executor. That said Withers also delivered up to defendant choses in action to a large amount, being the whole of said Wilson's personal estate: and defendant has ever since acted as sole executor, and received divers sums of money which he hath applied to his own use. That at the time or soon after the completion of said settlement, said complainant, Ann executed to defendant a bond for 456*l.* 3s. 9*d.*

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being *the amount of half her purchases, and gave a mortgage of sundry negroes as a further security: but charges that the same was given merely for securing one half of the purchases to defendant in case he should not be able to recover so much money on account of said estate; and defendant when she was about to execute said bond promised he would apply one half of the monies he should receive on said estate to the discharge of said bond and mortgage.

The bill charges that defendant hath received divers sums of money of said estate, but instead of applying them to the debts of the estate, and then one half of the balance to satisfy complainant Ann's bond and mortgage, hath placed said mortgage in the hands of the sheriff of C. T. D. to seize said negroes and sell them to satisfy the same.

The bill prays that defendant account for all money received by him for said estate; and if it should appear that he has been guilty of a devastavit, that he may specifically comply with the condition of his said obligation; and after paying the debts of said estate to give credit on the obligation of said Ann for one half of the balance; and to be restrained from selling the negroes under the mortgage. And that the agreement or compromise may be confirmed; and one half the estate be secured to the complainants.

The answer of George Henderson admits the marriage of complainant Ann with said Wilson. That he died at the time mentioned in said bill, but not intestate. He admits the administration and sale by John Withers. Admits his own arrival and production of the paper in bill mentioned (see exhibit A) whereby defendant is made sole heir and executor of said Wilson. Admits that on producing said will, the administrator and complainant Ann, were disposed to give him trouble; and being informed that by law no property after making a will would pass, and thinking it reasonable some provision should be made for the widow, it was agreed, as stated in bill. That the administration of said Withers was revoked—the bond as mentioned in

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bill given by complain*ant Ann to him, and he qualified as executor. Admits he has placed the mortgage in the sheriff's hands; but previous thereto applied to complainant Jacks for payment of so much of the bond as he was in justice entitled to receive, assuring him that the debts and legacies on the estate were so large as to absorb the whole estate within £400 or £500 and offered to shew him vouchers to prove the same; but said Jacks refused to examine them, and put defendant at defiance, and insisted that defendant should pay out of his moiety, the debt due from said Wilson to his father in Scotland, and also all the legacies; which is unconscionable; as by the operation of the will, the whole personal estate became the property of defendant, inasmuch as said Wilson died before the law took effect which enacted that property acquired after the making of wills, should not pass thereby. Defendant denies he has received large sums of money. On the contrary he has made considerable payments of debts, and is anxious to close the same, and would have done so, had the complainants settled with him. Denies he had any power from the legatees of said Wilson to compromise their rights, or had an idea of relinquishing the smallest part. Believes the claims set up under said will are well founded, and knows of no discount against them; nor that said will was ever revoked. That he has no interest in said legacies; but means to pay them to the utmost, and is ready to come to a fair settlement.

The paper relied upon by the defendant as the will of George Wilson, the first husband of Mrs. Jacks, was executed by him, in Scotland, before he came over to this country and married her. On the face of the recorded copy it is stated, that on the 25th May, in the year of our Lord 1792, James Ross, writer in Perth, proctor for George Wilson, appeared in the presence of David Smyth, esq. advocate, sheriff depute of Perthshire, and gave in a disposition and deed of settlement after inserted. The deed was executed on stamped paper; and he desired the same to be registered in the sheriff's court books, which was done accordingly; whereof the tenor follows. The paper recites that the

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said George Wilson being the heir *of Dr. James Crockatt of South Carolina; and that having arrived at the age of majority, and proposing to leave Great Britain and reside in Carolina, and take possession of the estate and effects of his late uncle, in Carolina; but that as many accidents might occur to prevent the execution of his design, he resolved by a general deed of settlement to prevent any disputes that might arise concerning the estates heritable and moveable in case of his death; and therefore under the conditions and provisions therein mentioned, he sold and disposed to himself and the heirs of his body, all the lands, debts and sums of money, heritable or moveable, that should belong to him at his death; and particularly (without prejudice of this generality) the balance of the price of the lands of Colholl, sold by him to William Mercer,

of Air; and also all the lands in South-Carolina, which belonged to his deceased uncle, Dr. James Crockatt, with the slaves on the plantation, &c.—and all other lands and plantations in that or any other province, country or kingdom that might belong to him at his death, in any manner or way. And on failure of his own issue, he disposed, sold, &c. the said property to his nephew, George Henderson, and his issue; and on their failure with limitations over to other relations. And the said George Wilson in said deed, bound and obliged himself to procure the rights and securities relating to the said lands and subjects thereby disposed of, agreeably to the laws of the country where they lie; and to grant, subscribe and deliver all such writings and securities proper and necessary for vesting the substitutes above mentioned, in case of his death, to be applied for the ends and purposes therein after mentioned, or such other purposes as he might afterwards order by, or write under his hand. And in the first place for the payment of all his just debts—In the second place for making effectual an annuity of £20 during his own life, and the life of his father, and the sum of £50 in case of his death, agreeable to a bond of provision for that purpose by him executed, of that date. And in the third place, for payment of such legacies and provisions as he should make or grant

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to any friend or relation during *his life; and in the event of said George Henderson succeeding him, he bound and obliged the said George Henderson to pay certain sums of money to certain relations whom he names. And moreover in case of his death without lawful issue, he appointed George Henderson, and failing him, certain others to be his executors and universal legatees—and he made over and conveyed to them successively, in the order set forth, his whole debts, and sums of money, goods and effects that he might die possessed of in Great Britain, or America, or elsewhere. And the said deed is stated on its face to be delivered to the said George Wilson's father, David Wilson, to be kept for the behoof of all concerned—and he consented that the paper should be put on record in Great Britain or America. And he appointed James Ross in Perth, his procurator. In testimony whereof he put his hand and seal, before three witnesses, on stamped paper, on the 4th day of August, 1781.

The following is the substance of the bond mentioned in the foregoing paper:

It recites that George Wilson being about to go to Carolina to take possession of his uncle Dr. J. Crockatt's property; and that his father, David Wilson being living and might by the casualties of life, be deprived of support, he thought it his duty to grant this present deed. He binds himself, his heirs and successors to pay to certain persons (whom he names) as trustees, the sum of 20*l.* per annum, from a day fixed, during the said David Wilson's life. And in the event of his (George Wilson's) death, he binds his heirs and successors (named in the paper purporting to be a will or settlement) succeeding to his estate, to pay a yearly sum of 50*l.* for the use of his said father. It was dated on the 4th August, 1781; and he consented to its registration; and it was put on record in Scotland.

The cause came to a hearing in 1797. It was argued by Mr. Desaussure and Mr. W. Johnson for the complainants, that the paper in question, executed by G. Wilson in Scotland, could not be considered, or made to operate, as a last will and testament. That

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it was a mere deed, *operating in part immediately; and making a provision for his connexions. It was a family settlement. It has few of the features of a will, and many of a deed. It was executed on stamped paper, which wills were not then required to be in England or Scotland. See William's abridgment. It was put on record, which is never done with wills, before the death of the testator. A paper having a present operation, as this had, in connection with the bond (which mutually refer to each other) cannot be a will. See Swinburne, 55. Dyer, 166. Here was an annuity granted to George Wilson's father to take effect immediately. To make a paper testamentary, it must be ambulatory—for omne testamentum morte consummatum est; et voluntas est ambulatoria usque extremum vitæ exitum. 4 Co. 61b. A will or testament is a declaration of the mind in disposing of an estate, to take place after the death of the testator. See office of executors, 2 vol. p. 7. 5 Bacon, 497. Swinburne, p. 1, § 2 and 4. Carthew, 38. Lea v. Lib. Comyns, 452, 3. 4 Burn's Eccl. Law, 95. 2 Lord Raym. 1282. Powell on devises, 13, 14. The paper having some of the characteristics of a will, cannot change its essential character, which is that of a deed—And it cannot operate both as a deed, and as a will, for the rules of construction applicable to these two kinds of instruments, are entirely different and even incompatible. Now if this be not considered a will, but a deed, then it cannot operate on any property acquired after making the deed; and the personal property of Mrs. Jacks cannot be swept away from her by this deed—She would be entitled to a moiety of the real and personal property of her husband, not disposed of, as there were no children of the marriage. Her claim is very humble, for she asks only for a moiety of that very property which she carried in marriage to her husband George Wilson. But if this really was intended to be, and must be considered as a last will and testament, it is contended for the complainant, that this paper was a mere provisional will, made on a particular occa-

sion, and was contingent, and became inoperative and void afterwards: and also that if it were a good will originally, it was re-

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*voked by subsequent circumstances. This is not a novel idea. In the case of Parsons v. Lanoe, reported in Ambler, 557, and 1 Vesey, sen. 190, it was decided by lord chancellor Hardwicke, that a will made on the eve of a journey abroad, was a contingent will, made on a special occasion, and for a particular purpose, and was avoided by the testator's safe return. The words of the will however were particular—"Imprimis, in case I should die before I return from the journey I intend, God willing, shortly to undertake for Ireland, my will and desire is," &c. &c. The testator was a married man, but had no children—he returned safe from his journey and had children. He afterwards died without revoking this will. Lord Hardwicke in giving his judgment in the case said, that under such circumstances, no court of equity will give any latitude to support such a will, but will take hold of any words they can, to make it conditional and contingent. He accordingly laid hold of the conditional words in the will, and pronounced it contingent, and avoided by the return of the testator. See also 4 Burr, 2165, Wellington v. Wellington. It might also be fairly contended that the subsequent marriage, connected with the other circumstances, ought to induce the court to consider this as a case of implied revocation. It is true that the decided cases, and our statute, have not yet gone so far as to say that the marriage alone of the man, should amount to an implied revocation of a preceding will, as however is the case on a woman's marrying—but the whole doctrine of implied revocations has grown up by degrees. It was a long time before marriage and the birth of children, were allowed to amount to a revocation of testaments, even of personal estate. The reason and justice of the doctrine afterwards induced its adoption, and its extension to wills disposing of real estate. And we see in Lanoe's case how readily the court seized on any words, to get rid of a will of a married man, in favor of after born issue. So we contend that a will made abroad, having direct relation to the property then possessed by the testator, ought not to be allowed to be set up, after the lapse of many

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years, against a wife, *married in another country, to rob her of all the property she carried in marriage. A woman's will is revoked of course by her subsequent marriage. 4 Co. Rep. 60, 1. Justice requires that the husband's will, under such circumstances as exist here, ought to be considered as revoked. There is no evidence that the original has not been destroyed. It has never been produced: only an official copy from the record in Scotland where it was registered by his proctor. Another point conclusive for the complainant is, that the defendant made a written and formal compromise with Mrs. Jacks, allowing her a moiety of the property she carried in marriage to George Wilson—the other moiety she abandons to him. And he had a right to do so; for he is the first taker under the paper, whether deed or will, executed by George Wilson. He alone is interested to give effect to that instrument; to enlarge its operation, or to limit it. He has done so, and is bound by it. He at least cannot question it. There is no pretence that the property of George Wilson in Scotland, and in this country, inherited from his uncle, is not sufficient to satisfy the provision for the father under the bond he gave him, and to pay his debts.

Mr. Edward Rutledge for the defendant, argued, that the paper was a will. It gives legacies, appoints executors, and is to take effect after death. These are decisive marks of a will. This has been admitted to be a will, and has been proved as a will by the consent of the complainant, in the court of ordinary. The spiritual court is the proper tribunal to decide on the character and validity of papers set up as wills. See 1 Atk. 560. 7 Bro. P. C. 319. And this is the settled course in this country. The act of 1789 expressly gives the probate of wills to the ordinary, with appeal to the courts of law. Then it has been established as a will, and cannot now be shaken—and we can only look to its operation. It is full and complete, and disposes of every thing which the testator then possessed, or might afterwards acquire. And as the marital rights gave the husband the absolute right of all his wife's personal estate reduced to possession, the will attaches upon that property, and dis-

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poses of it. As *to the implied revocation, arising from George Wilson's subsequent marriage, no case has ever gone so far. None of the English decisions have been carried to that extent: and that eminent ordinary, Mr. Burrows, of Charleston, decided expressly in Mr. Hugh Wilson's case, that marriage alone, without issue, did not amount to an implied revocation of a prior will. And our statute in providing, that marriage and the birth of issue should amount to a revocation, decides by implication at least, that nothing short of marriage and issue, should have that effect. As to the agreement, the defendant has explained it in his answer; and his answer is not contradicted by any testimony. The compromise cannot affect those in remainder; and G. Wilson's debts are yet to be paid.

The chancellors took time to consider the case, and afterwards Chancellor RUTLEDGE delivered the following decree of the court:

The bill states, that complainant Ann Jacks, then Ann Withers, in the year 1789

married one George Wilson. That he died in 1791, without having either before or after his marriage, as complainants contend, made a will or leaving any issue or relation in this state. That letters of administration were granted to her brother John Withers, who sold the personal estate by permission of the ordinary—And that she purchased to a considerable amount. That some time afterwards, in the year 1794, defendant arrived from Great Britain, produced a certain writing said to be a will, and signed by the said George Wilson, dated 4th August, 1781; under which he pretended to claim the whole of the estate, real and personal. That defendant having received notice from the said John Withers of his intentions to contest his claim under that paper, unless he would agree to certain proposals made by said Withers; the said defendant agreed to secure to complainant Ann, one half part of the clear residue of the said Wilson's personal estate, after paying his debts; and accordingly executed a bond to that effect and for that purpose; in consequence of which the said John Withers withdrew his opposition, and permitted defendant to qualify as executor, and then gave

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up to him all *the bonds, notes and other papers, relative to the said estate. That soon after defendant executed the bond abovementioned, complainant Ann signed one to defendant for £456 3s. 9d. being half the amount of her purchase, and gave him a mortgage for securing payment of the said sum. That the said bond and mortgage were given solely for securing payment of one half of the purchase, in case the defendant should not recover so much money on account of the estate as would be equal to the amount of her purchase; and that defendant at the time of executing the bond, promised he would apply one half of all the money he received above the payment of the debts of the said George Wilson, to the discharge of her bond and mortgage. That instead thereof, he had applied the money received to his own use, and placed the mortgage in the sheriff's hands, to seize and sell the negroes. The bill therefore prays an account and injunction. The defendant admits the marriage of G. Wilson with complainant Ann, and his death; but not that he died intestate: on the contrary he exhibits an instrument of writing, which he calls a will, wherein he is made sole heir and executor of the said G. Wilson, chargeable however with payment of his debts and legacies. Defendant admits that complainant Ann being disposed to contest the validity of the will, it was agreed that she should have one half of the clear residue of the personal estate, after payment of all incumbrances—the letters of administration were then revoked, and he qualified on the will. He denies that he had any authority from the legatees to compromise their rights, or that it was his intention to do so; and avers that he fully intended by his contract with complainant to allow her one half of the clear residue of the personal estate, after paying the debts and fulfilling the said G. Wilson's testamentary dispositions, and does not know or believe that the will was ever revoked. It is necessary here to refer to the paper writing mentioned in bill and answer, and state particular facts, before the questions for the determination of the court are stated.

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*George Wilson was a single man when he executed this paper. He came over to South-Carolina afterwards; and in 1789 married complainant Ann, with whom he lived until he died in the year 1791, without leaving any issue. It does not appear that he ever made a will in this state, or signed any other writing, disposing of his estate; nor is there any evidence of his having ever spoken to any person about the paper above recited.

Upon this case the general question was, whether under these circumstances, this paper writing was to be considered as a will still subsisting? Under that, two others arise. First, whether this writing is merely a conditional contingent instrument of disposition, depending on the event of G. Wilson's death before he arrived in Carolina, or whether absolute and subsisting in all events? Secondly, supposing it absolute, whether the great alteration in his circumstances by a subsequent marriage seven or eight years after making it, will amount to a revocation thereof, so as not to be subsisting at his death?

For complainant it was contended, that this paper was nothing more than a conditional disposition by deed of the estate, on certain contingencies, which never having happened, it became null. On the other hand it was objected for defendant, that this paper was a will duly executed. That it is not essentially necessary to make use of any particular form of words in drawing wills, provided the intention of testator to dispose of his estate, is evidently and plainly shewn. It was also insisted, that this paper has been proved in the court of ordinary, where its validity as a will, was properly and only determinable. On reading this paper with attention, it is evident that the only words in the whole instrument that give it the smallest resemblance to a will, are those wherein he names and appoints the defendant and several others, successively, sole executors, and universal legatees; for in every other respect, it has the form of a deed. It cannot however be denied, that a man may make his will in any form he pleases, provided he complies with the formalities required by law.

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It is equally true, that by long *usage the ecclesiastical court has become the proper, though in this state not the only court wherein a will of personal estate is to be proved,

and its validity contested; but this court has a power to set the will aside for fraud. This case is singularly circumstanced. A paper writing, now for the first time called a will, is proved and recorded in Scotland as a deed. The party who is injured by it, has no opportunity of contesting its validity there: and a copy of it some years afterwards is brought here by the person claiming the estate under it, who when he finds that its validity as a will is about to be disputed, makes a compromise with the widow and gives her a bond, agreeing to allow her one half of the clear residue of the personal estate, after payment of debts: he is then permitted without opposition to qualify before the ordinary, who not having investigated the business, in fact has not determined on the validity of the will. We must here observe that the defendant comes with an ill grace to make this objection, after the compromise he has entered into; because it is doubtful whether the ordinary would have granted him letters testamentary, and qualified him as executor under the paper, if the complainant had made opposition: and defendant fearful of this, seems to have made this compromise in order to lull the complainant into a deceptive security, until he had obtained letters testamentary; supposing that the probate being once gained, no other court had the power to set it aside. The paper having been qualified under as a will, before the ordinary, the question for consideration is, whether it is merely a provisional contingent disposition, or absolute and subsisting. Here reference must be had to the instrument itself; from which it is evident that the whole of it, except the clause which provides the annuity for his father, is contingent and eventual; for he sets out with declaring his intention to leave the kingdom and reside in Carolina; but as many accidents might occur to prevent the execution of his design, he made that deed as he calls it to prevent any disputes that might arise about his estate, in case of his death. What those accidents were, he does not men-

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tion; but we must presume them to *be such as might befall him and occasion his death before he arrived in Carolina, not contemplating that the paper was to have any efficacy if he should arrive safe. That it was not intended to be absolute is further evident from his reserving the estate to himself and his heirs in the first instance, with the power of making such alterations as he should afterwards order by witnesses under his hand, in giving legacies or making future provision for any friend or relation during his life. The case of Parsons and Lanoe, is very nearly similar to this, but much stronger; for in that the testator, after some pecuniary legacies, gave the rest of his estate to his wife: in this the bequest is unto nephews and nieces. There lord Hardwicke determined the will to be a provisional contingent disposition; and it is observable also that although the testator had two children born after his return from Ireland, yet the lord chancellor would not make that great alteration of circumstances, the ground for his decision, but chose rather to found his decree upon the words of the will. This will then, being so penned, we are of opinion that the disposition is merely provisional and contingent; which not having happened, the disposition of the estate cannot take place: the rather too as it does not appear that he did any act after his arrival here expressive of an intention to confirm it, or even mention to any of his friends in this state the existence of such a paper; and nothing will set it up but some act done by him after that event to republish it, or defeat the condition. Indeed it is presumable from the length of time that elapsed after its execution, that he considered it as a mere nullity, and altogether inoperative—we must either presume that, or that he intended a fraud upon his wife, with whom he lived in harmony for two years after his marriage. As this will therefore was merely contingent and eventual, it is unnecessary to give an opinion upon the second question; but it has never yet been determined that marriage alone will amount to a revocation of a will of personal estate; at least there are no cases in the books, wherein the question has been immediately before the court; for all the cases

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that we have examined from Lug *and Lug in 1699, to that of Lancashire and Lancashire in 1792, have been on the question of marriage and the birth of children, either in testator's lifetime, or posthumous children; and the judges in the several courts have uniformly declared that marriage simply, and alone, has not yet been held to be a revocation of a will of personalty. The legislature having by law recognised the doctrine in its utmost latitude, that marriage and the birth of issue, is a total revocation of a will, it may be a subject worthy their serious attention to settle the question, whether marriage alone shall be a revocation of a will.

The injunction therefore must be continued until a liquidation of defendant's account by the master, and further order of the court.

1 Desaus. 557

Case CXX.

Present—Chancellors Mathews and Rutledge.

CHARLES and THOMAS DRAYTON, Executors of John Drayton, v. GLEN DRAYTON, and M'CREDIE and Others, Creditors of Glen Drayton.

(September, 1797.)

[*Executors and Administrators* ⇐308, 318; *Wills* ⇐716.]

Executors who were also residuary legatees, divided their testator's estate among them: except some parts which they sold, and became purchasers. One of them contracted debts and judgments were obtained against him, and he became insolvent. The other executors are solvent: they filed a bill against their co-executor, and his creditors, to subject the estate he had received from his testator's estate to his testator's debts and legacies still unpaid. It was decreed that the assent of the co-executors to their legacies had so far vested the personal property, (though not the real) in the legatees, that the executors could not pursue the assets, and take them from the creditors of the co-executor who was insolvent: but they, the solvent executors, who had assented, were liable to the testator's creditors.—The will of the testator having charged, the whole of his real and personal estate with the payment of his legacies to his minor children: that part of the estate which came into the hands of the insolvent executor as one of the residuary legatees is still liable to those legacies. Executors selling property, and a co-executor purchasing: the property is changed, and is liable to his creditors. The co-executors not requiring bond and mortgage, are liable.

[Ed. Note.—Cited in Stallings v. Foreman, 2 Hill, Eq. 405, 407.

For other cases, see Executors and Administrators, Cent. Dig. §§ 1263, 1319; Dec. Dig. ⇐308, 318; Wills, Cent. Dig. § 1709; Dec. Dig. ⇐716.]

This was a bill filed by the complainants under the following circumstances. John Drayton being possessed of very large real and personal estates, made and executed his last will and testament, wherein after giving several legacies to his wife and daughters, he devised and bequeathed certain estates and property to his son John, and on his death, under age, and without issue, to his sons William Henry, Charles, Thomas and Glen. He also devised and bequeathed the remainder of his estates, real and personal to his said last named sons. They all survived the father: William Henry died soon after, leaving issue. John died under age, and unmarried;—and the property bequeathed to him fell to the sons, according to the will. The sons Charles, Thomas and Glen, qualified as executors on their father's will, and possessed themselves of the whole estate, real and personal.—Knowing that the estate

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was very large, amply sufficient *to pay the debts and legacies, and to leave a considerable estate to them, they divided a good deal of the property among themselves, and sold some of the unproductive lands, of most of which they became purchasers. Glen Drayton, one of the sons and executors, held his share of the estate many years, (as the other sons did,) treated it as his own property: sold some of it to third persons; contracted debts, &c. Some of his creditors brought suits against him, obtained judgments, issued executions, and in some instances levies were made on the property which came to him from his father's estate. His brothers and co-executors being alarmed lest his private creditors should sweep away all the property, and leave nothing to pay his proportion of the father's debts and legacies, (which were considerable,) the payment of which would then devolve on them, filed their bill against him, and several of his judgment creditors, to subject the property to the payment of the debts and legacies of the father, in the first instance. The creditors of Glen Drayton contended that the property had vested in him, and that some of them having obtained judgments against him, and caused levies to be made on the property, have acquired a lien, which cannot be taken away: and that they were all entitled to be paid.

The cause came to a hearing in September, 1797, and was argued by Mr. E. Rutledge, and Mr. J. Parker, for the complainants. They contended that the creditors and legatees of a testator have more than a personal demand on the executors; they have an equitable lien on the very assets of the testator. And this lien, or equitable right, yields only to purchasers who have an equity to rebut such equity. And this right or lien is stronger where the executor is also residuary legatee. His assent to his own legacy cannot prejudice the creditors of the testator, or his other legatees. A creditor may follow the assets into the hands of a legatee, though vested in him by the assent of the executor.—The court will follow the assets as far as possible, unless mischief results to third persons. If the executors are solvent, the court

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relying on their liability, might not *pursue the assets. But here, Glen Drayton, one of the executors, is insolvent, and his effects cannot pay the whole of his share of his father's and testator's debts.—Where an executor sells assets of his testator to pay his own debts, the creditors of the estate may follow the assets into the hands of the purchaser; especially if he knew that testator's debts were unpaid. 2 Vernon, 616. 1 Atk. 463, 4. All assignments, or sales by an executor, fraudulently made, are void. 3 Atk. 240. And however the court may favor bona fide purchasers from executors or legatees, yet whilst the legacy remains in the hands of the legatee, it is liable to creditors of the testator. See 1 vol. of Cas. in Chanc. 257. To sanction the misconduct and sales and assents to legacies by executors, and to make them liable as on a devastavit, which is a mere

personal claim, would be very mischievous to the creditors of the testator. Glen Drayton's own assent would have vested the property bequeathed to him, as much as the assent of the other executors. Their assent therefore was of no importance. If he stood sole executor, would his assent in his own favor as legatee, vest the property in him to the prejudice of the creditors of the estate? Surely not yet this is substantially the case under consideration. A person taking by operation of law, stands on the same footing with the person from whom he takes by such operation. See 1 Vesey, 239, West v. Skip. The creditors then of Glen Drayton, who claim a lien by operation of law, stand in his place; and in his hands the assets of his testator might be followed to pay his debts. The funds of the testator are legally and rightfully bound to pay his debts first; and this right of his creditors to be paid, ought not to be shaken but on the strongest grounds. So in cases of partnership, the joint funds are first liable to pay the joint debts. The conversion or change of them by one partner, shall not deprive the copartnership creditors of the benefit of this rule. The case of Laurens v. the executors of Hawkins, [1 Desaus. 144,] decided in this court, shews the extent of this doctrine. It would be very hard on the executors, that they might be ruined by the act of a co-executor, without

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any fault on their part. They knew *their testator's estate was large, and could not refuse their brother and co-executor to take his share of it; but surely subject to the testator's debts. What could they have done with the estate? If they had kept it together undivided, it might have been wasted in that way by the operations of the war, by neglect, by various accidents.—The creditors of Glen Drayton must have known that he got his estate from his father, and that it was liable to his father's debts. If they credited him, it was at their own risk. Executors are liable only for their own misconduct, not for that of others. The complainants come before the court as legatees as well as executors; and legatees may come and oblige other legatees to refund or abate. See 2 Eq. Cas. 554. 2 P. Wms. 446. But they come in also for the benefit of the creditors of the testator. If Glen Drayton's creditors are entitled to be paid before the testator's, because his co-executors assented to the legacy, the same may be said as to Charles and Thomas Drayton's creditors, and the father's debts and pecuniary legacies may go wholly unpaid. As to Glen Drayton's return of the property to the tax office, it was unavoidable. A division had been made, and he was in possession. He could not make a special return and say, that he obtained the property from his father, and it remained liable to his debts. This is never done by legatees, or ever by mortgagors or mortgagees. The case of the creditors of Glen Drayton, is not so strong as that of purchasers: a creditor must always take the property of his debtor subject to its equity. Glen Drayton had other property acquired by his wife, to which they might have trusted in crediting him. The equity set up by the creditors of Glen Drayton, who are defendants, is ideal and unfounded. They are neither purchasers nor mortgagees, who would be too strong for the complainants but mere creditors, who trusted to the character and person of Glen Drayton.

The negroes purchased at the sale by Glen Drayton, are still liable—he did not pay for them. His creditors must therefore pay for the property, if they take it.

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*Mr. Pringle and Mr. Desaussure argued for the defendants.

Executors cannot make a legatee refund, unless the payment to the legatee was compulsory. 2 Vern. 205.—On a voluntary payment to a legatee, the executors will be personally liable to the creditors. Vinter v. Pix, 1 Chan. Reports, 71, 133. Tilsy v. Throckmorton, 2 Cha. Cas. 132. 1 Vernon, 90, 453, 460. If the deficiency arises from the executor's wasting the assets, the legatee who has recovered his legacy, shall not be compelled to refund. 1 P. Wms. 495. See also Sadler v. Hobbs, 2 Bro. C. C. 114. Scarfield v. Howes, 3 Bro. C. C. 90. And though the rule is, that creditors who are unpaid, and the assets fall short, may compel legatees who have been paid to refund; (1 Vern. 162,) yet executors cannot, if they paid the legacy voluntarily. 2 P. Wms. 296, Coppin v. Coppin; and 2 Vesey, 194, Orr v. Kaimes. Where a party has lain by for a great length of time, and suffered an estate to be distributed, he shall not have an account. See 4 Bro. C. C. 257, and the cases cited. A fortiori, the executors who made the distribution cannot. The executors are liable to the creditors of the testator for the assets, and there is no pretence that they are insolvent. They are men of large property, derived entirely from the testator's estate. Even if the executors had a right to call on the legatees, to whom they made a voluntary payment or delivery to repay, they would stand only as simple contract creditors. But they desire in this case, to be preferred, even to the judgment creditors of Glen Drayton: nay, they even sold and delivered some property of the estate to Glen Drayton, for which they neither took bond nor mortgage; yet they expect to be allowed a priority over his judgment creditors. It is admitted that the executors have abundant assets to pay the creditors, yet they have not paid them: but they ask the court to aid them to compel the application of the estate of a legatee, to whom they voluntarily delivered it, to refund at the expense of his creditors, even of his judgment creditors who have liens.

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*By the common law, which was the law applicable to this case, at the time it arose, the executor could sell the assets, and the bona fide purchaser would be protected even against creditors; and even if the executors wasted the money received on the sale. The executors having assented to the legacy, and divided the estate, and delivered Glen Drayton his share, he held it as his property; and third persons, his creditors, have become interested in it. These would be injured, if the assets could be followed. But some of the decided cases say, that the assets can be followed where third persons have obtained an interest in them by purchase, or by obtaining liens on them by way of mortgage or executions.

The parties have slept too long on their rights, if they had any. It is nearly twenty years since testator's death. See 4 Bro. C. C. 125, respecting purchasers from executors. The cases quoted from 1 Atk. 463, 4, and from 3 Atk. 240, for the complainants, are more favorable for the defendants.

Chancellor MATHEWS afterwards delivered the decree of the court.

The first and most material point in this cause is, whether the division of the estate by the executors of J. Drayton, was such an assent by the present complainants, as executors, to the legacy of G. Drayton, as will extinguish any right they might have had under different circumstances, to that relief they have prayed for by their bill? The second point is, how far, if at all, they are liable for any act done by them to the prejudice of the rights of the creditors and other legatees of J. Drayton? It appears on the face of the proceedings that the executors and complainants Charles and T. Drayton, and the defendant G. Drayton, in the year 1779, agreed to make a division of their testator's estate, conformably to the dispositions pointed out by his will, for the reasons by them assigned, previous to their having ascertained or paid their testator's debts and other legacies; on a mutual understanding that each was to be responsible for his proportion of debts and legacies. Glen Drayton having thus drawn out his proportion of his

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father's estate, and being *in full possession thereof, contracts considerable debts; they have been prosecuted to judgment and execution, and even levies made on some of them; but further proceedings on them have been enjoined by this court, till the hearing of this cause. As to the first question, it being a novel one, great ingenuity has been displayed by the counsel in their arguments on it; and they have referred to a vast variety of cases from the books, for the purpose of establishing certain great standing principles. But no case has been, nor do we think there is any which can be assimilated to the present, which has received a solemn adjudication. It has therefore been necessary for us to trace this truly important question into all its ramifications with great minuteness, and to decide with caution. We already foresee that the conduct of the present complainants, is not alone implicated in the present question, for we have good reason to believe that the same has been the conduct of other executors similarly circumstanced. However, our duty confines us simply to the case before us; and the rules of law, and not policy, must be our guide. There are few principles of law better settled than this: that an executor assenting to, and the legatee being put in possession of his legacy, and alienating the same, it never can be followed as assets of the testator into the hands of the purchaser. But it is contended, that the legacy which went into the hands of Glen Drayton, not having been disposed of by him, and being still in his possession, is in its essence the same as it originally was, and is subject to that legal lien which was attached to it by the testator's will, viz.:—the payment of his debts and legacies in the first instance. And it was further contended, that as an executor, G. Drayton had a right to possess himself of his own legacy without the consent of his co-executors. On the other hand it has been contended, that although there has been no formal alienation by G. Drayton himself, yet the law has made such a disposition of this property, as will as effectually wrest it out of his hands, as if he had disposed of it in ever so formal a manner; for the division of the testator's estate, was an assent of

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Charles Drayton and Thomas *Drayton, two of the executors, to the legacy of G. Drayton; and his possessing himself thereof, enabled him to obtain a credit on this visible property, and made it liable to the judgments and executions of his own creditors, and which have created such a legal lien thereon as they cannot be divested of at this time; provided there are assets sufficient of the testator in the hands of those executors who thus assented, to pay his debts and legatees: and that these are sufficient, is not denied. That as to his being an executor himself, and having a right independent of the assent of his co-executors to possess himself of his legacy, that cannot avail the complainants in this case, because they were privy, and assenting to his taking his legacy. It is with reluctance we pronounce the latter argument to be well founded, and must prevail: we say with reluctance, because we think the case of the complainants a very hard one; they must become severe sufferers by their misplaced confidence, and in whom? In a brother. But as it is their misfortune to have done so, they are bound to abide the consequences; and however we may regret the inconvenience resulting to them, a superior duty calls on us to say, that by the divi-

sion of their testator's estate under their immediate sanction, and their permitting G. Drayton to possess himself of his part thereof, in the unlimited and uncontrolled manner they did, was to every legal intent such an assent on their part as must subject them to all the disadvantages growing out of such incautious and untenable conduct.—In the exercise of the office of an executor, great caution ought to be used; for the law subjects them to such penalties for small deviations from those rules, it prescribes for their conduct, as renders it obligatory on them to act up to its rigid rules, if they wish to avoid after inconveniences. The predicament in which the present complainants stand, verifies the observation; for had they done what the law directed them to do, which was to pay the debts of their testator, before they proceeded to a division of his estate; or if after a division, they had entered into proper mutual engagements for so doing, and made it an act of general notoriety, much might

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have *been done in their favor; but on the contrary to suffer G. Drayton to possess and incumber that part of the estate he was entitled to in the manner he did, was a degree of negligence, such laches on their part as never can entitle them to that relief, merely as co-executors or co-legatees, which they come here to ask for, to the prejudice of bona fide judgment creditors of Glen Drayton, who, we must presume, had trusted him on the faith of a large visible estate, which for aught they could come to any legal knowledge of, was unincumbered with any other than his own debts.

Our opinion on this point is, that the division of J. Drayton's estate by his executors, was a reciprocal assent of the executors to their taking their several legacies; and that the capacity of the executor sunk from the moment of his receiving his legacy into that of a simple legatee uncontrollable by the co-executors: and in no other point of view can it be taken, for the assent of at least one executor is indispensable to the acceptance of a legatee, and his peaceable enjoyment of his legacy; for should an executor legatee take his own legacy before the debts of his testator are satisfied, might not the other executors, by legal means, compel him to restore the assets of the testator, until his debts are fully ascertained and paid? We think they might. In this case, G. Drayton was for many years in the peaceable enjoyment of his legacy, without any act done by the other executors to intercept him in such his possession. We shall next consider the effects of such possession. It is a well known rule in law, that if a man assigns his property to a creditor for valuable consideration, and the creditor permits him to remain in possession of it, and he afterwards claims a credit on that property, and the creditor is ignorant of such assignment, that the subsequent creditor shall be preferred in the payment of his debt. So here, G. Drayton having obtained a credit on the property in his possession, his creditors unapprised of any other incumbrance, acquire a legal lien thereon by judgment and execution. They certainly cannot, upon any equitable principle, be divested of such lien by the present

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com*plainants, merely to save them harmless, for an act of imprudence committed by them to the injury of unoffending bona fide creditors, whose rights are in this court, always favored and protected. As to the second point, it is unnecessary for us to take any particular notice of the claims of G. Drayton's creditors, as to his real estate; as it is too well understood, that the real estate which came to him by his father was not under the control of his executor, they can therefore have done no act which exempts it from the payment of their testator's debts and legacies. G. Drayton's creditors can consequently come in for no greater interest in that part of his estate than he himself had; and as it was liable in the first instance in his hands, for the payment of his testator's debts and legacies, so must it continue under the judgments obtained by his creditors. We must also consider his part of the personal estate as liable for its proportion of the legacies of the minor children; because the testator has by his will expressly charged the whole of his real and personal estate with the payment of his legacies; which will, being recorded in the secretary's office, (where all wills were formerly deposited,) it was incumbent on G. Drayton's creditors, as he derived all his estate from his father, to see whether he possessed it, subject to any conditions or limitations; and if they did not, they must blame themselves for the neglect; and because the executors complainants cannot be charged with any improper or unnecessary delay or neglect, in not raising the legacies of the daughters before G. Drayton had incumbered his part of the estate, for the daughters were not entitled to their legacies until 21, or day of marriage, a contingency, which might or might not happen; but as they are both married, and application has been lately made to this court to have the legacies raised, it has been so decreed; and lastly, because as the executors who are considered as trustees for the legatees, took the whole estate real and personal, burthened with the trust created by testator's will, the creditors of Glen Drayton then standing in his place, must take the personal estate subject to the same trust, and all the equity it was liable to in

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his *hands. As to G. Drayton's purchase at the sale of his testator's estate, we consider it in the same light as that of any other individual; there is no law which prohibits executors purchasing (without fraud,) any

property of his testator at open and public sale; and if his co-executors have been so incautious as not to oblige him to give the security required by the advertisement, but have suffered him to possess the purchased property for a series of years as his own, and have even been privy to his sale of a part of it, and quietly acquiesced until executions had attached upon what was left; it is such an inexcusable laches on their part as this court never can countenance. They have lost that equity which they had, and must submit to the consequences; although if this contest had been immediately between the creditors of John Drayton, and those of G. Drayton, and the executors of J. Drayton were insolvent, this court would support the claim of J. Drayton's creditors, who undoubtedly would have a prior and superior equity to those of G. Drayton's. It is therefore ordered, that the report which has been made by the master in this case, be referred back to him, and that he do state the same conformable to the terms of this decretal order.

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1 Desaus. 567

Case CXXI.

Present—Chancellors Mathews and Rutledge.

THOMAS CAPE and Wife v. B. ADAMS, and Others.

(October, 1797.)

[*Husband and Wife* ⟸29.]

A man marries a girl of 15 years of age without the consent of her guardian. Previous to the marriage, he executed a deed, by which he agreed that her estate should be limited over to his heirs, upon the death of his wife and himself, without children of the marriage. The deed was executed without the privity of his intended wife or her friends. The executor of her father never assented to the legacy. The husband died without issue, insolvent, without ever having reduced the property to possession. —So too of a distributive share she was entitled to, of a deceased brother's estate. The deed is inoperative; and the wife surviving is entitled to the whole against the representatives and creditors of the husband.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 159; Dec. Dig. ⟸29.]

Chancellor RUTLEDGE delivered the decree of the court:

This suit is brought by the complainants T. Cape, and Mary his wife, against the executor of N. Adams, her father, and the administrator of her brother N. Adams, to be let into the absolute and unqualified possession of the legacy bequeathed her by her father, and the distributive share of her brother's personal estate; and also against the administrator of her former husband J. Jaffray, who opposes their claim on behalf of the creditors of Jaffray, in consequence of a deed executed by him previous to his

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*marriage with complainant Mary, whereby her estate is agreed by him to be limited over to his heirs upon the death of the survivors of him and his wife, without children of the marriage: The bill states, and it is admitted, that she married Mr. Jaffray at the age of fifteen years, without the consent of her guardian; that the deed was made by Jaffray without the privity of his wife or her friends, and they are not parties to it. It is also admitted that the executors never assented to the legacy, nor was Jaffray ever in possession of any part of his wife's estate; nor is there any proof in the case that he ever assigned any part of it to any person whatever. Such being the incontrovertible state of facts, the question for consideration is, whether the deed executed by Jaffray previous to his marriage, under all the circumstances of it, shall be obligatory and binding on his wife no way privy or consenting thereto, and transfer her right or interest in her own property to his creditors for payment of debts contracted before their marriage; for it would not admit of any argument, that if he had married without making a settlement, and was obliged to come into this court to get her fortune, he would not have been allowed to receive a shilling unless he had made such a settlement as the court should direct. If then he could not have got the estate without a suitable settlement, is this such an one as the court would have ordered? Certainly not; from the uniform tenor of settlements directed by the court of the wife's fortune, it has been invariably on the issue of her body generally, and not of the present marriage; because it would be both unjust and inequitable to limit the estate of the wife to the issue of the first marriage, in exclusion of those which she might have by a future husband. If therefore Jaffray had come forward to demand his wife's fortune under such a deed as the present, accompanied with all the unfavorable circumstances which attended this transaction, he certainly would not have obtained the aid of this court. His creditors therefore standing in his place, can be in no better situation than he would have been; because they must take the estate, subject to all the incumbrances that it would

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have *been liable to in his hands. None of the cases respecting the assignees of bankrupts are applicable to the present; because it does not appear that any of Jaffray's creditors have any legal lien upon his estate. The case of Jewson v. Moulson, which is a very strong one, and has very many of the circumstances attending it that this has, does not immediately apply, because there the husband had disposed of the whole of his wife's property for a valuable consideration. In the case before us, there has been no assignment: yet, even in the former case, the lord chancellor obliged the assignee to come

to terms. In this case, however, so far from Jaffray's creditors having any lien or claim upon this estate, he himself, by the deed which he executed, has expressly declared that it should be considered as a separate and distinct estate from his own, and no ways liable to the payment of any of his debts: but it is unnecessary to refer to books for authorities in this case, because the determination of this court, in the case of the administrator of Harleston v. Hamilton, [1 Desaus. 244,] furnishes a precedent, and is directly in point. In that case, Harleston, by a marriage bond, agreed to settle half of his wife's fortune upon her; and she became entitled after her marriage to a considerable personal estate under the will of her brother, which was never reduced into possession by Harleston—he died insolvent. His administrators in behalf of creditors, filed a bill in this court against his widow, in order to obtain possession of this property. The court decreed that as Harleston had never reduced it into possession, upon his death, it survived to his wife. So in the present case, as the executors have not only never assented to the legacy to the complainant, but have always objected to the inadequacy of the settlement made by said Jaffray; and as the administrators of N. Adams the younger, never did make any division and settlement of his estate; and as Jaffray, in his lifetime never reduced the estate into his possession, and could not receive it without the assent of the executor or the aid of this court; we are therefore of opinion that the whole of it on his death survived to his wife the complainant Mary. Let the plea be overruled,

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and refer it *to the master to state the account of the executor and administrator; and as the complainant Mary is still a minor, report a proper settlement to be made by complainant T. Cape. Costs to be paid out of the estate.

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1 Desaus. 570

Case CXXII.

Present—Chancellors Mathews and Rutledge.

SHACKLEFORD and MARY, His Wife, v. BUCHANAN, Executor of Collins.

(October, 1797.)

[*Executors and Administrators* ⟸298.]

Testator bequeathed £1000 and several slaves to his granddaughter Mary; but if she died before she attained 21 years, the legacy was limited over to others. The daughter is married, but has not attained 21 years. Decreed that the £1000 be paid, and the slaves delivered to complainant, and his wife Mary, on his giving security to refund, in case of his wife's death under 21 years.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1217; Dec. Dig. ⟸298.]

[*Trusts* ⟸127; *Wills* ⟸865.]

Testator devised the residue of his real and personal estate to his daughter Eliza; but if she died without leaving a son named J. Collins, he devised over the same to the eldest son of his granddaughter Mary, who should be named J. Collins. The estate must accumulate for the benefit of the person, who should ultimately take. The executors to place the income out at interest, under the direction of the master.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 170; Dec. Dig. ⟸127; Wills, Cent. Dig. § 2197; Dec. Dig. ⟸865.]

Chancellor RUTLEDGE delivered the decree of the court:

The complainant's bill is for the purpose of obtaining payment of a legacy of £1000 and several negroes bequeathed her by her grandfather, J. Collins, and to be quieted in the possession of the real estate of the testator, as heiress at law; and that they may receive the profits thereof, until the person comes in esse, to whom it is limited on a certain contingency. The defendant, executor of Collins, demurs to the bill for two causes: First, because the complainant Mary is not entitled till she attains twenty-one years, to the legacy; it being limited over, in case she dies before that age, without having issue: And secondly, because the limitation over of the remainder of the real and personal estate (devised and bequeathed to testator's daughter, Eliza Collins, but if she should die without a son who should be named J. Collins, to the eldest son of his granddaughter Mary Collins, one of the complainants, who should be named J. Collins,) although depending upon a possibility, yet not being too remote, is valid and operates to create a trust, both in the real and personal estate, in the executor, to answer the intention of the testator. This cause came on to be argued upon the demurrer. The first cause of demurrer was however but slightly touched upon, the defendant's counsel declaring his client was satisfied to pay over the legacy, and give up the possession of the negroes, if the court thought proper

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to decree it, on condi*tion that security be given by the complainants, to refund the money and return the negroes, if the complainant Mary did not attain her full age, or leave issue. As the court on a petition preferred some time ago by the father of the complainant, for an allowance to be made her out of the interest of the legacy, for maintenance and education, directed that she should have the whole interest of the £1000 for that purpose, we are of opinion and decree, that the £1000 should be paid, and the possession of the negroes be given up to the complainants, Mr. Shackleford and Mary his wife, on his giving security to be approved by the master, to refund the money and return the negroes, if it should be so directed at a future day, by the decree of this court. Upon arguing the second cause of demurrer,

the merits of the case have been fully gone into, and the doctrine of executory devises and contingent remainders elaborately discussed: but we think that it would be premature to determine in this case, the question whether this is an executory devise, or a contingent remainder; because the rights of persons would be implicated, in such determination, who are not before the court. The only point therefore that we think proper for consideration on the present occasion is, what is to become of the profits of the real and personal estate, till the person who is to take the principal, on the limitation over, is known; it being contended on the part of complainants that the descent of the real estate is cast by operation of law, on the complainant Mary, who is now the heir at law, at least by necessary implication; no person being designated by the will to take in the mean time. Upon reference to the will, although it is somewhat obscurely worded, in the devise to his daughter E. Collins, and also in the limitations over to the eldest son of his granddaughter Mary Collins, it is nevertheless sufficiently plain and clear, to shew that the testator did not intend that his granddaughter should take any part of the remainder of his real and personal estate, in any event whatsoever. In one clause he has made what we suppose he thought an ample provision for her, in the bequest of the £1000 and six negroes; and

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in the imme*diate subsequent clause, he devised to his daughter, who was his heir at law, all the remainder of his real and personal estate, to her and the heirs of her body for ever, with a proviso, that if she should die leaving no lawful heir or heirs of her body, then he gave the said remainder of his estate real and personal, to his granddaughter Mary's eldest son, who shall be named J. Collins. The testator having made provision for his granddaughter in a former clause of his will, and passed her by in this, it is evident he did not intend that she should ever take any part of this remainder of his estate, because he absolutely disposed of the whole of it: and to whom? In the first instance to his heir at law, who would undoubtedly be entitled to the rents and profits. If the heir at law dies without lawful heirs of her body, the testator has devised all the remainder of his real and personal estate to the eldest son of his granddaughter who should be named J. Collins. The testator having then by his will disposed of his whole interest in the estate to the heirs, there is nothing remaining to descend to the person who accidentally might become his heir at law, on the death of the residuary devisee, in which event the limitation over was to take place. By a plain and necessary construction of the will therefore, the intermediate profits of the real and personal estate so devised on contingency, must go to the person who will take the remainder of the estate; and the court will extend the trust which the executor has in the whole of the testator's real and personal estate, and which was created in him for the purpose of paying debts and legacies, in order to effectuate the intent of the testator, and carry it into execution, which would otherwise be defeated.

It is therefore ordered, that the demurrer in this cause so far as relates to the income of the real and personal estate be sustained; and that complainants do forthwith deliver up the possession thereof to the defendant, for the purposes aforesaid. And the said defendant is hereby ordered and decreed to account for the profits of the said estate, which he has heretofore received; and likewise to account annually before the master

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for the *profits which he shall hereafter receive; and that he do place the monies arising therefrom at interest, on security to be approved by the master, for the benefit of such person or persons, as may eventually be entitled to the principal of the said real and personal estate. The complainant to pay his own costs, and the defendant's to be paid out of the estate.

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1 Desaus. 573

Case CXXIII.

Present—Chancellors Mathews and Rutledge.

WAINWRIGHT v. READ, DUPONT, and WARING.

(November, 1797.)

[*Equity* ⇐339.]

The answer and evidence of a defendant who has no interest, receivable to explain the terms of sale, notwithstanding the objection that it is parol evidence, contradicting the advertisement and the deed. It is explanatory, not contradictory.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 691; Dec. Dig. ⇐339.]

[*Auctions and Auctioneers* ⇐7.]

A diminution of 171 acres of high land out of 662 acres of high and swamp land, is not such a deterioration as entitles the complainant to a recision: especially as notice was given at the sale that a claim existed, and that if it succeeded a proportional deduction would be made: and especially as the purchaser had voluntarily renewed the bond in part to a third person several years after the purchase: and the renewed bond has been assigned to another person for valuable consideration. The purchaser is entitled to a deduction for the land taken away: but it must be out of the original bond.

[Ed. Note.—For other cases, see Auctions and Auctioneers, Cent. Dig. § 21; Dec. Dig. ⇐7.]

[*Vendor and Purchaser* ⇐172.]

Interest also deducted till there was a resurvey made by the vender.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 349; Dec. Dig. ⇐172.]

[*Evidence* ⇐415.]

[Where the purchaser of confiscated lands seeks relief by injunction against the bond given for the purchase price and a judgment rendered thereon, on the ground that there is a deficiency in the land occasioned by the claim of a certain person, testimony of one of the commissioners that at the time of the sale it was publicly declared that such person had set up a claim to part of the land, and that, if she established the same, a proportionate deduction would be made from the purchase money, is admissible, notwithstanding the objection that it is parol evidence varying the printed advertisement of sale, which did not mention the claim of such person, and also as contrary to the written entry in the sale book, which states a certain number of acres as sold.]

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1867; Dec. Dig. ⇐415.]

The case was as follows: The estate of Gideon Dupont was confiscated by an act of the legislature for his adherence to the British government during the revolution. A sale of his lands was made at public auction, at Charleston, on the 18th October, 1784, by the commissioners of confiscated estates, to be paid for by instalments in specie. The lands were situated on Deer Creek, and consisted of two tracts, one of swamp, and one of high land. They were divided into two tracts, nearly equal, so that each division might contain proportions of high land and swamp. One tract was sold to Mr. W. Glover, at £3 15s. per acre. This tract was supposed to contain 350 acres of high land, and 312 acres of swamp. The other tract supposed to contain as much swamp and high land as that sold to Mr. Glover, was knocked off to Mr. Daniel Wilson at £2 1s. per acre; but he transferred his purchase to Mr. Wainwright, who assumed the purchase, accepted the conveyances from the commissioners, and gave his bonds for the purchase money.—This tract contained the buildings. It was declared verbally at the sale by the commissioners, that Mrs. Elliott had a claim on part of this tract, which, if substantiated, would induce a proportional deduction of price.

On the 22d of March, 1786, the legislature passed an act to authorize the commissioners of the treasury to assign over to Mrs.

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Jane Villeponteux, the sum of £462 *17s. 7d. out of the bonds of Mr. Wainwright, payable in specie, that were lodged in the treasury for the payment of the debts of the above named G. Dupont, who stood indebted in that sum to his sister Mrs. Villeponteux, for a legacy due to her. See the Public Acts, p. 433. In conformity to this act, the commissioners procured from R. Wainwright a bond, dated the 9th of May, 1787, to Cornelius Dupont, in trust for Mrs. Jane Villeponteux, "payable agreeably to the conditions of his bond to the treasurers in October, 1784."—for which a receipt was endorsed on his original bond in the treasury office, in these words; "Received 12th May, 1797, from Mr. R. Wainwright, his bond, payable to Cornelius Dupont, in trust for Jane Villeponteux, for £499 11s. 10d.—which bond, when paid, will be in part of the within bond; and until paid, stands secured equally with this by a mortgage of land. (Signed) P. Bouquet. This bond was afterwards assigned by Mrs. V. and her husband, and Mr. C. Dupont the trustee, to Mr. John Reid, the defendant, for a valuable consideration. No payments having been made on Mr. Wainwright's bond, Mr. Reid placed it in suit, and obtained judgment on it on the 16th of November, 1789; which was afterwards revived, and execution lodged on the 3d of October, 1791. Mr. Wainwright set up no plea in the suit at law to prevent the judgment; but he filed a bill in equity on the 18th February, 1793, to obtain an injunction and relief against the bond and judgment, on the ground that there was a deficiency in the land which he had purchased, and for which he had given his bond, occasioned by the claim and title of Mrs. Sabina Elliott; and that he was entitled to a rescission of the contract, or a deduction of the price. To the bill of complaint, Mr. Waring, the surviving commissioner of confiscated estates, put in an answer, stating that at the time of the sale, it was publicly stated that it was supposed that Mrs. Elliott had a claim on some part of the land, but how much was unknown; and that if she established her claim, a proportionate deduction would be made to the purchaser.

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*Mr. C. Dupont put in an answer, stating that he was merely a trustee for Mrs. Villeponteux, and had with her consent and for her use assigned Mr. Wainwright's bond which he held in trust to Mr. Reid the defendant, for valuable consideration.

Mr. Reid, in his answer stated, that he knew none of the early transactions of the case; and that he obtained an assignment of the bond abovementioned for valuable consideration; and after some time placed the same in suit against the obligor Mr. Wainwright, and recovered judgment on the same on the 16th November, 1789, which was afterwards revived, and execution lodged on the 3d October, 1791—no defence having been made by the said Wainwright against the recovery of the debt.

The cause was heard and argued before the chancellors; but it appearing to them that an issue at law was necessary. An issue was accordingly directed to try the title of Mrs. Elliott to a part of the land in question; and also to ascertain the quantity which might be deficient, and its value. That issue was tried, and a verdict was returned unfavorable to Mrs. Elliott's claim to any part of the land. But upon a new trial being ordered, the cause was tried a second time, and upon fuller evidence, a verdict was returned

establishing Mrs. Elliott's claim, (then devised to Col. Lewis Morris, and others) to 171 acres of the high land, sold by the commissioners to Mr. Wainwright, which the jury valued at 41s. per acre.

The cause came to a hearing in the court of equity.—Mr. Thomas Waring, one of the commissioners of confiscated estates (who is made a defendant in this case for form sake, having no interest therein) had been examined at the trial of the issue at law, and was again examined in this court. He proved that the commissioners advertised the land for sale generally, without specifying quantities, at so much per acre; and that at the sale it was publicly declared that Mrs. Elliott had set up a claim to part of the high lands, and if she established the same, a proportionate deduction should be made from the purchase money; that a resurvey was promised, and the purchaser called for it once or twice:

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but it was some time *before it was made. He understood and believed the purchaser took possession of the land soon after the sale.—Mr. Purcell and Mr. Glover had also proved that the taking away of 171 acres of the high land out of 350 acres, was a great deterioration of the value of the whole tract sold; that being the principal wood land.

It was contended for the complainant Mr. Wainwright, that the evidence and answer of Mr. Waring, a co-defendant ought not to be received in this court, on the ground that it would be admitting parol evidence to vary the printed advertisement of sale, which did not mention the claim of Mrs. Elliott; and also contrary to the written entry in the sale book, which states the number of acres sold at 662. The verbal declaration said to have been made at the sale, that Mrs. Elliott had a claim which might diminish the quantity, is parol evidence to contradict the written entry, which is inadmissible. See Powell on Contracts, 431. 2 Atk. 384. The cases cited by defendant's counsel, are cases of resulting trusts, which are expressly excepted out of the statute; or fraud and imposition, or palpable mistakes in the deed, contrary to the declared sense of the parties; or executory cases.

For the defendants, it was argued that the evidence and the answer of Mr. Waring were admissible evidence on this point—that Mr. Waring was a competent witness, having no manner of interest in the cause, but being made a defendant merely pro forma, because he as a public officer had sold the land. That this was not one of the cases where parol evidence was introduced to contradict a deed or written paper: that the advertisement in fact contained no particulars, and stated that the terms would be declared at the time of sale, which was accordingly done; and the declaration of the terms at the sale, announcing the claim of Mrs. Elliott, and that a deduction would be made from the purchase money if she established her claim, were the essential terms of the sale, and were receivable in evidence; and that the parol evidence went not to contradict the written advertisement, or the deed by the commissioners to Mr. Wainwright, but to explain and shew what were the real terms of sale; and that

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such *evidence was receivable. The following cases were cited 1 Atk. 447, Hutchins v. Lee. 2 Atk. 98, Walker v. Walker. 3 Atk. 77. Rosewell v. Bennet. 1 Vern. 366. 2 Vern. 252, 506. Cases Temp. Talbot, 78, Mallabar v. Mallabar. 3. Atk. 788. Joynes v. Statham. 3 Bro. C. C. 201, Clinton v. Hooper. 4 Bro. C. C. 472, Cripps v. Jee and al. 1 Fonbl. 188, and the cases there cited. Espinasse, 420. 780. 7 Douglas, 30. Wilson, 313.

The chancellors decided that the evidence of Mr. Waring was receivable, for the reasons given in their decree.

On the merits of the case it was argued by Mr. Pringle and Mr. Parker, for the complainant, that the contract ought to be wholly rescinded; because of the great and important diminution in the land sold, by the establishment of Mrs. Elliott's title to 171 acres of the land. That the loss of so great a part of the high land and wood land, occasioned such a deterioration in the value of the whole tract as could not be satisfied by a simple proportional deduction from the whole price: and therefore the complainant was entitled to an entire dissolution of the contract. And if so, then the bonds given for the purchase money are void, and must be given up, and the injunction perpetuated. The deficiency found by the jury on the issue, is 171 acres, which is nearly half the high land, and great part of the wood-land; without which the tract is of little value. The resurvey, which ought to have been made speedily by the commissioners, was not made for four years after the sale. Till that was done the purchaser could not take full possession and enjoy the whole tract, as the extent of Mrs. Elliott's claim was not known. And until the deficiency was established, the complainant could not file a bill of injunction, for relief against the bond. Therefore there was no improper delay imputable to Mr. Wainwright. The delay in the survey was the fault of the seller; and it was a great disadvantage to the purchaser, as he could neither improve nor sell, from the uncertainty of the title, and of how much Mrs. Elliott's claim might take off. The jury have by their verdict found a diminution of 171 acres, taken

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*away by Mrs. Elliott's better title; but they have not found the relative value of these 171 acres to the whole tract: only the proportionate value of the land taken away to that left, having reference merely to the price originally given, to wit, 41s. per acre. But the court is at liberty to look at the relative value, and to declare whether it is not

so material as to authorize a rescission of the contract. The doctrine that a deficiency which is material, and affects the enjoyment even of the remaining land, will authorise and induce a rescission of the contract, is founded in reason, is supported by the civil law doctrines, and is warranted by the decisions in our own courts, both of law and equity. 2 Bro. C. C. 118; Pool v. Shergold. Espinasse's Ni. Pri. Rep. 150. 1 Eq. Cas. abr. 357, c. 8. 2 Eq. Cas. abr. 685, c. 9. 2 Eq. Cas. abr. 678, c. 1. Glover's case, decided by this court, is similar to this: He bought the other half of Dupont's lands,—the deficiency was only sixty-four acres,—yet the court rescinded the contract, because the highland comprehended all the woodland. It was also argued for the complainant, that if the court would rescind the contract, or deduct from the price, in relation to the vendor, Mr. Reid, who holds the bond in question, and holds it merely as an assignee, cannot stand on better ground. He has no more equity against Mr. Wainwright the obligor, than the state. The assignee takes the bond with all the equity attached to it in the hands of the assignor. 2 Vern. 764. 2 Vern. Coles v. Coles. Mr. Wainwright's new bond, carved out of the old one, stands upon the same footing as the original. But if the court should not think fit to rescind the contract, the deduction made by the loss of the land recovered under Mrs. Elliott's claim ought to be made out of the principal: and interest should be deducted from the whole purchase money, till the quantity of land was finally ascertained by the trial; because the purchaser could not fully use or enjoy the estate, till that was ascertained. See 3 Atk. 637.

Mr. Desaussure, Mr. Ford and Mr. W. Johnson argued for the defendant Reid, that the contract was binding on Mr. Wainwright.

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That the declaration at *the sale, of the existence of a claim to part of the land, and that the purchaser should have a proportionate deduction, in case that claim should be established, formed part of the terms of sale. And he doubtless got the land much cheaper for this notice of a claim on it; for the land was knocked off at 41s. per acre; whereas the adjoining tract of the same quantity and quality brought, 75s. per acre. He could claim nothing more than the proportional deduction, even if the land taken away had been more material to the enjoyment of the tract than it appeared to be. But that in reality the deterioration was not such as would justify a rescission of the contract. That the conduct of Mr. Wainwright prevented his setting up any alleged equity against Reid; for he had consented to give a new bond, as late as 1787, several years after the purchase, for part of the purchase money, for the benefit of Mrs. Villeponteux, who was a creditor of Mr. Dupont, when he well knew that there existed a claim which might take away part of the land. This bond was assigned for a valuable consideration to Mr. Reid, who brought a suit on the bond, and recovered judgment on it, so late as November, 1789, without any objection or plea being set up against it, though a resurvey had been made as early as December, 1788. It is too late therefore for the complainant to set up such a claim now. He acquiesced in all these arrangements; and shall not now be allowed to set up such a defense to the prejudice of a third person. See 2 Eq. Cas. abr. 43, 668, § 8. 4 Bro. C. C. 265, 2 Bro. C. C. 118, 330, 3 Atk. 238.

The chancellors took time to deliberate, and chancellor MATHEWS afterwards delivered the decree of the court:

This cause had been pretty fully argued some time ago, but it then appearing necessary to direct an issue at law to try the right of Mrs. Elliott to a part of the tract of land in question, and also to ascertain the quantity which might be deficient, and its value; that issue was accordingly directed, has been tried, under the verdict now brought up. The cause has undergone a second and very full argument at the bar, and now rests for the final decision of this court.

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*In opening the cause the counsel for the complainant has thrown a stumbling block at the very threshold, viz. a pointed objection to the admission of the answers of Waring, one of the defendants, as evidence in the cause, as it tends to contradict a deed; the admissibility of which kind of evidence, is expressly provided against by the statute of frauds. Our first inquiry then must be, whether the objection is well founded. That the statute of frauds does make the provision here alluded to, there can be no doubt, but whether it is to be taken in the extent, and in the unqualified manner now contended for, we think very questionable. This, like all other general rules, is liable to exceptions; and it is well known that exceptions in a great variety of instances have been admitted; for were all cases brought into this court to be decided on the strict letter of that statute, its tendency would be to promote as much as to prevent fraud; and this is not the first time that this court has found it necessary to make this observation. We will now examine the nature of this evidence, and see whether it will come within those rules of exception which are allowed of. How came Waring into this court? Was he not brought here by the complainant? He was—for he is expressly charged by complainant's bill, as having acted improperly; and he was obliged to come forward with his answer to defend himself: but as it is discovered that his answer goes to such an explanation of the circumstances of the transaction, as might probably lessen or defeat the objects contemplated by the bill, it is

now called that kind of parol evidence, which ought not to be admitted to explain away or contradict his own deed. We have known instances when persons have been made defendants in this court, and who upon the coming in of their answers have been found to be no ways interested in the suit, their answers have been allowed to be withdrawn; but it is the first instance we have ever known, of an application to set aside the answer of a defendant, where it is material in the suit; for in what light is Waring's answer to be taken? He is not the only defendant; nor is it against him that the suit is particularly pointed: it is against another of

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the defendants, *Reid, who having obtained a judgment at law, has been enjoined from proceeding thereon, by this court: and the question now is, whether the complainant has so much equity in his case, as to induce this court to perpetuate the injunction. And to this point of equity, Waring's evidence particularly applies. We cannot garble a defendant's answer, and admit one part, and reject another: he is bound to answer fully; and if he does not, he can be compelled to do so. Having done so, it remains for us only to say, how far it is material, or not; and what weight is to be given to it, when it is before us. Waring swears by his answer, that previous to the land in bill mentioned, being set up at public auction, he explicitly declared, that it was sold subject to a claim of Mrs. Elliott, to some part of the high land; and that the purchaser was to take it subject to that claim. That a proportionate deduction was to be accordingly made out of the purchase money, for what might be afterwards found deficient. That another tract, the moiety of this tract, purchased by Mr. Glover, on which there were no buildings, brought a much higher price than the tract now in question, although there was no difference in the then supposed quantity or quality of the land; that it was necessary to sell some quantity of land; and the quantity named was, to the best of his information the real quantity. And that the commissioners of confiscated estates made it a general rule at all their sales, and particularly at this, to declare that the quantity of land named was to be restricted by the words more or less. To this evidence, it has been particularly objected, that a declaration of the terms of sale, at the time of the sale was improper. That a purchaser is bound by no other terms than those contained in the printed public advertisement. That if such declarations were made at the time of the sale, the complainant neither heard nor otherwise knew of them; and consequently cannot be bound by them. That the original entry in the sale book of the commissioners of confiscated estates, as well as the titles given him by virtue of his purchase, are contradictory thereto; as the quantity of 662 acres are in both in-

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stances mentioned to be *sold, and conveyed to him; but whereas by the survey made, it appears that the commissioners had at the time of sale no pretensions to sell more than 456 acres; and that the verdict of the jury before the court, has now decided the fact to be so. That the quantity of high land, viz. 171 acres thus severed from the tract purchased, containing all the timber and woodland, this loss is such a deterioration of the land, as will entitle him to a rescission of the original contract. As to the printed advertisements relative to this sale, it appears from that, no quantity of land was therein specified; and that the terms of sale were not to be declared till the day of sale. Whence then are we to seek for the terms of sale, if not from the evidence of Waring the commissioner, declaring what they were? Is there any other before us? There is not. Does it go to contradict the deed? It does: but sub modo only; for we must take the evidence altogether, or reject it altogether. In what predicament should we then leave the complainant? Why just where we found him. But take Waring's evidence altogether, it ought with much more propriety to be considered as explanatory of, than contradicting the deed; for he declares that the quantity of acres inserted therein was intended rather to fill up the chasm (we suppose he meant in the advertisement) than to define the precise quantity sold; as some quantity was necessary to be mentioned: but the real quantity was to be ascertained at a future day, and deduction to be made for any deficiency of the quantity then sold. That the commissioners made it a general rule at all their sales, and particularly at this, to declare that the quantity of land named was to be restricted by the words, more or less. Thus a transaction which would be enveloped in perplexity, is clearly and unequivocally elucidated. Is it reasonable then, or did even the statute of frauds, which is a remedial statute, contemplate the rejection of such kind of evidence? Its title will answer the question, which is "to prevent fraud." Can any fraud be attached to the letting in of this evidence? We can see none. On the contrary, we think it very proper for the explanation of a transaction.

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which would otherwise be *inexplicable. But it is contended that notwithstanding all this may be true, yet as the complainant was not made acquainted with these circumstances, he ought not to be bound by them. It is immaterial whether he was acquainted with them or not. Wilson who was the real purchaser, and in whose shoes he now stands, must have been acquainted with them; for is it at all probable that a man will at a public auction, bid for property then under the hammer, without knowing the conditions under which it is to be sold? Such a degree

of irrationality we will impute to no man. Does cash or credit make no difference to purchasers? Does short or long credit make no difference? Daily instances inform us, that both causes have a powerful influence. There is another ground for us to conclude that the terms mentioned by Waring, were known; for the moiety of the tract purchased by Wilson, although equal in every respect to that immediately before purchased by Glover, was sold for little more than half the price. Why then should there have been such a depreciation of this tract, unless it was from the uncertainty of what the purchaser was to get by his purchase? But as he at the same time was apprised that he was to pay for no more than he was really to possess, it was an inducement to purchase. If it was to be admitted as a legitimate excuse, that a purchaser did not know the terms of sale at the time he purchased, no man could ever be certain that he had sold his property, which would be productive of such a scene of confusion as would be attended with the most serious inconveniences. The words more or less, we think in this case, ought to carry more weight with them than they are usually entitled to. Custom will in many transactions be taken as a governing rule. In this case, Mr. Waring says it was a general rule of the commissioners of confiscated estates to declare at all their sales, and particularly at this, that the quantity of land named was to be restricted by these words. We think the regulation a very provident and proper one, under their circumstances; for as it was the decided interest of every person whose property was to be thus sold, to keep them as much in the

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dark as they possibly could, *they must necessarily have had numberless difficulties to encounter, to come at even an uncertain knowledge of the nature of, and incumbrances on, such property: certainly in few, if in any instances, was it to be expected. To restrict the words, more or less, to rules adopted in general cases, would be wrong. Indeed there is no precise rule; the words are generally limited or extended, to suit the circumstances of the case; and in this case we think they ought, when connected with other circumstances, to be considered as ingredients of considerable weight in the decision of the cause. We will now turn our attention to that part of the cause in which the defendant Reid is immediately interested. He is brought here by an injunction against his proceeding at law, on a bond of complainant, as assignee thereof, for a valuable consideration. It appears that this bond was for a part of the purchase money of the land, and was given three years after the purchase was made; after complainant was aware of some deficiency in the quantity of land, though uncertain what. It was given voluntarily; and why is it now required to be cancelled? Because it is said the land for which it was given, is so deteriorated as to become inadequate to the purposes for which it was purchased. Ought not the complainant then to have used the precaution to have this clearly ascertained, before he gave this bond? His not having done this, but executing this deed in the deliberate manner he did, without any kind of reservation, is a striking instance that he at that time had no other view, than that of an abatement of price in the purchase. Is the case so materially altered since, as to entitle him to a total rescission of the contract? We think not; for although the land, by the loss of the wood, might be considerably lessened in value, yet when it is considered that a very trifling part of the swamp is deficient, which is by far the most valuable part of a rice plantation, and the deduction to be made for the wood-land being high land, is equal in price to the swamp—when we consider that a bona fide assignee of a bond, will be materially injured by such a decision—when we consider that this bond was given three years after the purchase

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was made; *that no objection appears to have been made to its validity, until a judgment at law was obtained on it, nor was any defence ever there set up, in order to rescind the contract, (which might have been done with great propriety, as it was contended by complainant's counsel that such a defence had been frequently admitted in the court of common pleas) although the deficiency was then fully ascertained; nor did the complainant apply to this court for an injunction, till February, 1793, upwards of three years after the judgment; and that the purchase was made subject to a defalcation in some part of the high land, we cannot consistently with our duty grant the prayer of the complainant, in the extent prayed for. This case has been assimilated to that of Glover's case [1 Desaus. 433, 1 Am. Dec. 687,] decided in this court. We think the two cases materially different. In that of Glover's, there was no notice of any deficiency; the contract was never carried into complete execution, as he uniformly resisted the contract; there was no third person implicated in the manner the defendant Reid is in this case; and there was no building of any kind on the part purchased by Glover; therefore this case has no pretensions to a similar decision with that of Glover's. But as we think the commissioners of confiscation were very remiss in one part of this transaction, which was in not having a proper survey made of the land for upwards of four years after the sale was made, their principals must answer for their laches: because though the complainant might at his own risk, have taken possession of and cultivated the land, yet as he did not choose to run the risk of incurring an action to be

brought against him as a trespasser, we cannot blame him: but this excuse cannot avail him after the fact was ascertained by a regular survey, which was returned in 1788. On the whole of the case we are of opinion that the complainant is entitled to a deduction of £350 11s. conformable to the verdict of the jury, and the further sum of £71 15s. for the thirty-five acres of swamp which is also deficient, to be deducted from the original bond given by him to the commissioners

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of confiscation; and no inte*rest to be allowed on the balance, but from the day of the date of the survey made and returned by Trotti. That the injunction granted against the bond, in the hands of the defendant Reid, be dissolved, except as to the interest appearing due thereon, prior to the date of the survey abovementioned, which must be deducted therefrom. The reason for the distinction made between the bond originally given, and that held by Reid, is, that the latter was a special grant by act of the legislature to Mrs. Villeponteux, prior to the act of assignment to the creditors of G. Dupont. The legislature having therefore parted with so much of the property over which they had a control, they could by their subsequent act, give no more than the remainder that was due on the original contract, after releasing the purchaser from the payment of as much as was overcharged him, agreeable to the contract made by their agents with the purchaser at the time of sale. The bill must therefore be dismissed with costs.

Chancellor Matthews having resigned in November, 1797, the legislature did not fill up the vacancy; and there then remaining but one chancellor, in office, he could not (under the act of 1784) proceed to try causes, and pronounce final decrees. The court remained in that situation, until December, 1799, when Aedanus Burke and William Marshall were elected chancellors.

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1 Desaus. *587

*Case CXXIV.

At Chambers, March 1800. Present—Judges H. Rutledge, Burke, and Marshall.

Case of WM. HAZEL GIBBES, Master in Chancery.

(March, 1800.)

[*Constitutional Law* ⇐140; *Equity* ⇐393.]

The master in chancery for Charleston, was appointed to his office in 1784. The constitution of 1778, was then in force, by which all judicial officers were to hold their commissions during good behavior. Upon a new modification of the districts of the courts of equity in 1799 the governor supposing that the right of the master to his office was extinct, appointed another person to the office. The chancellors decided that the old officer holding his commission during good behavior, could not be so displaced. The new appointment is void.

[Ed. Note.—Cited in State ex rel. Huckabee v. Hough, 103 S. C. 87, 87 S. E. 436.

For other cases, see Constitutional Law, Cent. Dig. § 357; Dec. Dig. ⇐140; Equity, Cent. Dig. § 852; Dec. Dig. ⇐393.]

The Lieutenant Governor (Drayton,) acting as governor, on the demise of Governor Edward Rutledge, appointed Mr. W. Lee as commissioner and register in equity for Charleston, Colleton and Beaufort districts, (making one equity district,) under the idea that the office of master in equity, (held by W. H. Gibbes,) was abolished by the new judiciary law. The question respecting the validity of the new appointment was argued upon a rule taken out, for him to shew cause why he continued to act in this office after the new appointment.

Mr. Gibbes was elected to the office of master in equity by the legislature in 1784, under the constitution of 1778—by which all judicial officers were to be commissioned during good behavior. The office of master is partly judicial and partly ministerial: he holds his office during good behavior. After the first meeting of the legislature in 1791, after the formation of the present constitution, the court of equity was established (or re-organized) by law, and the master in equity is therein expressly recognized, notwithstanding commissioners and registers in equity were to be appointed for the upper districts. There was no re-election of any of the judicial officers, and Mr. Gibbes has continued to hold the office to this time. Two of the judges, Rutledge and Burke, were of opinion, that only the second clause of the law of 1791, is repealed by the judiciary law (lately passed;) but the rest of the law is substantially confirmed, inasmuch as it declares that the commissioners and registers shall be appointed in the manner prescribed by the act of 1791. That Mr. Gibbes having been legally appointed, (and constitutionally,) he has a freehold in the office, holding it dur-

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ing good behavior; and cannot be displa*ced by any other mode but that pointed out by the constitution, which is by impeachment.

The duties of the master remain the same as established by the act of 1791: The judiciary law has only subdivided the districts.

If the bare changing of the name, and not the duty of the officer was sufficient to deprive him of his office, the legislature might thus get rid of any officer, and thereby render the clause in the constitution respecting impeachments a mere nullity. It would by a mere strained construction, and by implication, deprive an officer of his place secured to him by the constitution. This would be contrary to the constitution, which declares that no man shall be deprived of his freehold but by the law of the land, or the judgment of his peers. Upon the whole the new appoint-

ment is null and void, and Mr. Gibbes is entitled to hold his office. He accordingly held the office, and Mr. Lee gave up his pretensions under Lieut. Governor Drayton's appointment.

NOTE.—See the following cases on this subject. 1 Shower, Justice Archer's case. 1 Shower's P. C. 161, 158, 426, 456. Lord Raym. 161, 12 Mod. 4, 199. 1 Bay, 365, 390. 2 Bay, 59. 1 Cranch, 137, Marbury v. Madison; 6 Cranch, 135, Fletcher v. Peck; 1 Brevard's Digest. p. 476, 7, 8, in note. 6 Bacon, 307.

The lex terræ, means the common law, and the statutes to the time of Edward II.

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1 Desaus. 588

Case CXXV.

Present—Chancellors Rutledge, Burke and Marshall.

BOONE and Others v. Executor of DURAND.

(May, 1800.)

[*Executors and Administrators* ⇐314.]

The court of law has no jurisdiction in cases of legacies.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1274–1297; Dec. Dig. ⇐314.]

[*Equity* ⇐339.]

The defendant's answer, stating that he has paid a legacy, is not sufficient to establish the payment. The executor must prove the payment by other evidence.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 685, 686, 688–696, 703–705, 710, 714; Dec. Dig. ⇐339.]

[*Executors and Administrators* ⇐308.]

An executor is a trustee for the legatee; and if he pays a legacy prematurely, when directed by the will to keep it in his hands till a certain event, he is liable to be obliged to pay it over, if the legatee has not had the full benefit of it.

[Ed. Note.—Cited in Rosborough v. Rutland, 2 S. C. 384.

For other cases, see Executors and Administrators, Cent. Dig. § 1257; Dec. Dig. ⇐308.]

The plea in bar in this case, having been solemnly argued and overruled by the court at a former hearing, it ought not again to have been brought into view; but the cause should have been taken up on the bill and answer only—in which case it became necessary for the defendant to prove his answer, as the verdict and judgment were entirely out of the question. This court having de-

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*termined that the court of law had no jurisdiction in cases of legacies, the question for the consideration of the court then is, whether the legacy has been paid by the executor? And if it has, whether it was agreeable to the direction of testator's will? No proof has been adduced to support the defendant's answer, respecting the payment of the legacy; and without such proof, the court cannot take the facts as stated therein to be true; especially as the defendant in his answer is swearing to the act and deed of another person, and not his own, which renders it still more necessary for him to substantiate his answer by other testimony, than his own oath. Admitting for a moment it had been proved that the legacy was paid, the court will consider whether it was conformably to the directions of testator, and under the peculiar circumstances of this case, whether the executor ought not to be obliged to pay over again.

Executors are always considered as trustees for the legatees; and therefore this court, whose peculiar province it is to guard the interests of legatees, particularly those of women and children, will take care that the trusts are faithfully and properly executed. In the case before us, the executor is expressly created a trustee for the legatee, by testator himself—for he positively orders him to keep the legacy in his possession until certain events happened; paying the interest half yearly to the legatee. Whether the legacy be vested or contingent, makes no difference in the case. He was not compellable to pay more than the interest, until the events took place mentioned in the will. It evidently appears the testator intended the legacy as a provision for his niece whenever she should marry; because he gave her no more than the interest until that event, with a power of disposing of it by will, if she died unmarried. If the executor paid the money before she married, he was guilty of a flagrant breach of trust; and therefore should be decreed to pay it over again. And there is a reason, and a very strong one, why the executors under the peculiar circumstances should be obliged to pay it again. It is that the funds out of which the legacy was to be

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raised, were lands and *negroes which were not subject to depreciation: and this legacy, if paid, was paid in paper money, when almost at the last stage of depreciation—a circumstance extremely unfavorable to the executor, who held the funds as residuary legatee undepreciated, and paid with paper not worth a shilling in the pound, a legacy, which he was not only at that time not compellable to pay, but expressly ordered to retain in his hands. Referred to master to ascertain the amount of principal and interest on the legacy, and report.

Chancellor RUTLEDGE delivered the decree of the court.

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1 Desaus. 590

Case CXXVI.

Present—Chancellors Rutledge, Burke and Marshall.

T. LOWNDES and Wife v. E. LEMPRIRE.

(June, 1800.)

[*Wills* ⟸565.]

A bequest of ten negro slaves under the age of 15 years must be complied with, and choice made for the legatee of that number under that age out of the whole estate, as well what the testatrix had originally, as what she acquired on the death of her brother.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1233; Dec. Dig. ⟸565.]

Chancellor RUTLEDGE delivered the decree.

It is evident that testatrix intended to give complainant ten negroes under the age of fifteen years, and in doing so, probably contemplated the tender age of complainant herself. Testatrix certainly counted upon some of the negroes being taken from those she was entitled to from her brother's estate, as she had but three of her own under that age. It is clear from the last codicil that she intended complainant should have ten at all events, by giving the choice out of her estate at large. It is also clear that another of her nieces was equally the object of her bounty, by the manner of wording the bequest to her "of six young negro women slaves." The other bequests are in general terms, and left in a great measure to the discretion of the executors.

Upon viewing the list of the negroes belonging to the estate, it appears that the intentions of testatrix may be fully complied with, because there are more than ten negroes who were under fifteen years of age when she became entitled to them, that may be chosen for complainant; and a sufficient number of women who were young when the testatrix died, that may be allotted by the executor to the other legatee. It is ordered

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and decreed *that ten negroes, agreeable to the bequest of testatrix, be chosen for complainant, and if it should happen that any of them have died since the list filed, others shall be chosen as nearly of the age of those who are dead as will make up the ten out of the estate at large; and that it be referred to the master to liquidate the account of defendant, and report thereon.

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1 Desaus. 591

Case CXXVII.

Present—Chancellors Rutledge, Burke and Marshall.

PEIGNE v. SNOWDEN.

(June, 1800.)

[*Fraudulent Conveyances* ⟸95.]

A married man cannot convey property of which he was the absolute owner, in trust for his wife, to the prejudice of a creditor, to whom he was indebted before he executed the deed. There was no evidence that she was a sole dealer, and that the property was purchased with her earnings. The pretense of a small debt to the wife would not support the conveyance of a large property in trust for her, to the prejudice of creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 285; Dec. Dig. ⟸95.]

Chancellor RUTLEDGE delivered the decree.

The single question in this case is, whether the deed of settlement of 30th June, 1796, is to be considered as fraudulent or not, with respect to defendant, to whom Peigne was indebted, previous to making the deed. From the records of the conveyance for the lots which Peigne settled in trust for his wife, it appears plainly that he was the absolute owner of the property, with regard to one lot (and which was the most valuable) so long as Jan. 1792; and as to the other from April, 1794. That he exercised every act of ownership over it that a person could do, by leasing one lot and mortgaging another. And although he recorded the paper writing which he calls a settlement in July, 1793, he does not seem to have contemplated a settlement, until upwards of four years after the purchase of the first lot; more than two years after the purchase of the second lot; and not until after he had contracted the debt with the defendant, which are strong symptoms of a fraudulent intention. We lay no stress on the receipt being given for the money in her name: The bonds were her husbands, and the court must presume the money to have been his also. It appears from the testimony of one of complainant's evidences, that she did not keep a store till 1794, so that the first lot which he purchased in 1792, could not have been bought with the

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money gained by her earnings. There *is no evidence of her being a sole dealer till he constituted her one by deed (not that a deed is absolutely necessary) but in the present case there has nothing come out in evidence to warrant a conclusion that she was. Another strong circumstance to induce a presumption that the settlement was made with a fraudulent intention is, that it constituted the whole of Peigne's property, amounting, as complainant Snowden states, to upwards of 2000*l* for the purpose of securing to her so small a sum as 3000 florins, the value of which is not above 270*l* or 280*l*. Complainant in her bill has charged that her husband contracted that debt with defendant subsequent to the execution of the deed of trust. That charge has been fully contradicted by defendant's oath, by the evidence of his books, and by the testimony of one of his clerks.

Upon the whole of this case, the complain-

ant does not stand in so fair a point of view as to entitle her to the relief prayed for. The injunction therefore must be dissolved and the bill dismissed, with costs.

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1 Desaus. 592

Case CXXVIII.

Present—Chancellors Rutledge, Burke and Marshall.

JOHN TALBIRD and ELIZABETH, His Wife, v. JOHN MARK VERDIER and JOHN M'KEE, Executors of Thomas Bell.

(November, 1797.)

[*Descent and Distribution* ⟸47.]

A posthumous child unprovided for by the father's will, is entitled to an equal share with the other children, in proportion to their respective proportions under the will.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 128; Dec. Dig. ⟸ 47.]

The bill states that the complainant, Elizabeth's father, Thomas Bell, deceased, duly executed his last will, dated 16th August, 1795, and died on the 7th September, 1795. That by the said will he bequeathed to his wife Sarah Bell, a number of negro slaves named therein, and some other personal estate for her widowhood, and afterwards to be divided among the testator's then surviving children. That he also bequeathed to the complainant Elizabeth, being one of his daughters, half of a tract of land of 250 acres, one fifth of all his negroes, (including the increase of those bequeathed to his wife)

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*also one fifth of all his horses, and one sixth of all his cattle, &c. The estate to be divided upon complainant's marriage, or coming of age. That the testator also further disposed of the rest of his estate equally among his several children, and directed that upon the death of any of them without leaving lawful issue, their portion should be divided among the survivors: of which will the testator appointed John M. Verdier and John M'Kee, to be executors; and they qualified and possessed themselves of the estate of the testator, and received the profits thereof for the use of the children of the testator.

The complainants further shew, that the family of the testator at his death, consisted of his wife, the complainant Elizabeth, also two other daughters, Mary and Sarah Bell, and two sons, Thomas and John Bell. That complainant's mother, eight months after the death of the testator, bore a son, for whom no provision was made by the will, which child would remain unprovided for, if the law did not relieve it. And the complainants further shew, that Sarah Bell, one of the testator's daughters died in about thirteen months after the testator; and her share of the estate became by the said will, divisible among the surviving children. That the complainants have since intermarried on the 10th of May, 1799; and have since often desired of the said executors, an account of the testator's estate, with its profits, and their application; and also the payment of whatever should, upon a balance of accounts appear to be due to them. That they have also applied for a division of the personal estate, and their share as well of that as of the real estate; which the said executors have refused to comply with.

The bill further prays an answer account, division, and statement of the said estate; and also for a writ of subpœna.

The defendants in their answer, admit the will of the late Thomas Bell, as stated in the bill; and also that they proved it in the court of ordinary for Beaufort District, on the 14th October, 1795, and qualified under it, as executors. The defendants also admit the intermarriage of the complainants,

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and their application for an account of *the profits of the said estate, and for the payment of their proportion, and for a division, conformable to the said will, which applications the defendants declined complying with, because the wife of the testator was enseint at his decease, and has since borne a son, for whom no provision is made by the will, but who is entitled by the law to a certain proportion of the estate; and because one of the daughters and legatees died on the 29th of August, 1796, unmarried and intestate, whose share of the estate is by will divisible among her brothers and sisters; but in what proportions defendants cannot determine without the intervention of the court.

The defendants further admit that under his will, they did possess themselves of the estate of the testator, and that the complainants are entitled to an account and proportion of the estate consistently with the said will, and with the rights of the posthumous child, and other children of the said Thomas Bell. The defendants offer to do as they shall be directed by the court, being indemnified therein: and the defendants crave leave to refer the court to the accounts of the said estate, herewith filed and marked A and B.

There was no point of litigation in this case, but to determine the rights of the posthumous child. By the statute of the 13th March, 1789, section 8, it is enacted, "that if no provision shall be made by the will of the testator for any child or children that may be born, after his death, such child or children shall be entitled to an equal share of all real and personal estate given to the other child or children, who shall contribute to make up such share or shares, according to their respective interests, or portions derived to them, under such will."

The court said that the provisions of the statute are too clear to admit dispute.

1st. The court decreed the delivery to John Talbird and Elizabeth his wife, of the tract of land devised. 2d. The delivery to John Talbird and Elizabeth his wife, of one sixth part of the personal estate of the testator, instead of one fifth part bequeathed to Elizabeth: this arises from the birth of a post-

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humous child, after the *decease of the testator. 3d. The delivery to John Talbird and Elizabeth his wife, of one fifth part of the personal estate, bequeathed to Sarah, a daughter of the testator, who died since his death, and after the birth of the posthumous child. Commissioners to be appointed to divide the personal estate agreeably to the act for abolishing the rights of primogeniture. The real and personal estate delivered to John Talbird and Elizabeth, to stand charged with raising a sum of 100*l.* for the posthumous child, as their proportion to be contributed as an equivalent to the land devised specifically to the other children: and also to remain chargeable with their proportion of the posthumous child's one fifth part of the 400*l.* directed to be raised by the devisees of the land, for Sarah Bell, one of the legatees, who hath since died. And that the following persons (A. B. C. D. E.) be commissioners for dividing the estate agreeably to the act for abolishing the rights of primogeniture.

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1 Desaus. 595

Case CXXIX.

Present—Chancellors Rutledge, Burke and Marshall.

Legatee and Executrix of WM. JOHNSON, Jun., v. the Executor of WM. JOHNSON, Sen.

(November, 1800.)

[*Bastards* ⇐3.]

The court will presume the legitimacy of a child, on slight proof, after the lapse of thirty years and after the death of the father and child.

[Ed. Note.—Cited in Dinkins v. Samuel, 10 Rich. 70; In re Robb's Estate, 37 S. C. 33, 38, 16 S. E. 241.

For other cases, see Bastards, Cent. Dig. § 4; Dec. Dig. ⇐3.]

The only question in this case, related to the legitimacy of William Johnson, junior. His father, William Johnson, senior, in his will, used an expression which created a doubt on the legitimacy of his son's birth. Some testimony was given on the subject. One of the witnesses testified that William Johnson, senior, and the mother of William Johnson, junior, had lived together, as husband and wife, and were so considered in the neighborhood.

The court in delivering its decree, said, that the evidence of legitimacy was very slight; but that the court would presume a marriage, after the lapse of thirty years; especially as all the parties were dead; and if a contrary presumption should prevail, it

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would have the effect of *baztardizing a person after his death, which would be contrary to every principle of law, justice and equity. And the court said, it would act the more readily on the presumption, as there was no legal heir of Wm. Johnson, senior, to contest the legitimacy of Wm. Johnson junior. And it was decreed accordingly.

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1 Desaus. 596

Case CXXX.

Present—Chancellors Rutledge, Burke and Marshall.

RADFORD and Wife v. Executrix of J. WESTCOTT.

(November, 1800.)

[*Wills* ⇐562.]

A devise of lands to the wife for life, does not pass a toll causey and bridges, running through part of the land, but held by grant of the legislature for a term of years; especially as the testator directs part of the income from the toll to be applied to support his wife.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1225; Dec. Dig. ⇐562.]

[*Infants* ⇐47.]

A minor is not bound by a purchase which is disadvantageous to him, though he may hold a beneficial one.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 99; Dec. Dig. ⇐47.]

[*Executors and Administrators* ⇐348.]

A sale made under an order of the ordinary, which he had previously revoked, is void.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1448; Dec. Dig. ⇐348.]

[*Executors and Administrators* ⇐348.]

[It being essential to a court of inferior jurisdiction that it have power to revise and correct its proceedings before they are finally completed and decided on by the superior court, an ordinary has authority to revoke permission to an executor to sell real estate made under a mistake of facts.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1448; Dec. Dig. ⇐348.]

Chancellor RUTLEDGE delivered the decree of the court:

There are several questions in this case. First. Whether the devise of the tract, of land of one hundred and sixty acres, to testator's wife, for life, and after her death to his sons in fee, includes an important toll causey, adjacent to and going over part of the tract of one hundred and sixty acres, held under grant of the legislature for a term of years? The court is of opinion that though the testator devises to his wife that

part of his lands on which the turnpike lies, he uses those words merely as descriptive of the land intended to be given; for he goes on and says, that the income of the causey is to be applied to the payment of his debt; except so much as was essential to her support.

Secondly and thirdly. Whether the purchases made by Joshua a son of the testator, should not be set aside? It was argued that as the contracts of infants when injurious to them, are not binding on them, and as Joshua was a minor, (and died so) he and his representatives ought not to be at liberty to retain those which are beneficial, as was the case with his purchases of negroes. The court said that it was true the courts protected infants, and the rules of law and equity would not permit them to be bound by acts prejudicial to them. But equity will support such as are beneficial, more especially as in this instance the defendant (and also

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one of the *heirs) had made equally advantageous purchases at sales of the estate.

Fourthly. Whether the re-sale, made by the executor, of the causey, ought not to be set aside as void? The court said there could be no doubt it must be set aside. The will did not give power to sell it. There was a necessity then to have the ordinary's permission. It was obtained in the first instance, but upon his being afterwards satisfied that he had been misinformed, and that the necessities of the estate did not require a sale, he rescinded it. It was however argued, that the ordinary having once exercised his authority and granted permission to sell, he cannot revoke the same—and that the re-sale made by the executor, in spite of such revocation by the ordinary was regular even though he bought it himself. This is not correct. It is essential to the existence of a court of inferior jurisdiction, that it should have the power to revise and correct any error or mistake in its proceedings, before they are finally completed, and decided on by the superior courts; and especially to revoke orders obtained by misrepresentation or mistake. It is true the ordinary could not punish this contempt of his authority (by a sale contrary to his order rescinding the permission to sell) other than by ecclesiastical censures which would not now be much regarded. But this court will interpose, and though it will not punish the contempt, it will correct the offence by setting aside the sale.

Decree made accordingly. Costs out of the estate.

APPENDIX

1 Desaus. *599

*The COMMISSIONERS OF PUBLIC ACCOUNTS v. Creditors of PETER BOQUET.

(August, 1795.)

(Vide ante, p. 450.)

At the time this important case was prepared for the press, the reporter possessed few and those very imperfect notes relative thereto. By the aid of T. Ford, Esq. an eminent member of the bar, full notes have since been obtained, from which the following statement and argument of counsel have been drawn up by that gentleman, with his usual fulness and accuracy. It is believed that this improvement of the report will be acceptable to the profession.

Peter Boquet was for several years commissioner of the treasury of this state. He was first appointed by the governor in May, 1784, upon the occasion of a vacancy occurring in the recess of the legislature. On this occasion he gave a bond to the state, which was recorded in the office of the secretary of state, conditioned for the due and faithful performance of the duties of his said office. At the next session of the legislature, to wit on the 4th of February, 1785, he was elected treasurer of the state, for the term of two years; and again on the 2d of March, 1787, he was elected for the further term of two years. On the occasions of these elections by the legislature, Boquet gave no new bonds. The treasury department as well as the finances of the state being greatly deranged, a board of commissioners was constituted by the legislature in the year 1791, to examine and settle the accounts of all former commissioners of the treasury, and all other persons having accounts with the state. Large powers were committed to this board, and they were authorised to commence suit against all who were in any wise indebted to the state, and to prosecute the same to judgment and execution. In the course of the investigations, about the year 1793, the accounts of Peter Boquet fell under their review, and from statements made, the board concluded he would be very considerably indebted to the state for sums of money that were received by him as treasurer, and were unaccounted for. Before this conclusion was arrived at, P. Boquet died, and no person qualified as administrator or executor on his estate. He had been out of office several years, had incurred large debts to individuals, and had encumbered his real and personal estate by mortgages to several creditors, and there were many judgments against him upon which executions had been issued, and the sheriff had levied upon his real and personal estate; and after his death the creditors were pressing their remedies under their mortgages and executions. The claim of the state was for an unliquidated debt arising from his defaults in office; the sum was uncertain; but it appeared that his defaults had chiefly been incurred during the periods

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of office, while he held under *the legislative appointment, during which time he had not given any bond. The commissioners of public accounts filed their bill, alleging that Boquet was largely indebted to the state: that his estate was insufficient to pay the public, if his private creditors were allowed to appropriate a sufficiency to pay their demands; that the public was entitled to a preference, as well by that branch of the royal prerogative which before the revolution gave the king the preference, and which it was contended was transferred to and vested in the sovereignty of this state; as also by the 26th clause of an act of 1789, directing the manner of granting probates and wills and letters of administration, &c. which says "the debts due by any testator or intestate shall be paid by executors and administrators in the order following:—Personal and other expenses of the last sickness, charges of probate of will or of letters of administration; next debts due to the public," &c. And the bill prayed that the defendants, who were creditors by mortgage, judgments and execution, should be restrained from selling or appropriating the estate of the deceased until the claims of the state should be liquidated and satisfied.

The defendants in their answers, (without admitting that P. Boquet was a debtor to the state, and contending that as there was no executor or administrator there were not parties before the court to enable that point to be judicially investigated and settled,) rested their principal defence upon the ground that the branch of royal prerogative which gave a preference to the king was not of force in the state; that even if it should be construed to be of force, it does not cover this case; and that the clause of the statute of 1789, being only directory to executors and administrators, has no application in a case like this; that the debt due to the state, if any, was not a debt of record, nor even a bond debt, as the defalcations of Boquet did not occur during the term of office, for which alone he gave a bond. The defendants insisted on their rights at law, and that the sheriff might be permitted to proceed with the levies he

had made on the property by which the title was evicted out of Boquet, and that they might be dismissed.

It was argued by Mr. Pringle, attorney-general, for the state, that the branch of prerogative whereby the debt of the king was preferred when it came in conflict with the debt of a subject, of right became vested in the sovereignty of this state at the revolution; that it was annexed to the sovereignty by the common law originally, though modified by statutes; and was given to the king in his representative capacity as the head of the nation, whose right it was; that the reasons assigned by the law are equally applicable to our situation as a state. Every citizen has a common interest in it, for maintaining the public revenue of the country, and guarding it against the practices or collusion of individuals; that though no act of assembly since the revolution has expressly asserted this right in the state, yet as it was incorporated in the body of our laws, as part of the system, which were carried over by the revolution into the new sovereignty, it abides, like all other laws, of full force until by some legislative act it should be qualified, abridged or abolished; that the legislature

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have not only passed no law for this *purpose, but have in some of their acts, and especially in the act of 1789, plainly supposed its existence. In this they have enjoined on executors and administrators to regard the priority of the state in the administration of assets, and declared that that law shall attach upon the estates of testators and intestates. This court is now called upon to carry the positive injunctions of this law into effect upon the estate of Boquet, whose debt to the state is not on a mere general contract, but arises upon his defaults as a receiver of the public monies intrusted to his hands, which gives a peculiar energy to the claims of the state in this respect. And as there is no executor or administrator of his estate, there is a peculiar propriety for the extraordinary jurisdiction of this court to be interposed, to prevent a failure of justice. Where private creditors are the claimants on an estate so circumstanced, they have a legal remedy at hand; for a creditor may take out letters of administration. But the state cannot become an administrator, and therefore can have no other remedy but in the interposition of this court, which always moulds its relief to the exigency of the particular case, and supplies the accidental defects of the law.

For the creditors it was argued by Mr. T. Ford, 1st, on the principle of prerogative; 2, on the act of 1789. The counsel contended that the doctrine of prerogativa regis, was not of force in this state. They endeavored to show by a variety of elementary principles that it was inconsistent with the improved plans of government and doctrines of common right on which the revolution was founded and these new republics constituted, and inferred that the courts ought to lean strongly against any constructive adoption, more especially as this royal preference was only a branch from that luxuriant stock which had even in England always been regarded with jealousy, and sometimes threatened the subversion of civil liberty. And if one branch were adopted, it might be a precedent for adopting another, and perhaps eventually the whole might be transplanted into our free country. That this preference of the king over a subject does depend exclusively on prerogative, as laid down in all the books. See Off. of Executors 133; 2 Bac. abr. 198; 2 Ventr. 268, where it is said, detur digniori. "The etymology of the word is from præ and rogare, and it extends to all powers pre-eminences and privileges, which the law giveth to the crown." Co. Lit. 90. Blackstone declares it to be a pre-eminence which the king hath over and above all other persons, and out of the ordinary course of the common law, in right of his royal dignity." 1 Black. 239. Barrington says it is founded on the French law. B. on the Sta. p. 20. All which shews how little pretensions this doctrine has to be constructively embraced by us, as a part of the common law. There have been many acts of parliament passed on the subject of prerogative, which have never been adopted and made of force here. The Stat. de prerogative regis, 17th Edw. 2 St. 1, is not of force. The St. 33, Hen. 8, C. 39. "The king shall be preferred to others in suit and execution," is not of force. The Stat. 9 H. 3 C. 18, is made of force, which relates to the goods of a deceased debtor, and prescribes that they shall first be answerable to the king, "if the sheriff or bailiff do shew the letters patent, or summons for debt." We have no such instruments with us as those

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here called *letters patent, and as to "summons for debt," whether it apply to our capias ad respondendum, or to any species of execution, the statute, if of force, has no application to this case; for the state hath never brought any kind of suit against Boquet in his lifetime, nor against his estate since his death. But supposing the rights of prerogative to be in the fullest force in this state, as much so as in England, this is not a case in which those rights can attach and be effective; for the two conflicting rights must meet at the same time, as is stated in the Stat. 9 H. 3, already cited. The rule is laid down in 9 Coke, "where the king's title and the title of a subject concur in the beginning, the king shall have the preference. 9 Co. rep. 55. Also, 9 Co. rep. 129 the same rule is thus laid down: "Et quando jus domini regis et subditi insimul concurrent, jus regis præferri debet." See also 4 Bac. 198, Co. Lit. 306. It is manifest from these authorities that the king's title depends upon the insimul. Thus if there had been a judgment entered up by the state against Boquet on the same day

with the judgments of these defendants, that co-incidence of right would have occurred. But the state has no judgment, never having brought any suit. On the other hand the claims of these defendants are by judgments, executions and mortgages; and by the statute of frauds the lands are bound from the time of the judgment, and the personal estate from the delivery of the writ of execution. 2 Bac. abr. 352. So completely are the goods bound, that the sheriff may levy on them in the hands of the executors or administrators. 2 Bac. 352; Cro. Eliz. 181, Raym. 695. And execution is an entire thing, and once it is begun, (as by levy of goods) it cannot be superceded. Salk. 322. But this question is most ably argued and luminously decided in the case of Rourke v. Dayrell, 4 T. R. 402, in which all the necessary learning on this subject is embodied, and the counsel relied on this case and the case of Rex v. Holcrift, Parker 262; 2dly, the act of 1789 has been relied upon, not merely as matter of positive institution, but as implying the existence of this branch of prerogative. But in neither view ought it to have any effect in this case. All the arguments that apply with so much force against putting the royal prerogative constructively into execution, apply with equal force against drawing such an inference from the act of 1789, which was professedly made for another purpose. It was long ago in effect decided by the Judges of the Court of Common Pleas that the nullum tempus branch of prerogative is not of force in this state, and they allowed presumption of a grant to be inferred from mere possession. Lessee of Alston v. Sanders, 1 Bay. The legislature have had full opportunity of asserting the principle directly if they saw fit; but have not done it; and it is incongruous that the courts of justice should do it by mere construction. It is a fit subject of legislation only, and that direct and positive, and ought not to be implied in an act which professes only to prescribe and regulate the duties of executors and administrators. This act ought to be restrained to its scope and purview. It can apply only to the case of the administration of legal assets in their hands. Now none of the property here implicated could come under that description. 1. Because there are no executors or administrators in this case to be directed; 2. If there were, the lands would not be assets to be administered; and

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*as to the personal estate the property was evicted by levies thereon, in the lifetime of P. Boquet, by which a special property was vested in the sheriff; and the creditors have no need to come into this court to have assets marshalled, or to effect their remedy; but being in pursuit of their legal rights at law, and now interfered with by this bill, they are entitled to be dismissed.

[Vide ante, p. 450, for the decree of the court.]

1 Desaus. 603

THOMAS LEGARE and ANN ELIZA, His Wife, v. Mr. ASH and the Children of GEORGE BARKSDALE.

(August, 1795.)

(Vide ante, p. 457, 8.)

The bill in this case stated that Mrs. Ann Berwick had made and duly executed her last will and testament, in the presence of three witnesses, on the 10th day of May, 1786, by which she disposed of her whole estate real and personal, to her daughter Ann Eliza Berwick, her heirs and assigns forever; but if she died under age, and without having issue, then to the testatrix's other children. That the original of said will is in the possession of Edward Rutledge, the friend of the testatrix, who drew it. That afterwards the said Ann Berwick being desirous to alter her said will in some respects, drew up and signed, on the 10th of November, 1790, minutes of another will, and left them with her counsel, Mr. E. Rutledge, to draw up one accordingly. But before it was drawn, the testatrix's daughter Ann Eliza Berwick, intermarried with the complainant, Thomas Legare, with the consent of her mother; and the said Ann Berwick, afterwards and some time in the year 1793, directed her said counsel to draw up a new will, which was accordingly drawn and executed by her in the presence of three witnesses, Keating Simons, junior, Henry Rutledge and —— Dunlap. That by this last will, the testatrix, after some pecuniary legacies to particular friends, devised and bequeathed her real and personal estate to her daughter Ann Eliza Legare, during her life, and to the complainant Thomas Legare, during his life; and after death to their children, and in case there should be no children, and the complainant Thomas should survive the complainant Ann Eliza, then to him absolutely. The complainants further stated that the said Ann Berwick died leaving the said last will in full force and virtue; but that the same has been mislaid or lost; but full proof exists of its execution by the said Ann Berwick, and of the contents thereof, and of her speaking of the same as her last will, to the day of her death. And complainants submitted whether under all the circumstances, the said last mentioned will, ought not to be esteemed and set up as the last will of the said Ann Berwick, and the property to be vested accordingly. The bill further charged that John Ash, the son of the testatrix by her first husband, was so well convinced of the due execution of said

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will, and of the intentions of *his deceased mother, that he executed a deed on the 6th day of August, 1794, declaring his acquiescence therein, and his renunciation of all claims on his mother's estate, as one of her heirs. But that the other defendants, grand

children of the testatrix, and who would be entitled to part of said estate in right of their deceased mother, in the event of the said will not being set up, oppose the same, and require proof thereof. The bill prays that the evidence respecting the said last will might be perpetuated; and that the will may be established by the court, directly, or by an issue devisavit vel non, in the usual manner. The bill prays for a subpœna.

The defendants, (who are minors, answering by their guardian,) admit that their grand-mother Ann Berwick made and executed the last will stated in the bill of complaint, in the year 1786, and that afterwards in the year 1790, she executed another writing, which the defendants deny to have been a mere memorandum from which her will was to have been drawn in order to be duly executed, but insist that on the face of it, it bears the strongest proofs of her having intended it to be her last will and testament. They also contend that as the said last mentioned writing (of the year 1790,) contains a clause revoking all former wills, the said former will of 1786 is effectually revoked as to real property; and as the complainants allege no republication of the first will, the operation of the said former will cannot be revived; but as the will or paper of the year 1790, was not attested by three subscribing witnesses, it cannot operate as a devise of real estate. The defendants further say that as far as relates to any other last will and testament which is alleged to have been made by their grand-mother, subsequent to the two former, (in 1786 and 1790,) they are totally ignorant; and being infants they hope the Court will take care of their interests, and will not set up or establish such last will and testament, without the addition of the strongest and most complete testimony; as it would strip them of all share in their grand-mother's estate, to a part of which they conceive themselves to have a just claim as the complainants. The defendants insist their rights cannot be affected by the renunciation and release of John Ash, the half brother of complainant.

The cause coming to a hearing in Chancery, on the 1st July, 1795, and the bill and answer being read, five witnesses were examined viva voce in open court, and their testimony reduced to writing in memoriam rei perpetuam.

Mr. Edward Rutledge testified, that the first will of Mrs. Ann Berwick was drawn and duly executed in May, 1786, which is still in existence. That in pursuance of her directions in writing, he drew another will for her in November, 1790. But the same was not executed. He afterwards drew a third will for Mrs. Berwick, subsequent to the marriage of her daughter Ann Eliza Berwick with Mr. Thomas Legare, in which last will the testatrix devised and bequeathed all her real and personal estates, (after a few pecuniary legacies mentioned in the said will,) to her said daughter for life; to her daughter's husband for life, and to the children of the marriage absolutely; and in case there should be no child, and the husband survived his wife, then to him absolutely. The will was duly executed in the witnesses' office;

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but he was not a *subscribing witness, being nominated an executor therein, together with Mr. Thomas Jones and Mr. Thomas Legare. He thinks she took the will away with her.

Mr. Keating Simons, jun. proved that he was a subscribing witness with two other persons to a will drawn by Mr. Rutledge and executed by Mrs. Ann Berwick; but he does not recollect the exact time of the execution. He never witnessed but one will executed by her. Mrs. Berwick after the execution of the will took it away with her.

Mr. Thomas Jones proved that Mrs. Berwick on or about the 14th of May, 1794, (on her death bed,) requested the witness, as one of her executors, to pay some small legacies which she had omitted in her will. That the witness requested her to mention her wishes to Mr. Thomas Legare, as he supposed Mr. Legare would have a particular interest in her estate. Mr. Legare was accordingly called in, and she informed him of what she had wished. Thence the witness concluded the will was in favor of Mr. Legare and his wife.

Mr. John Ash proved that Mrs. Berwick, his mother, had informed him, before the marriage of her daughter with Mr. Legare, that she had made a will and left everything to her daughter, the present Mrs. Legare, and after the marriage, she told him she had left everything to her daughter, Mrs. Legare.

Dr. M'Calla proved that Mrs. Berwick told him in the autumn of 1793, that she was going on that day to Mr. Edward Rutledge's to execute her will; and she went from his house, as he supposed, for that purpose. He understood from Mrs. Berwick, that she had given her whole estate to her daughter, Mrs. Legare.

Upon this an issue was directed to be tried at law, devisavit vel non. The jury found the verdict in favor of the will, which was certified up to the Court of Chancery, and the verdict approved, and the will established.

Vide 1 vol. of Bay's Rep. 457. And vide ante 455, 457, 8.

C. C. Pinckney, for complainants.

W. Johnson, for defendants.

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

COURT OF CHANCERY OF THE STATE OF SOUTH CAROLINA

FROM THE REVOLUTION TO DECEMBER, 1813, INCLUSIVE

IN THREE VOLUMES

BY

HENRY WILLIAM DESAUSSURE

SENIOR JUDGE OF THE COURT OF EQUITY, AND PRESIDING JUDGE OF THE COURT OF APPEALS IN EQUITY IN THE SAID STATE

VOLUME II

Justitia est velle omnibus quod æquum est.
The duties of life are more than life.—Bacon's Works, Vol. VI.

COLUMBIA, (S. C.)
PRINTED BY DANIEL & J. J. FAUST
1817

ANNOTATED EDITION

ST. PAUL
WEST PUBLISHING CO.
1917

District of South-Carolina.

Be it Remembered, that on the twenty-fifth day of April, Anno Domini one thousand eight hundred and seventeen, and in the forty-first year of the Independence of the United States of America, the Honorable Henry William Desaussure deposited in this Office the title of a Book, the right whereof he claims as author and proprietor, in the words following, to wit:

"Reports of Cases, argued and determined in the Court of Chancery of the State of South Carolina, from the Revolution to December, 1813, inclusive, in three volumes, by Henry William Desaussure, senior Judge of the Court of Equity, and presiding Judge in the Court of Appeals in Equity in the said State."

"Justitia est velle omnibus quod æquum est."

"The duties of life are more than life."—*Bacon's Works, vol. 6.*

In conformity to the act of Congress of the United States, entitled "An act for the encouragement of learning by securing the copies of Maps, Charts and Books to the Authors and Proprietors of such copies during the times therein mentioned;" and also, an act entitled "An act supplementary to an act entitled 'An act for the encouragement of learning by securing the copies of Maps, Charts and Books to the Authors and Proprietors of such copies during the times therein mentioned,' and extending the benefits thereof to the arts of designing, engraving and etching historical and other prints."

JAMES JERVEY, Clerk of South-Carolina District.

TO MAJ. GEN. CHARLES COTESWORTH PINCKNEY

DEAR SIR,

I avail myself of this opportunity of placing your name at the head of a volume of Reports of Cases, decided in our Court of Chancery. Your acknowledged eminence in the profession, when in the practice, renders this mark of respect highly proper.

But permit me to add a more personal motive. It is a peculiar gratification to me to put on record a memorial that I have long enjoyed your friendship; an honor to which your character gives a value of no ordinary kind.

At your advanced age, and retirement from all public stations, I have only to pray to the Almighty Disposer of events, that the sana mens in corpore sano, which you have possessed in a degree, and to a period beyond the ordinary lot of men, may be long continued to you, for your own comfort, as well as for the delight and instruction of your friends.

Accept the assurances of the perfect respect and esteem of your sincere friend, and obedient servant,

HENRY W. DESAUSSURE.

NAMES OF THE CHANCELLORS

AND OTHER LAW OFFICERS, IN THE TIME COMPREHENDED WITHIN THE PRESENT VOLUME.

CHANCELLORS.

Hugh Rutledge—Elected in February, 1791.
Ædanus Burke—Elected in December, 1799.
William Marshall—Elected in December, 1799.
William Dobein James—Elected in December, 1802, in the place of Ædanus Burke, deceased.
Waddy Thompson—Elected in December, 1805, in the place of William Marshall, deceased.

ATTORNEY-GENERAL.

John Julius Pringle.

SOLICITORS-GENERAL.

William Dobein James—succeeded by Samuel Wilds; and he was succeeded by James Irvin.
David R. Evans—succeeded by David Johnson.
Charles J. Colcock—succeeded by Robert Stark.
John Taylor, (of Pendleton.)

MASTER IN CHANCERY.

Charleston.—W. H. Gibbes.

REGISTER.

James Ryan.

REGISTERS AND COMMISSIONERS.

Georgetown.—Robert Heriot.
Cheraws.—Josiah J. Evans—succeeded by G. Bruce.
Camden.—B. Bineham.
Orangeburgh.—Samuel P. Jones.
Ninety-Six.—Richard A. Rapley.
Washington.—John Garlington.
Pinckney.—B. Birdsong.

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REPORTS OF CASES

ARGUED AND DETERMINED IN THE

COURT OF CHANCERY OF THE STATE OF SOUTH CAROLINA

2 Desaus. *1

*Case I.

[Present, Chancellors Rutledge, Burke and Marshall.]

THE STATE v. EDWARD PENMAN and Others.†

(May, 1800.)

[*Witnesses* ⊂⊃99.]

A partner in a company is not an admissible witness to prove that another person is a member, especially where there are written articles.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 371–377; Dec. Dig. ⊂⊃99.]

[*Principal and Surety* ⊂⊃89.]

A defendant denying in his answer that he was a partner in a company, and there being no proof that he was, shall not be presumed to be so from equivocal circumstances, nor shall he be presumed to know that a public agent was loaning public funds, of which there is no proof, and which he denies in his answer. A surety to a bond shall have the benefit of a release fairly obtained, though the bond is afterwards assigned to the state.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 133, 133½, 136–139; Dec. Dig. ⊂⊃89.]

[*Attorney General* ⊂⊃6.]

[The attorney general loaned indents, belonging to the state, to a person having no notice of the property of the state in the indents, to be applied to a particular purpose specified in the bond given for the repayment, and afterwards assigned the bond to the state. *Held*, that a release given to the obligor in the bond, by the attorney general, upon the misapplication of the indents by persons connected with him, was binding upon the state.]

[Ed. Note.—For other cases, see Attorney General, Cent. Dig. § 7; Dec. Dig. ⊂⊃6.]

[*States* ⊂⊃124.]

[The attorney general loaned indents belonging to the state to a person having no notice of the property of the state therein to be applied to a purpose specified in the bond given for their repayment, and afterwards assigned the bond to the state. *Held*, that under the bond the state claimed as assignee only, and not as original obligee.]

[Ed. Note.—For other cases, see States, Cent. Dig. § 123; Dec. Dig. ⊂⊃124.]

This was a bill filed by the attorney-general against Edward Penman, to recover the amount of a bond dated 17 February, 1790, executed by Isaac Huger, Thomas Washington, Jacob Weed, Alexander Inglis, Alexander M'Gillivary, William Clay Snipes, and Edward Penman, to Alexander Moultrie, conditioned for the payment of £21310. 4s. 1d. in general indents of this state. The bill charged that at the time this bond was given, Alexander Moultrie was attorney-general, in which capacity he had recovered large sums from the public debtors, which had

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*been paid to him in indents, and being in default at the close of his office, and having taken the benefit of the insolvent debtors act, he had turned this bond over to the state. It was stated and alleged in the bill, that the indents which he advanced at the time the above bond was signed, were the property of the state. The indents had been sold by col. Moultrie for £2,700. sterling, and £2,500. of the money committed to J. Weed, one of the signers of the bond; who had squandered the money. The bond contained nothing on its face implying that fact, but was conditioned to pay to the said Alex. Moultrie, his executors, administrators or assigns, (like other common bonds) general indents of this state, to the same amount, "and to save him harmless from any alteration in the nature of such indents," with a clause expressing, that "for such indents, Alexander Moultrie was to be accountable to the South-Carolina Yazoo Company at their present rate of value;" and another clause expressing, "that this obligation is given by us in behalf of ourselves, and the rest of the members of the said company." It was admitted on all hands, that those indents were advanced by col. Moultrie, who was a zealous member of the Yazoo Company, to enable them to make a present payment to the state of Georgia, conformable to the terms, and at the period prescribed by their law for issuing to the Yazoo Company, a grant for a large tract of land; which grant it was expected would

† This case was intended to be inserted in the preceding volume, but could not be prepared in time.

soon be obtained, and large funds realized by the Company from sales. The principal points on which the case made in the bill was bottomed, were that the defendant was a partner in the Yazoo Company; that he knew that the indents that had been borrowed from col. Moultrie, for the use of that company, were the property of the state; and that col. Moultrie held them only as its officer and trustee; and that the defendant ought to be considered as contracting with the state, when he contracted with its public officer, and should be charged with the trust of which he was so connusant.

On the 28th June, 1790, (about 4 months

*3

after the giv*ing of the bond) col. Moultrie executed a deed of release to Edward Penman, "releasing and discharging him from all obligations to him prior to that day, and especially one dated 17th day of February last, for furnishing a sum in indents." On the same day, the said Alexander Moultrie gave a certificate which he signed as director of the Yazoo Company, setting forth, "that the said Edward Penman was not then a member of the company, nor was he at any time interested therein, except only that he had been offered a part of a share, (of about 150,000 acres of land), for some friendly services he was to procure to be done for the Company in London, and which offer Mr. Penman had declined." When col. Moultrie gave these instruments, he observed to the witness, J. Gairdiner, who attested the execution, that Mr. Penman had refused to accept of a large present of land." One object of the bill in this case was to set aside the above release and certificate, as having been unduly and improperly obtained through great solicitations and pathetic appeals to the feelings of a man of an easy nature, and by representing that the public impression of defendants having a connexion in that business, would destroy his credit in England, and ruin himself and family.

The defendant in his answer, denied that he ever was a member of the above Company. He also denied a knowledge that the indents loaned by col. Moultrie, were the property of the state; and he did not admit the fact to be so. That had he known he was incurring any responsibility to the state, he never would have signed the bond. That on the urgent solicitations of all the parties, and col. Moultrie himself, (all of whom represented that it was only a temporary thing, to enable the company to make the cash payment, and get their grant, which would speedily reimburse the sum,) and on the express stipulation by col. Moultrie, that the sum would be so applied, and the grant obtained with the money, and immediately reimbursed from the sales of lands, the defendant was prevailed upon to sign the bond. That his

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principal inducement to facilitate *their acquisition of the grant was the expectation that some of the company who owed money to himself and friends would be enabled to pay their debts, and particularly Alexander Inglis, who was not only one of the debtors, but also one for whose interest and prosperity the defendant took a friendly concern. But the defendant had no share or agency in the concerns or plans of the company, or the application of the funds so borrowed. The defendant farther insisted in his answer, that as soon as he found that the indents, instead of being faithfully applied to the purchase of the grant, had been sold, and the money confided to J. Weed, who had squandered it, he called on col. M. and demanded to have his name taken from the bond, as the express condition on which he signed it was broken, and that col. M. readily admitted the fact, and requested, that instead of erasing the name of the defendant, which would mutilate the deed and might destroy its effect upon the other parties who were of the company, the defendant would accept of a distinct release, which the defendant agreed to, provided col. M. would give him something to counteract the effect of those words in the bond, which implied his being a partner in the Yazoo Company.

To prove that the defendant was a member of the company, the attorney-general relied on the before cited clauses of the bond. He also produced evidence from the records to shew that col. Moultrie was overwhelmed by judgments and mortgages, and that his affairs were so greatly embarrassed at that time as necessarily to suggest the fact that so large a sum in general indents in his hands, must have been the property of the state, and held by col. M. as such, of which the defendant could not but be sensible. The attorney general also produced long lists of judgments and executions against the other parties named in the bond, with returns of nulla bona, to prove their insolvency. And the attorney-general also offered to call col. Moultrie himself, as a witness to prove that the defendant was a partner in the company.

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and the circumstan*ces under which the indents were loaned, and also the occasion and inducements for his giving the release and certificate before mentioned.

The court, on argument over ruled this species of testimony, on the ground that there was a written charter of association signed by the parties thereto, which was the highest evidence; and col. M.'s evidence was refused on the additional ground that he was directly interested, to fix the liability of the defendant, who being the only solvent party in this bond, was the only source from whence reimbursement can be obtained, and col. M. shielded from being hereafter sued for those indents by the state. For although he also had before this time taken the benefit of the insolvent debtors act, the state was

not then a suing creditor, nor had they taken any dividend under the assignment; and therefore were not barred from suing him after a year and a day.

The defendant laid before the court a printed pamphlet, published by the Yazoo Company, which contained proof that the company was constituted under a deed of association, and the individual names subscribed thereto; and having given notice to produce it, now called for the said deed. The deed was produced, and the name of "Thomas Washington for Edward Penman," subscribed thereto by Thomas Washington. †† The defendant having proved that he was in England at the date of this signature, and no authority for Washington or Welsh to sign defendant's name being produced, he called James Gairdiner as a witness, who proved that he was the sole and lawful attorney of the defendant while he was absent, and the power was produced. That he knew nothing of the transaction, and did not give to Washington, alias Welsh, or any other person, authority or instruction to put de-

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fendant's name to the Yazoo associa*tion. Defendant further proved that he arrived from England about the close of January, 1790; that on the 28th February following, Washington, alias Welsh, having arrived from Savannah, (being a director of the company) wrote a letter to the defendant, which was produced, inquiring if it was true, as he had heard, that he (the defendant) had resolved to decline the offer of being a member of the company; that the company was to meet that evening, and he wished Mr. Penman's answer, that he might let the company know it. On the reverse of this letter, was a copy of the answer, of the same date, in the most unqualified manner, disavowing all connexion with the company.

It was contended by Mr. Pringle, the attorney general, on behalf of the state, that although by the form in which this bond was taken, and has been transferred to the state, she appears to hold as assignee, and stand in a derivative capacity, yet that the circumstances that are developed entitle her to claim in an original right; and if so, that no acts subsequent to the signing of this bond can prejudice her claim. That the office of attorney general conferred no power to release the just and lawful claims of the state by matter in pais; and therefore that col. Moultrie's release, (he being then attorney general) though under his seal, and might bind him individually, provided it were properly obtained, could not bar the right of the state.—That it is now admitted on all hands that the large sum of public indents which col. M. advanced on the security of this bond, was the property of the state, paid into the hands of their attorney by the public debtors, and ought to have been cancelled in the treasury as obligations paid off by the state. For although these obligations of the state were a species of circulating medium, yet they carried in them, inherently, the quality of all obligations, that their obligatory force would be destroyed upon being paid off by the obligor. That to issue them again into circulation, and give them the second time

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an efficacy against the state, by *the officer or agent who was intrusted with the possession of them as instruments equitably cancelled, was a breach of trust, and all parties engaged therein must be affected thereby.

As to the defendant's knowledge that the indents which col. M. offered to advance were the property of the state whose officer he was, it is inferrable from all the circumstances. col. M. was before and at that time in most embarrassed circumstances, greatly pressed by his creditors, whose multiplied suits, judgments and executions against him were public and notorious.

In these circumstances it was impossible to suppose that he had then in his own right so large a command of effective funds; and they being of that species which were usually payable for dues to the state, in whose behalf he was the suing officer; the conclusion was obvious and unavoidable, that they were the property of the state. This was also more than implied by the circumstances of taking this bond and the terms used in it. Abundant security was to be taken by col. M. not for paying the indents over to any of the obligors, but for his "becoming accountable to the Yazoo Company for the indents at their present rate of value"—that is, he was to convert indents that were then in his hands to the use of the company, and the penalty of the bond was stated in indents specifically, and the condition of the bond was not only to repay the precise sum in indents, with no reservation of intermediate interest, but "to save him harmless from any alteration in the nature of such indents." To what could this clause allude, but to the idea that these indents were quasi cancelled and withdrawn by the state from circulation, and now about to be re-issued? That their negotiable nature had ceased in fact—but were now about to be altered in that respect, and to commence a new course of negotiability? There is nothing in the case that furnishes any other construction to this clause of the bond. The importunity by which the defendant states in his answer, he was prevailed upon to sign the bond, and that too by

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col. Moultrie himself, in a *case too in which his own interests as a principal member of

†† This was a noted speculator, who had impudently assumed the above name while in Georgia; his real name was Welsh. He came to this state in 1790, where he exercised his pernicious talents for a time, and in the year 1791, was executed for forging the state indents. Vide, 1 Bay's Reports [1 Am. Dec. 601]. The State v. Washington.

the company were to be advanced, proves that his personal indemnity was the prominent condition on which only he could be induced to depart from the official obligations of duty, and violate the trust under which he held those indents.

If the defendant did not therefore know by direct formal information the concern the state had in these indents, the fact was sufficiently manifest to put him on enquiry—and there are many cases in this court to shew that to be sufficient to affect the party, and be equivalent to notice of a trust. As to the grounds on which the defendant afterwards sought to be discharged from the obligatory effect of the bond, they were not well founded. It is true that Col. M. intrusted them to an agent, who instead of applying them to the uses of the company, sold them and squandered the money. But supposing that agent not to have been one agreed upon by all the parties, and employed to use the fund for the purpose of obtaining the grant (which is highly presumable from all circumstances) yet the stipulation by col. M. in the bond was, that he was to be accountable, not to the defendant, but to the "South-Carolina Yazoo Company." To that company he was still accountable, and the defendant, in common with the other signers of the bond, had the remedy. The release therefore was demanded on fallacious grounds; and it was yielded to the intreaties of the defendant improperly and ought not to stand—more especially too as the release operates in law as effectually to discharge the other co-obligors as though the name of the defendant had been erased as he required. So that the reason given for substituting the release was equally fallacious. It ought therefore to be regarded as a collusive instrument to defeat a responsibility already incurred to the state, the consideration of which was past and gone —beyond the possibility of recall. As to the defendant's not being a member of the Yazoo Company, he cannot be permitted to aver against his own deed which expressly says,

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"this obligation is given by us *in behalf of ourselves and the rest of the members of the said company." This was a strong affirmation that all the signers then were members—and each is estopped to deny it. The defendant might be a dormant partner, and it might suit his purposes and views to remain such, and therefore his not subscribing the association or articles of partnership was not repugnant to such a connexion: a person who is interested in a concern for profit and loss, according to a well known rule of law, is equally chargeable as a partner, with those who do formally subscribe the articles of partnership. And the certificate of Col. M. an insolvent partner, surely ought not to be set up against the creditors of the concern, after the responsibility has once attached. Authorities cited. 2 Foubl. 155. 2 Vern. 271. 1 Atk. 490. Amb. 313. 2 P. Wms. 414.

Mr. Ford defendant's counsel stated that he would in the first place review the transactions between the parties, as they appear of themselves unconnected with extraneous circumstances. 2d. State what is necessary to be made out in order to connect them with the state, and produce a responsibility to her. 3d. Examine how the facts and the law so necessary, have been made out and proved.

Here we have a simple bond given to Alexander Moultrie, dated 17th February, 1790, in the penal sum of £21310. in indents payable on demand: conditioned to pay to the said A. M. his executors, administrators, or assigns, general indents of this state to the like amount; and save him harmless from any alteration in the nature of such indents —with a clause expressing that for such indents, "the said A. M. was to be accountable to the South Carolina Yazoo Company at their present rate of value;" and another clause, "that this obligation is given by us on behalf of ourselves and the rest of the members of the said company." This instrument purports on its face to be a mere private transaction; and by its terms implies nothing more than the plain matter expressed—intimating no interests except those of the parties. The attorney general has erected an ingenious construction on the

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clause of in*demnity to col. Moultrie, "to save him harmless from any alteration in the nature of the indents." But a more obvious construction, and doubtless the true one, will be found in the fluctuating value of that species of paper. This is well known —and from this circumstance indents were as much a subject of speculation as any other commodity in the market. Col. M. advanced them "at the present rate of value" —if when they came to be repaid him, they should have fallen from that value, he would have been a loser had not this clause been provided to make good the difference. The release given 28th June, 1790, sealed by A. Moultrie to the defendant, imports also to be a private transaction between individuals, no less than the bond.—We see neither the attorney general nor the state in the one or the other: and as to the certificate that is given, it is subscribed expressly "as director of the Yazoo Company." The release is expressed on its face to be for consideration. The bill states that this release was given in consequence of great importunity and pathetic representation—but it does not charge fraud. That this release and certificate were so obtained, is however not admitted in the answer, nor proved by the state, and therefore forms no feature of the case. Yet were it even true, mere importunity is not sufficient to set aside a deed if attended with no fraud no circumvention. If

the facts alleged in the answer were true, that the very condition of the whole transaction was that the grant should be obtained with the indents, there was on the part of Col. M. a moral obligation, upon that purpose being frustrated, to give the release—most probably it would have been decreed in this court—and therefore importunity and pathetic representations were just and proper. And as to the certificate of the defendant's not being a member of the company, we have no need of its aid—for it is charged in the bill and denied in the answer, and by the rules of this court that denial stands good and conclusive, until it shall be encountered at least by the testimony of one positive credible witness, and his attestation for-

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tified by strong corroborating circum*stances. 1 Vern. 161. 2 Atk. 19, 140. 3 Atk. 649.—The state has not produced even one witness—the attorney general has rested on circumstances only. But surely the door was not open for the proof by circumstances, until the effect of the defendant's answer on oath was neutralized by the oath of one credible witness. This is stumbling at the threshold. Yet if the circumstances apart from the answer be considered, they preponderate in favor of the defendant. It is proved that the company was formed by a written instrument to which the names of the members were subscribed. This was the highest evidence of who constituted the company—and being called for was produced. It is true the name of the defendant was found at the bottom of the instrument; but instead of proving him to be a party, the very history of that signature proved that he was not a party. It was officiously placed there by Washington (or Welsh) who we have proved had no authority; and whose correspondence with the defendant at an after period, in effect admitted fully that he had no authority. This signature, and the great pains taken by that same person, and by all the other parties, to get the defendant's name signed to this bond, with the insidious clause attached at the end of it, "for ourselves and the rest of the members of the Yazoo Company," savours rather of a desire to obtain by an indirect means what they had failed to accomplish by the consent of the defendant. The words used by Col. M. to the witness when he executed the certificate, "Mr. Penman refuses to accept of a large present of land"—shews that their obtaining his association in their plans, had been a matter of trial and experiment. As to those words of the bond, they ought to be restrained to those signers who are confessedly members of the company. As the bond was not made for the purpose of specifying who were members, that clause is to be regarded as res inter alios acta. 1 P. Wms. 683. And an ancient maxim saith, "if many join in one act, the law saith it is the act of him who could best do it." Noy Max. p. 33. Thus

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the answer, which by the rules of *this court was entitled to stand conclusive, instead of being encountered, is strongly confirmed by all the attendant circumstances. And so stands the question as between the original parties. And this brings us to consider secondly, what is necessary to be made out, in order to connect these transactions with the state, & induce a responsibility to her. The attorney general, with his usual discrimination, has seen the danger of predicating the claim of the state upon the footing of an assignment of the bond by Col. Moultrie, knowing that by all the established rules, the bond would pass to the state, charged with all the original equity. For an assignment of a bond "is an agreement, only that the assignee shall have all the fair and equitable benefit that the assignor was himself entitled to." 1 P. W. 498. 1 Vern. 240, 348, 475. 2 Vern. 499, 588. 2 Ves. 375. 1 Bro. C. R. 543. The bill therefore seeks to place the state in an original relation, either by an actual or constructive privity. It is charged that the indents which were the subject of the contract, were the property of the state—that they were known to be so by the defendant—that they were advanced for the benefit of the Yazoo Company—that the defendant was a member of it—that these indents being subject to a trust in the hands of Col. M. the defendant is affected by actual or constructive notice, and therefore a trust results to the state. If these points have been made out, the liability of the defendant must follow—but it is necessary they should be made out by confession, or by proof. And this leads to the consideration,

Thirdly, how far these grounds are made out.

That the indents did in fact belong to the state, has been assumed—but is neither confessed in the answer nor proven. No witness has sworn it—no document has established it. Individual persuasion has been adopted for legal proof—but for the sake of experiment, let that fact be assumed. The next point is, that the indents were advanced for the benefit of the company. This is an indispensible link, because the very bond

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given to col. Moultrie ex*pressly makes him a trustee for so applying the indents. Therefore, if he diverted or allowed them to be otherwise applied, or used them, the very substratum of the contract would fail, even at law, and far less would equity set up and enforce it. But it is in proof that Col. Moultrie did not so apply the indents, but they were sold and the money squandered—and so this ground would fail. But if this point should be conceded or surmounted, the next point, "that the defendant did know that the indents belonged to the state, remains to be

considered. And were we still to overlook the defect of proof, in regard to the principal fact, that they did so belong—what proof have we that the defendant knew it at the time? There is no proof, and it is denied in the answer; and if more were needed, even probability is against it—for if Col. M. was in fact committing a gross breach of trust, in converting & disposing of the public funds in his hands, he must have felt the strongest inducements to conceal it from every body; and there was no circumstance attending this transaction, prompting the disclosure of such a fact. Then the law of this court, before adduced to another point, is conclusive on this. But it is argued that because Col. M. was much in debt, and pressed by his creditors, the defendant ought to have presumed that the indents could not be his own. This ground is very broad indeed, and would go to convict any one of a legal indiscretion, who carried on dealings with a man who was in debt. It goes farther—it imposes an obligation to make an offensive scrutiny into the funds of a man in debt, to ascertain whether the monies in his hands were truly his own, to guard one against becoming constructively a confederate in a breach of trust. It is said the circumstances of col. M. were sufficient to put the defendant on enquiry. From whom else could he have enquired, but from col. M. himself? And the answer he would have given, (had not the indecorum of the enquiry prevented any answer at all) is sufficiently manifest from what the bond itself implies. He proffered them as his own indents—dis-

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posed of them *as his own—and took bond, payable to himself, his executors, administrators and assigns. Then the answer denies knowledge of the fact, if it existed, (which is not proved) and the enquiry of the defendant, if the court could exact from men a precaution so extraordinary, would have conducted to the same result. Indents were a species of circulating medium, payable to bearer. They passed from hand to hand like cash; and like money, having no ear mark, it was equally impossible to distinguish the owner from the possessor. The authorities cited and urged for the complainant, have therefore no application, "as where a party will take a thing, knowing of a use or trust, he shall be construed a trustee, for then he is particeps criminis et dolus and fraus nemini patrocinantur," cited from 2 Fonb. 155; and 2 Vern. 271. Also, "that constructive notice shall be held sufficient, for whatever is sufficient, to put a party upon enquiry, is good notice in equity." 1 Atk. 490. Ambl. 313. And that where a purchase is made with trust money by a trustee, and the conveyance taken to himself, a trust will result. 2 P. W. 414. All these authorities, good and true in themselves, fail of application here, for want of the facts on which they arise. The defendant was no trustee—had no notice actual or constructive, of this being a trust fund, and was not particeps criminis of any fraud on the state; and having already been shewn to be no member of the company, and being released from this bond by the obligor, before it was assigned or transferred, he is on no ground whatever liable to the state. The bill therefore ought to be dismissed.

Chancellor RUTLEDGE delivered the Decree of the Court.

This is altogether a bill of discovery. There is no fraud charged on defendants. The allegations of the bill are intended to draw from defendants a discovery whether they are not associated in the company called the Yazoo Company; whether they did not apply to Mr. Moultrie to loan them a

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sum of money in indents, and *did not know at the time of obtaining them that they were the property of the state, and could not be lent to them by him as his private property; but merely as the agent or trustee of the state, and that the bond they gave, was to secure the re-payment of them to the state. The defendant Penman in his answer explicitly denies that he was ever associated with that company; nor did he know that Moultrie had judgments in his hands, belonging to the state; nor did he apply to him to loan them. That no explanation was ever made by Moultrie, & defendant supposed they were his own, as he offered to loan them, and took the obligation in his own name, and to his own use. That had he known they belonged to the state, he would not have signed the bond. The proposed loan came from M. and so far from defendant's seeking it, great pains were taken by Moultrie and other defendants, to get his name to the bond. That he never signed the association; and some short time after he returned from Europe, finding his name had been set down by Washington, alias Welch, he immediately applied to him to know by what authority he had done it, and insisted on its being erased. He then assigns his reasons for signing the bond to Moultrie, and that it was on the express conditions declared at the time to the obligee and the others, and acceded to by them, that the grant should be immediately obtained with the indents so loaned, and that he signed on that condition only; and if the grant was not obtained, he would not be bound. That when they failed, he applied to Moultrie to be released agreeably to his stipulations, who refused to take his name from the bond, in as much as the others were still liable, but gave him a release, and also a certificate, declaring defendant was not, nor had he ever been associated with them in the company. Counsel for complainant, to prove Penman a member of the Yazoo Company, produced

the bond above referred to, which in the concluding part, declared that the obligation was given by them in behalf of themselves, and the rest of the members of the company. A list of judgments against Moultrie, the

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*obligee, and mortgages to a considerable amount, were also produced; whence an inference was drawn, that Penman could not but have known Moultrie's embarrassed situation, and that it was not in Moultrie's power to have furnished them with indents to so large an amount out of his own funds. And to prove by circumstantial evidence, that Penman was the person who principally induced the loan, a list of judgments was also produced against Huger and Snipes, two of the co-obligors. Opposed to this evidence, is the defendant's answer, pointedly denying his ever being associated with the company, corroborated by the deed of association, signed in 1789, when defendant was in England; signed indeed by Washington on his behalf, but without any authority; as Mr. J. Gairdiner, who was sworn, declared he was the only attorney of defendant, authorized to act for him. Next, Washington's letter to Penman, in March, 1790, requests to know if it was true that he had refused being a member; with Penman's answer, declining it. Then the certificate of the obligee in the bond, and director of the company, declaring Penman was not, nor had he ever been a member of the company, together with the release, under hand and seal of the obligee, at a very early period after the bond was signed.

It was objected to the release, that it was provisional; that the other obligors should still be bound, or it was not to have effect. The release does not purport any thing of the kind; it is absolute, and the obligee must have known it would have the effect to release them all. As to the idea that the release was to be kept secret, and the co-obligors made responsible, it was absurd, because, if the bond was ever put in suit, defendant Penman, must have been sued with the others, & his pleading the release, would be an effectual bar to a recovery against them all. It was known at the time the bond was given up, and stated in the bill, that the release existed. The state took the bond from the obligee subject to that release, and would not allow it in Moultrie's account,

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as a payment; but held it merely as a *collateral security, which plainly shews they did not consider it as a bond taken by him for their use. Nor indeed has it been attempted to be proved, that the indents loaned were the property of the state. There is a provision in the bond, specifying that for such indents to be paid, the obligee should be accountable to the company. There is no proof before the Court, that he ever accounted for them to the company. On the contrary, it was proved that he sold some of them, and gave others to one of the obligors, who dissipated them. If defendant received nothing, and the company for whose use they were loaned never received them from obligee, (and if they had, it is presumed that might have been proved,) the bond was given without consideration, and the obligee might have fairly released it.

It is a maxim in this Court, that he who would have equity must do equity. It is hard that the state should suffer so great a loss by the improvident conduct of one of its confidential officers; it would be still harder, that the defendant should make good that loss, when it is evident that he did not contribute to it, or even received a single farthing of the money; and the obligee, who induced him to sign the bond, was so conscious of his innocence, that he gave him the release and certificate before mentioned. It were to be wished that the rules of evidence had permitted the obligee to be examined; it is very probable the defendant's case would have appeared in a still more favorable light. But we can judge of it only from what appears to us. Upon the whole, the answer of defendant on oath, positively denying the allegations in the bill, supoprted by the variety of testimony above mentioned, cannot but make so strong an impression on the mind, as to leave no doubt, that he ought, in this Court to have the full benefit of the release pleaded, and therefore the bill should be dismissed.

Pringle for the complainant. Ford for the defendant.

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2 Desaus. *18

*Case II.

[Present, Chancellors Rutledge, Burke and Marshall.]

WILLIAM BRAILSFORD and MARIA, His Wife, Devisee and Legatee of Daniel Heyward, Deceased, v. THOMAS HEYWARD, Executor of Daniel Heyward, Deceased.

(November, 1800.)

[*Wills* ⇐684.]

The testator devised certain real and personal estates to trustees, to hold to the use of his wife during her life, and at her death, to the youngest child of testator, who should attain 21 years of age. The wife died, and also the two youngest children, under 21 years of age. The next child, having attained 21, claimed the estates, and the intermediate rents and profits. The court decreed that she was entitled to the rents and profits (which alone were in contest) against the claims of the heir at law, and of the residuary devisees and legatees.

[Ed. Note.—Cited in Gage v. Rogers, 1 Strob. Eq. 374; Drayton v. Rose, 7 Rich. Eq. 339, 64 Am. Dec. 731.

For other cases, see Wills, Cent. Dig. § 1615; Dec. Dig. ⇐684.]

[This case is also cited in Hinson v. Pickett, 2 Hill, Eq. 354, on question of rehearing.]

The complainant's bill states, that Daniel Heyward, being seized and possessed of a considerable real and personal estate, duly made his will, dated 7th June, 1776, and thereby devised to his son Thomas, and in trust for the testator's wife, (in lieu of dower) during life, his plantation called Rose Hill, together with all the slaves, stock, and plantation utensils thereto belonging, and at her death, he gave the same to his youngest child that should attain the age of 21 years, and his or her lawful issue. That said plantation, slaves, &c. were, by virtue of said will, in the possession of said widow, until her death in the spring of 1788.

Testator also devised and bequeathed to his wife, for life, his house and lot in Charleston, with furniture, servants, &c. and at her death, to his next youngest child, who should attain 21 years of age, and to the lawful issue.

That testator also bequeathed as follows, "I will to my sons Thomas and William, in trust for the use of my daughter Elizabeth, during her natural life, the following lands, slaves, stock, &c. thereon, and appurtenances thereunto belonging; and at her death, I give the land to the male heir of her body

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lawfully begotten, when he *shall attain to the age of 21 years, and for want of such, to the eldest female that shall attain to that age, or her lawful issue, if she should leave such before she attains that age, and the slaves, &c. to be divided between the heirs as above mentioned; and in case of no such heirs, then I give the land and slaves to my youngest child that shall attain to the age of 21 years, viz:—my plantation or tract of land, on Portroyal Island, containing 526 acres; two tracts of land, originally granted to John Linder, near O'Ketty creek—one containing 450, and the other 150 acres—one negro lad Scipio, the carpenter, and one girl Eliza."

The testator also devised the remainder of his estate, real and personal, to his sons James and Nathaniel, to be divided between them. And he also gave his executors full power to act, do with, and dispose of the yearly product of his estate, for the benefit of his heirs, mentioned in his will.

That the testator died some time about the 11th of Oct. 1777, leaving said will in force, (except as the same is altered by two codicils, neither of which relate to the said devises); and did nominate his sons Thomas, Daniel, and William, and Mr. Keating Simons, as executors.—That Thomas and William only qualified.

That defendant Thomas Heyward, took upon himself the execution of said will, and possessed himself of all the testator's estate, and particularly that part given to his daughter Elizabeth, and also after the death of the widow, of that given to her for life.

That said Elizabeth Heyward died some time in the year 1780, without issue, and never having attained 21.

That Benjamin, the youngest child of said testator, also died some time in Sept. 1796, under 21, and without issue. That by the death of said Elizabeth and Benjamin, complainant Maria, (being the youngest child, who has attained 21) is entitled to said Rose-Hill plantation, slaves, &c. and to the plantations,

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stock, slaves, &c. left to *said Elizabeth, and to the crops, profits, and emoluments, since they came in possession of defendant.

That at the death of testator, there were on Portroyal plantation, besides cattle, hogs, and sheep, 53 negroes, named in the bill, as appears by the inventory. On Rose-Hill plantation, there were also at the death of testator, exclusive of cattle, hogs, and sheep, forty-one negroes also named, as appears by the inventory.

Complainant William saith, that he hath married the complainant Maria, whereby in right of his wife, he became entitled to said devised property.

That complainants applied to defendant for an account of the crops, profits, and emoluments arising from the cultivation of said plantations, and from the labor of the slaves, and for an account of the application thereof, and for payment of the balance, and for an assignment of such part as consists in securities.

The bill charges that complainants are entitled to said crops. That said crops never belonged to said Benjamin, and could not be spent for his use, as he never arrived at the age of 21, and the estate could not therefore vest in him. That the fund arising from the Callewashie plantation, specifically devised to said Benjamin, was the proper one for his support.

That the accounts of the funds claimed, ought to have been kept separate from the property of said Benjamin, as they were the property of complainant Maria, or of her brothers, as Benjamin could not have been the devisee contemplated, not being in existence when the will was made; but even if the negroes have worked together, it cannot be difficult to ascertain the relative proportions. The bill further charges that considerable crops have been made on these estates, to which complainants are entitled, and for which the defendant ought to account.

That though defendant in a letter of the 24th December, 1796, admitted the right of complainants to the estates in question, he has since refused to give them possession.

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*The bill charges, that defendant has never rendered any account in the ordinary's office, though by law he is bound to do it annually.

That on Cole's Island, belonging to the estate of said testator, there were about thir-

ty negroes: that neither Cole's Island nor the negroes thereon, are mentioned in said will, nor do complainants know to whom they belonged. That for some particular reasons, said land and negroes were conveyed in trust, and were in case of Benjamin's death, to be divided among the testator's children; but whether among the whole, or among part only, complainants cannot say. That defendant has, since the death of Benjamin and James Heyward, divided said land and negroes among the children of his brother William Heyward, deceased, Nathaniel Heyward, and himself, and utterly excluded complainants.

The bill charges, that complainants are entitled to an equal proportion of said land and negroes.

The bill prays that defendant may account for all the crops which have been made on Portroyal plantation, as also on Cole's Island, since testator's death, and for all the crops on Rose-Hill place, since the death of the widow.

That he may pay interest on the monies (arising from such crops and labor) which have come to his hands, or received for his use, and that he may pay complainants what shall appear to be due.

That he may discover under what trust Cole's Island, and the negroes thereon were held, and produce the trust deed; and should complainants be entitled to any part thereof, that he may be directed to put the same in their possession.

That complainants may be let into possession of the real estate, negroes and personal property, which they (in right of complainant Maria, as the youngest child, who has arrived at 21) are entitled to ——— and for general relief.

The defendant, in his answer, admitted that his father Mr. Daniel Heyward, made,

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and duly executed the will *set forth in part by the complainants, and departed this life, leaving the same in full force, except so far as the same was modified by a codicil, executed afterwards, wherein and whereby he provides for a child, with whom his wife was then pregnant, who was born after the execution of the said codicil, and being a son, was named Benjamin. After the birth of Benjamin, the testator added another codicil to his will, by which he devised the Callewashie estate to Benjamin, and his heirs, but if he died under age, &c. it was devised over to testator's grand-son, Daniel Heyward.

The defendant admits, that at the death of the testator, in the year 1777, Elizabeth and Benjamin were his two youngest children, and that Elizabeth died in the year 1780, under age, unmarried, and without issue. That the widow of the testator died in 1788, and Benjamin died in the month of September, 1796, under age, unmarried, and without issue, and that the complainants thereupon became entitled under the will of the testator, to the Rose Hill and Portroyal estates; the complainant, Maria, being the youngest child of the testator, who had attained 21 years of age.

The defendant denies the right of the complainants to the crops and emoluments of those estates, till the death of Benjamin, the youngest child, in the year 1796. For as he answered the description of the youngest child, he had the best right to them, until his death.

The defendant states, that with respect to Cole's Island, it was devised by the testator, in the codicil to his will, to his son Daniel. But he also executed a deed, conveying Cole's Island to trustees, in trust for testator's son Benjamin, in case he lived; but if he died, the same should go according to the codicil. The defendant submits that upon the death of Benjamin, under age, and without issue, the deed was cancelled, and that Cole's Island went according to the directions of the codicil, to the said Daniel. But he being dead, without issue, before the abolition of the rights of primogeniture, Cole's Island be-

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came the pro*perty of his two brothers, of the whole blood, William and the defendant Thomas. But that if the deed should be considered valid and operative, the property would be divisible among Benjamin's legal representatives.

The defendant requests of the court that the complainant William Brailsford may be required to make a settlement of the estates of Rose Hill and Portroyal, on his wife Maria and her children.

The testator devised to his sons James and Nathaniel, the remainder of his estate, real and personal, to be divided between them. And he gave his executors, "full power to act, do with, and dispose of the yearly product of his estate, for the benefit of his heirs abovementioned."

Mr. Parker and Mr. Gaillard argued for the complainants.

The right of the complainants to the property is not questioned. The answer admits their right. But the intermediate profits, from the death of the testator to the death of the son Benjamin, under age, when the estates vested in the complainant Maria, are denied to belong to the complainants.

It is admitted that this depends upon the intention of the testator, and that if that intention is not clear, to pass the profits, they must go to the residuary devisees and legatees, or to the heir at law. But the intention is clear in this case, that the intermediate profits should go to the person who should ultimately answer the description of the youngest child who should attain 21 years of age, and be thus entitled to the estate itself.

It is manifest that the testator meant to

dispose of his whole estate, for he says, "as to all my worldly estate," I give, &c. See Cowper, 356. The devise is to trustees for his wife; and at her death, to the youngest child, who should attain 21 years. This is a contingent remainder, in the hands of the trustees, of a trust estate, co-extensive with the objects of the devise. The devise to the executors in trust does not contain words of inheritance to them. But as it was to sup-

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port an inheritable estate, it must be *co-extensive, to answer the purposes of the creation of the trust. The trust goes with the estate, however worded, till the contingency happened, on which it was to determine. The court would even add words to make the trust co-extensive with the estate. A trust may be in fee without the word heirs, or other words of inheritance. See 2 Stra. 798. 3 Burr. 1684. Even if a trustee be not named, the heir would be made a trustee by the court, to give effect to the intention.

But if it were not so, there was such a devise to the executors, as gave them at least a life estate; and the executor, Thomas Heyward, surviving the contingency, kept up the trust, till the estate vested in Maria Heyward, on the happening of the contingency. That this was a contingent remainder is clear. See Fearne on remain. p. 3, 5th edition. See also, p. 230, 4th edition. The rule is, that the devise cannot be construed to be an executory devise, if it can take effect, as a contingent remainder. See Fonb. 97. In this case the free-hold having vested in the trustee, it has taken effect as a contingent remainder.

The youth of the children, intended to be provided for, seems to have required that the trustee should take the legal estate for life, or until the contingency happened, when the estate was to vest.

The estate did not vest in the son and devisee, Benjamin; for when the remainder is limited to a person not ascertained, it cannot vest. See Fearne 458, 5th edition, and 467, 9. The estate was contingent, till it should be ascertained whether Benjamin should attain 21 years of age. He did not attain it, and the estate never vested in him.

The whole interest was transferred to the trustee, for the benefit of the person who should be entitled to take the estate. The produce therefore must follow it.

If the profits be not given to the youngest child, who attained 21 years, the will of the testator will be defeated; for they were the

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peculiar objects of the concern of the *testator in the devises under consideration. The residuary devisees and legatees were not at all in view. They were abundantly provided for in the will, and the residuary clause in their favor, was to carry any small undisposed parts of testator's estate, but not such a very large portion of the estate as this.

The last clause in the testator's will authorising the executors to dispose of the profits of the estate for the benefit of the devisees, shews the intent, that the intermediate profits should be improved for the benefit of the devisees, ultimately entitled to take under the will. The hæredes facti, were intended to be benefited, and not the heir at law, or the residuary devisees and legatees. It is true there is no express devise of the profits to them; but that is not necessary. If used, it would have been only evidence of intention to give, and when the intention can be collected without express words of bequest, it will take effect. It was so determined in the case of John Drayton and others, vs. the executors of Drayton, decided in this court; † in which the intention of the testator was collected from circumstances, and did not require words of gift. So in Smith and Motte v. Smith and others, determined in this court.

There is a difference between the real and personal estate, and complainants will be entitled, at all events to the profits at least of the personal estate, in case it be decided, that there was no disposition of them by the will. See 3 P. Wm's. 300 note, Studholme v. Hodson.

Mr. Desaussure and Mr. Ward, for the defendant:

It is agreed that the intention of the testator must prevail; but it is to be collected from the expressions on the face of the will, or from the circumstances at the time of making the will; not from subsequent events. It is also agreed, that where an estate is given, and a charge is made on it, the court will presume an intention to give a fee to the devisee so charged, though there be no direct and express words giving a fee.

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*But there is no appearance of intention in the will under consideration, to give the intermediate rents and profits to the complainant Maria. Examine all the clauses, and no such intent is discernible.

It has been labored to shew that the court will enlarge the trust estate, to support the remainders. Allow this, but it does not decide any thing on the point now discussing; for it does not follow that the court will enlarge the estate to be supported.

As to supplying defective words and provisions, the court will be cautious of exercising such a high act of power. The defect must be apparent, and the intention plain. See 2 Bla. Rep. 1159. 3 Burr. 1626.

If the testator did not provide for the disposition of the rents and profits, on the death of the youngest child, before attaining 21 years of age, this court will not presume an intent and supply the defect, without clear evidence of such intent. Now there is no

† See 1st Vol. of the Reports in Chancery in S. Carolina [Desaus.], p. 324, 325.

such evidence in this case; the court will therefore permit the profits to go where the law would carry them, to the residuary legatees, or to the heir at law.

On the death of the testator's widow, to whom the estate in question was given for life, there was no person entitled to take the estate—none of the younger children had attained 21 years of age—the estate then could not vest.—Could the profits then pass? Certainly not.

When did Mrs. Brailsford's right to the estate accrue and vest? On her becoming the youngest child (by the death of others,) and on her attaining 21 years of age. Until the estate vested in her, she had no right to the rents and profits.

If implication be resorted to, in whose favor would the court raise it. Surely in favor of the youngest child Benjamin, who had the potentia propinqua, and not of Mrs. Brailsford, who had, only potentia remotissima—for she was the third youngest child at the death of testator; and richly provided for by direct devises to her. She has by accident become the youngest child, who has at-

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tained 21 *years of age; and in that character takes most of the estates devised to Elizabeth and Benjamin. Shall she also have a presumed intention, a voluntary implication raised for her, to give her the intermediate rents and profits, and place her above all the children? It would not be reasonable to do so.

Benjamin lived to nearly the age of 21 years. He surely, whilst he answered the description of youngest child, was better entitled to the rents and profits than Mrs. Brailsford. It was necessary for his subsistence and education—for though he had another estate devised to him, that also was limited over; and the remainder man claims the rents and profits of that estate also: so that Benjamin might have perished in the midst of abundance.

It has been contended that this is a case of contingent remainder; but we insist that it is an executory devise.—It comes precisely within the definition of an executory devise. The particular estate on which it was grafted was determined by the death of the widow, before the youngest child attained 21 years; consequently before the estate could vest—there was nothing to support the remainder—it must be considered an executory devise; and if not vested, what could give a right to the rents and profits to the ultimate devisee.

It was argued that the clause in the will, directing the executors to make use of the rents and profits for the benefit of the heirs mentioned in the will, furnishes evidence of the testator's intention, that the rents should accumulate in this instance, for the benefit of the ultimate devisees. But the clause will not support this exposition. It is simply a power to the executors to improve the income of the estate, for the benefit of those respectively interested, according to their several interests. It is nothing more.

We must then enquire how the law disposes of the rents and profits, not disposed of by the testator, of an estate which is contingent, and cannot vest for many years. And it is insisted that the rents and profits so undis-

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posed *of, descend to the heir at law. See 1 Vesey, senr. 268, 9. Hopkins v. Hopkins. 1 Atk. 598. 2 P. Wms. 471, Papillon v. Voice. Cases Temp. Talbot, 44, 51. In the case of Bullock v. Stones, 2 Vesey, senr. 521, 2, it was decided that where there was a devise of real and personal estate, to the first son of A. when he shall attain 21 years of age, this was a good executory devise of the real estate; but that the mesne profits descend to the heir at law—the profits of the personal estate accumulate. See also the cases of Carrick v. Errington, 2 P. Wms. 361, 2, 3, 4. Also Carter v. Barnardistone, 1 P. Wms. 505. Harris v. Barns, 4 Burr, 2157. Gore v. Gore, 2 P. Wms. 28. Heyward v. Stillingfleet, 1 Atk. 422.

Where there is even a preceding estate limited, with an executory devise over of the real estates, the intermediate profits (between the determination of the first estate, and the vesting of the limitation over) will go to the heir at law, if not otherwise disposed of. Fearne on devises, 434, 512. 1 Atk. 581.

Where a testator devised his real and personal estate to trustees, and willed that the first son of A. should have the estate when he attained 21 years, and his heirs; and that he should be well educated: A. had no son at testator's death. Lord Chancellor Hardwicke decided that the intermediate rents and profits of the real estate, belonged to the testator's heir at law; but that the heir's interest would determine on the birth of A.'s son; because the education of that son was to be paid for out of the rents. Fearne on devises, 435, 513.

It is obvious then, that if the provision for the application of the rents to the special purpose of education, which amounted to a disposal of them, had not been made, the mesne profits would have gone to the heir. There is no such disposition of them in the case under discussion.

These cases go very strongly to shew that the mesne profits of real estate, go in such cases to the heir at law, or residuary devisee. But it was contended that the rule was different as to the personal estate, the interest

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of which *would accumulate for the benefit of the person ultimately entitled. There is doubtless a distinction in general cases—but the personal estate is so blended with the real in this case; the negro slaves are so essential to the productiveness of the real es-

tate, that it is impossible to separate them; and the whole mesne profits must go, according to the rule as to real estate. But in fact, the residuary clause in the will under consideration, puts an end to all these difficulties—for that clause carries with it all the property, real and personal of the testator, not otherwise well disposed of. See Fearne 515, 516, 517. Cases Temp. Talbot, 228, 145. 1 Vesey, senr. 485, 490, 1. 2 Vesey, senr. 122, 3.

It seems quite settled that the interest of a contingent legacy, between the death of tenant for life, and the contingency happening, falls into the residuum, and goes to the residuary devisees and legatees. See 2 P. Wms. 330, 489; also, 2 Atk. 473, Green v. Ekins. 3 Bro. C. C. 58, Wyndham v. Wyndham; 4 Bro. C. C. 144, 152, Shaw v. Cunliffe; 3 Atk. 101, Heath v. Perry.

With respect to the settlement, which the defendant, the brother of Mrs. Brailsford, requires to be made, there can be no doubt that the court will order it to be made. It is the course of the court, whenever a wife becomes entitled to new property, to require a new settlement, in whole or in part, according to the circumstances. And there is no reason for departing from that course in this case. See 2 P. Wms. 202, 639; 1 Fonbl. 88; 3 P. Wms. 12; 1 Vesey, senr. 558; 2 Atk. 420; 3 Atk. 20.

In ex parte Higham, 2 Vesey, 579, Lord Chancellor Hardwicke refused to order the whole of the wife's property to be paid to the husband, though she was in court and desired it. So in cases Temp. Talb. 43; though there are some cases to the contrary, see 2 Atk. 67.

One of the reasons given for the courts of law not exercising jurisdiction over legacies is, because they have not power to compel settlements as the Court of Chancery can. 5, Term. Rep. 690, Deeks v. Strutt.

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*Chancellor RUTLEDGE delivered the decree of the Court.

The case before us is upon the construction of the following clauses in the will of the testator, D. Heyward, who was the father both of Mrs. Brailsford, the complainant, and the defendant.

"I will to my son Thomas, and my brother-in-law, J. Gignilliat, in trust for my wife during her natural life, in lieu of her dower, the use of my house and lot in Charleston, with all the furniture, &c. belonging, to the same; my house wenches, Rose and Precilla, &c. my plantation or tract of land, called Sandy Hill, containing 764 acres, together with all the slaves, stock and plantation utensils, thereto belonging; and at her death, I give the plantation, with the negroes, stock, &c. thereon, to my youngest child, that shall attain to the age of 21 years, and his or her heirs for ever; and my house and lot, slaves, &c. to the next youngest child, that shall attain to that age; and in case my youngest children die before they attain that age, if they should leave lawful issue, they shall inherit; also one mulatto carpenter boy, named Will; and the above legacy to be clear of any incumbrance of my debts."

"I will to my sons, T. & W. in trust for the use of my daughter Eliza, during her natural life, the following lands, slaves, stock, &c. (described in the will,) and appurtenances thereto belonging; and at her death, I give the land to the male heirs of her body, &c. and in case of no such heirs, then I give the lands and slaves to my youngest child, that shall attain to the age of 21 years."

The testator died some time after making his will, leaving five children in minority, viz. James, Nathaniel, the complainant Maria, Elizabeth and Benjamin.

This widow died in 1788, Elizabeth died soon after him, (the testator) under age, and without issue. Benjamin is also dead under age, and without issue, whereby the plantation, negroes, &c. devised to testator's wife, for life, and the estate devised to Elizabeth, became the property of the complainant Ma-

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ria, by the devise thereof in *the above recited clauses, she being the youngest child who has attained the age of 21 years.

For complainant, it was contended, that by virtue of the trust estate given to the defendant in the first instance for the life of the first taker, the estate limited to the child who should first take, should be construed a contingent remainder, and the trustee considered as holding the estate, together with the rents and profits, for the benefit of such child, until the estate vested: but that admitting such limitation not to be a contingent remainder, but an executory devise, yet the complainant was entitled to the profits, it being evidently the intent of the testator, and might be collected from the will, that they should accumulate for the benefit of the devisee, in whom the estate should ultimately vest. On the other hand, it was insisted for defendant that this was an executory devise. That the trustee had only an estate for the life of the first takers; and upon their deaths (if it were not for the residuary clause) the profits of the real estate would descend to the heirs at law, until the contingency happened, and the profits of the personal estate would accumulate and be an undisposed part of the estate, to be divided according to the statute. But that by virtue of the residuary clause, the residuary legatees must take the whole, it being therein given to them. In support of this doctrine, a number of cases were cited by defendant's counsel, which were not controverted; but in reply, it was insisted, that the intent of the testator must prevail.

To whom the profits of the estate belong, since the death of testator's widow and his daughter Elizabeth, is the single question to be considered.—With regard to the defendant, it is of little consequence; his interest is no way concerned in the determination; for if they do not belong to the complainant, they will go to the residuary devisees and legatees, Nathaniel and James Heyward.

The governing rule of construction in the case of wills, is the intent of the testator;

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and that intent must be *collected from the whole will, ex visceribus testamenti, so as to leave the mind quite satisfied about what the testator meant; and to construe conformably thereto, so far as it is possible, consistent with the rules of law. When sentences are doubtful or ambiguous the exposition must be made according to the testator's intent, which lord Coke calls the pole star, to guide judges in their determinations. In some cases equity will construe a will against express words, to make it take effect according to testator's intent; and will reject inconsistent or contradictory words. How far a devisee or legatee, who is not entitled immediately to the estate, or thing devised, shall have the profits or interest in the mean time, depends upon particular circumstances. Lord Hardwicke observes, most of them depend on the particular penning of wills; and hardly one case can be cited as a precedent for another. But if it be the case of a child to whom the testator gives the estate, the court will be astute to find out the testator's intent, to give it effect.

This being premised, we shall proceed to consider the will of the testator. To shew that he meant to dispose of all his estate, he begins with declaring, that as to such worldly goods as God had been pleased to put in his hands, &c. &c. he gave, devised and bequeathed to certain trustees for his wife's life, and to other trustees for Elizabeth's life, the estate in question; and at their deaths, (if Elizabeth should die under age, and without issue) the lands, slaves, &c. to his youngest child, that should attain the age of 21 years. The testator having amply provided for all his children in his will, but particularly his sons, and his two youngest children, who were the complainant, Maria and daughter Eliza, (for Benjamin was not then in esse) they appear, by the clauses under consideration, to have been the peculiar objects of his care, and to have been principally in his view; although by the singular manner of wording the first clause, Nathaniel has become entitled to the house and lot, &c.; and it is more than probable, testator did not

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contemplate that either James or Natha*niel would take any share of the estate devised in these clauses; for, after having made a disposition of a very large fortune among his children, lest he may have omitted something, which was not improbable, he inserts the clause, giving to his sons James and Nathaniel, the remainder of his estate, real and personal, to be divided between them. The profits of the estate, which he had specifically devised, could not be considered as any part of the residue; for that can only apply to such estates as he had at the time of making his will, and were not therein particularly disposed of. The whole property, lands, negroes, &c. being blended and united together, and given to the respective devisees under certain limitations, the profits as naturally follow and belong to such devisees as the shadow follows the substance. If however there remained on the mind a scintilla of doubt respecting the testator's intent, the last clause would remove it completely; for where he appoints his executors, whom he also nominates guardians of his children, he gives them full power to act, do with and dispose of the yearly produce of his estate, as they should think proper for the benefit of his heirs above mentioned. To effect the testator's intentions, the word heirs must be construed children; for in the legal sense of the word, a man's eldest son is his heir, and it is evident he could not mean him; neither could he mean his residuary legatees, because they were not his heirs. The heirs then to whom he refers, can be no other than his children, the devisees respectively named in his will, for whose respective benefit, the produce of the estate he had given to each of them should be appropriated. Suppose the son Benjamin had lived to the age of 21 years, would it be contended that he would not have been entitled to the profits of these estates, which are now in dispute? Surely not. Nothing is more evident, that the defendant did not view the question formerly in the light it is now contended, than the circumstance of his giving up the house and lot, &c. to complainant and his wife, on the death of testator's widow; judging as he did very

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naturally and justly, that she having *an interest, although at that time contingent, would be in equity entitled to receive the profits, when the estate should vest. In most of the cases cited the testator disposed of a part of the profits of the estates devised, particularly in Hopkins's case. In the case before us, the testator is silent, as to the profits, but has devised the lands, slaves, &c. in general terms, which according to lord Coke's notion of an &c. would be sufficient to convey every thing; and in the present case, we are of opinion, even without the aid of the last clause, would warrant the court in decreeing the profits of the estate to complainants. But that is so full, comprehensive and explicit, that we cannot hesitate to decree, and it is hereby ordered and decreed, that the defendant do account for the profits of the

estates devised in the will from the death of the respective devisees, Mrs. Heyward and the testator's daughter Elizabeth.

A petition was afterwards presented to the court for a re-hearing, and the same being granted, a re-hearing took place, and the cause was again fully argued. Chancellor RUTLEDGE afterwards delivered the opinion of the court as follows:

The defendant having applied for a re-hearing on the point respecting the right of complainants to call upon him for an account of the profits of the estate, to which they became entitled on the death of Benjamin Heyward, (son of the testator,) or that if held accountable, he might be allowed all advances made by him for Benjamin, over and above the income of Calleswashee, (which was the estate devised absolutely to Benjamin,) to be deducted out of the income of the other estates; that point not having been particularly urged at the former hearing; the court thought it reasonable and equitable to grant such re-hearing, (notwithstanding the decree to account,) in order to give the defendant an opportunity of making as full a defence on that point, as on those his counsel had made on the other questions in the cause. A re-hearing has accordingly been had, and

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the ingenuity of counsel has been *exhausted, to evince that Benjamin was entitled to the income of those estates, from the death of the respective devisees, or at any rate to so much as was necessary for his maintenance over and above the income of the estate, specifically devised to him. In support of their arguments, a variety of cases were adduced, which though very good law, were not applicable to the present case, because they were either cases of vested legacies, or where parents had given legacies to children, payable at 21, without making provision for their maintenance in the meantime. There is indeed one case, that of Bourne and Tynte,† where the whole interest of the legacy was given the legatee, though not a vested legacy. In that case, however, it was a bequest by the father for an unborn child, and he directed that £80. part of the interest should be paid to his wife, for the education of such child. The lord chancellor allowed the whole interest, and declared that it was never the intent of the testator that the defendant should have any benefit of the legacy, if a child should be born; which had happened. In most of the cases which have been determined here, provision was made by the court for the education and maintenance of the legatees, out of the estates devised to them; because the parents had not the means of supporting and educating them suitable to the estate they would be entitled to. In the case of Woodberry, the father was altogether unable to do it. In the present case, the testator, it is true, has made no particular provision for the maintenance of any of his children: he has, however, made specific devises to each of them; out of the profits of which, he certainly intended they should be maintained. The very estate now in contest, being particularly devised to his wife and daughter during life, and that to the daughter and to her issue afterwards, shews most manifestly that he did not contemplate that the child or children, who might thereafter become entitled to the estate, on the devise over taking effect, should be maintained out of those funds, because it was altogether uncertain when the persons

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to whom the estates were immediately *devised, would die. To be sure, if there had been no provision at all made for Benjamin, and if he had been left destitute, the court on the death of the first devisees would have made a hard shift as the book expresses it, to make provision for him, and do what the father was bound to do, and ought to have done, which was to provide necessaries for him: and therefore would have allowed somewhat out of the said estate for his maintenance. But because the court in such a case might have exercised their discretion, rather than that the child should have wanted bread, we do not think this case would warrant the exercise of such discretion, because the provision made for Benjamin by testator, (we must presume) he thought fully sufficient at that time; and could only have intended the devise of the estates in question, as an additional bounty to the youngest child, whomsoever it might be that arrived to the age of 21, in the event of the death of the first devisees, (the latter of them without issue.) Upon the whole, we are of opinion, that the decree is correct as it now stands. It will undoubtedly be a very hard case, if the defendant should eventually be injured; and it is a misfortune which the court may lament, but have it not in their power to redress; not being warranted therein by precedents; and there being no intention of the testator expressed in his will, sufficiently apparent to authorize the court to decree either the profits, or a maintenance to Benjamin out of these estates. As to the question whether Benjamin had not an absolute estate in the negroes specifically bequeathed, and therefore, (as was suggested by complainant's counsel,) defendant might be made whole out of that property, we give no opinion, it having been mentioned that a suit is now depending in this court on that subject.

Holmes and Parker, for complainants.
Desaussure and Ford, for defendant.

The defendant afterwards accounted with the complainants conformably to the decree of the court before the master.

† See 1 P. Wm's 786.

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*The principal question before the master was, as to the allowance of interest on the annual balances in the hands of the executor, which the master reported to be due. Exception was taken to this part of the report, but was overruled.

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2 Desaus. 37

Case III.

[Present, Chancellors Rutledge, Burke and Marshall.]

GEORGE PARKER v. JAMES KENNEDY.

(May, 1801.)

[*Discovery* ⟸22.]

The defendant denying by his answer the allegations of the bill, which was filed for a discovery, and the answer not being contradicted sufficiently distinctly, or positively, by evidence and by circumstances, the bill was dismissed with costs.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 33; Dec. Dig. ⟸22.]

The bill charged that the defendant assigned and delivered to the complainant by a blank endorsement, a bond executed by Benjamin Singleton, and dated the 12th Dec. 1786, conditioned to pay £486. with interest, at a discount of 50 per cent.; that the consideration was 212,500, bricks which he has delivered.

That the complainant took the bond on the express terms that Kennedy should guarantee the payment of the bond, which he promised to do. That at that time it was the general opinion of the counsel at the bar that a blank endorsement of a bond, imported a guarantee of the debt. That the complainant instituted a suit on the bond, against the obligor, and obtained judgment and issued execution; on which the sheriff made a return of nulla bona, Singleton being insolvent.

That the complainant then sued Kennedy on the endorsement, and the jury decided under the direction of the court, that a blank endorsement on a bond does not import a guarantee of the debt, and found a verdict for the defendant Kennedy. (On motion for a new trial, the then chief justice John Rutledge, and the justices Burke and Grimke thought the verdict right, and refused to

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grant a new *trial. The justices Waties and Bay, were of a different opinion. See 1 Bay's reports, p. 398.)

That Kennedy is suing the complainant at law on another bond, for the sum of £236. and is urging the same to judgment.

The bill prays for a discovery, whether the defendant Kennedy did not agree at the time of the assignment of Singleton's bond, in blank, to guarantee the payment of the bond to the complainant, and whether he did not in consequence thereof retain some funds of Singleton, (arising from the sale of lands) to secure himself. The bill also prays relief by having the guarantee established, and to have the amount discounted against the bond of complainant put in suit by Kennedy at law.

The defendant in his answer admitted that he assigned the bond of Singleton to the complainant, in blank, at 50 per cent. discount, as stated in the bill. But he denies positively that he agreed to guarantee the bond; on the contrary that he refused to do so; and he denies that he retained any funds of Singleton's in his hands to secure himself, but avers that he has paid them all over to those who are entitled to them. The defendant relies on the verdict and judgment at law, on the question of the guarantee; and he admits that he has sued the complainant on another bond, and intends to recover the money due thereon.

At the hearing of the cause, Mr. Lance gave evidence, that Mr. Kennedy, (to whom he applied on the part of Mr. Parker, on the subject of the Singleton's bond, after the insolvency of Singleton,) informed him he had funds in his hands to secure himself.

John Parker corroborated this testimony.

The cause was fully argued, and Chancellor RUTLEDGE afterwards delivered the decree of court.

The intent of this bill is to oblige the defendant to discover whether he did not at the time of transferring Singleton's bond to the

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complainant, agree to guarantee it? *And whether in consequence of such agreement, he has not retained in his hands the purchase money of a plantation which was sold on Singleton's account? And having done so, that he should be considered in the light of a trustee for complainant, and be obliged to account with him for the said bonds.

The defendant in his answer positively swears that he never agreed to guarantee the bond, nor did he ever consider himself responsible on failure of the obligor, to pay it. He also denies that he has not accounted for the net sales of the plantation, and avers that he has paid the same to those who were entitled to receive it; nor had he ever any idea of retaining the money to indemnify him against the said Singleton's bond.

In an action at law which was brought by complainant against defendant to recover the money from him as guarantee of the bond, by virtue of a blank endorsement, Singleton having failed to pay it, and become insolvent, the court determined on solemn argument, that a blank indorsement on a bond, did not make the indorser responsible on failure of the obligor, to pay the money. As that question did not decide the particular merits of complainant's claim, to wit, the

agreement to guarantee, he should have brought the action of assumpsit against defendant, in order to bring the whole merits before a jury, the question being properly triable at law. He has thought fit however rather to bring this suit, in order to search the conscience of the defendant. In doing so, he has got a most positive and unequivocal answer denying both the guarantee and the retaining the purchase money of the plantation. It was attempted to be proved that the defendant had acknowledged funds of Singleton in his hands, and that he had said he purchased the plantation to secure himself for this particular debt; but the proof by no means came up to it. It amounted to no more substantially, than that he had first purchased to secure himself for his engagements against Singleton's debts, and it is no proof on the part of defendant, that he has paid several debts on Singleton's ac-

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count. *It may be a hard case on the complainant, but instances of this kind have occurred, and will happen again, so long as persons are so extremely incautious in making their contracts. It appears to have been a speculation altogether on the part of complainant, for he got the bond from defendant, at a discount of fifty per cent. If Singleton had been solvent, (and he was not known to be otherwise at that time) complainant would have received the whole debt, and been very well contented. This court does not assess damages; it is the peculiar province of a jury.—Complainant might, and ought to have brought his action to have had his damages assessed. He did not. He has slept upon his rights, and if eventually he suffers by it, the inconvenience will have been occasioned altogether by his own laches. The court sees no propriety in directing an issue, because the complainant may, if he pleases, bring his action without the sanction of the court. Ordered therefore, that the injunction be dissolved, and the bill be dismissed with costs.

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2 Desaus. 40

Case IV.

[Present, Chancellors Rutledge, Burke and Marshall.]

FOLTZ v. POURIE & DAWSON.

(June, 1801.)

[*Discovery* ⟸5; *Partnership* ⟸286.]

One copartner cannot bind the concern, by giving notes in the copartnership's name, after the dissolution of the partnership. On a trial at law on such notes, the verdict was in favor of the defendant.—The holder of the notes then filed a bill to discover whether the notes had not been given by one partner, with the knowledge or consent of the other partner. The answer denying the charge, and there being no proofs against the answer, the bill must be dismissed with costs.

[Ed. Note.—Cited in Fisher's Ex'rs v. Representatives of Tucker, 1 McCord, Eq. 173; Heckheimer v. Allen, 89 S. C. 454, 71 S. E. 1033.

For other cases, see Discovery, Cent. Dig. § 6; Dec. Dig. ⟸5; Partnership, Cent. Dig. § 647; Dec. Dig. ⟸286.]

[*Judgment* ⟸405.]

[A court of equity will not grant a new trial in an action of law, when it does not appear that any motion for a new trial was made, and no excuse for such neglect is shown.]

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 767; Dec. Dig. ⟸405.]

Mr. Foltz had brought a suit at law, on certain notes of hand, given by Mr. Pourie, in the name of the commercial house of Pourie & Dawson. Mr. Dawson resisted the payment, on the ground that these notes

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were given by *Mr. Pourie for his own private purposes, and subsequent to the dissolution of the copartnership.

On a trial at law, the jury found a verdict for the defendants.

Mr. Foltz then filed his bill in this court, to compel a discovery, whether the notes were not given by Pourie in the regular course of the transactions of Pourie & Dawson, or with the privity of Dawson. The defendant Dawson denied any knowledge or privity in the transaction, or that the notes were given in the regular course of the commercial affairs of Pourie & Dawson. The case came to a hearing, and some evidence was given, which was referred to, and noticed in the decree.

The cause was fully argued, and Chancellor RUTLEDGE afterwards delivered the decree of the court:

This suit is brought for the purpose of obtaining a discovery from the defendant Dawson, of the following charges: Whether he did not know or was not privy to Pourie's giving the two first notes in the bill mentioned, during the partnership? Whether the two notes last mentioned, with the partnership signature, were not drawn by Pourie, after its dissolution with Dawson's privity; and whether they were not renewals of the first notes, and antedated? And whether there was not a mistake in the dates? The bill states that these facts were only in the knowledge of the parties interested in the transaction, and particularly of the defendant Dawson; but could not be made to appear on the trial at law; otherwise the jury would have found a verdict for the plaintiff instead of defendant. (The bill prayed a discovery and relief.) The defendant in his answer positively denies being in any manner privy to, or having any knowledge of the first note having been given by Pourie, till after the dissolution of the partnership: and with respect to the two last mentioned renewals, he is equally ignorant of

the transaction, as they were given after the dissolution of the partnership, without his knowledge or consent, and without his being consulted. Cantor acknowledged to Huger,

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that the de*fendant Dawson knew nothing of the renewal, and corroborates the answer.

This case has been very fully discussed, but it lies in a small compass: the single question is, whether any new light has been thrown upon the subject by Dawson's answer, which should induce the court to order a new trial, under an idea that another jury would give a different verdict.

The defendant Dawson, has sworn so fully and pointedly, with respect to his want of knowledge, or being in any manner privy to this transaction, from first to last, as to leave no doubt on the mind about the business. He has placed the conduct of the parties in a stronger and more unfavorable point of view, than it could possibly have appeared in the trial at law.

The whole of this transaction is extremely mysterious, and attended with many suspicious, if not absolutely fraudulent circumstances. One very strong one that we shall notice is, the charge in bill, that complainant was possessed of the original notes, and in January, 1797, delivered one to Cantor for collection; that being unpaid on the 15th of February, they were protested. It must be remembered that at this time the partnership was dissolved.—From defendant Dawson's answer, it appears that the complainant had then other notes in his possession of Pourie and Dawson's; that he applied to the defendant Dawson for payment or renewal of those, and never said any thing to him about the notes in question, although defendant Dawson had previously given public notice in the Gazette of the dissolution of the partnership, and that he alone was authorized to settle the debts of the company. During this time, Cantor is the ostensible owner of the first notes, and has them protested. He afterwards colleagues with Pourie to renew them, (the partnership being dissolved) in their name, notwithstanding the notice in the Gazette, without applying to Dawson. When the two notes became due, they were protested. An action is then brought in his name, and on the trial, a verdict is given in favor

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of *the defendant. From the protests, it appears that the different applications, by the notary for payment, were all made to Pourie. After the verdict, notice is given of a motion intended to be made for a new trial, which, however, was never brought forward, although it is stated in the bill that the opinion of the judge who tried the case, was in his favor. From February, 1797, when the first notes became due, till August, 1800, Cantor appears to be the owner of the notes, and complainant's name is never mentioned. Eighteen months after the verdict, and several months after the death of Huger, who was a material witness for defendant, then for the first time, complainant comes forward, files this bill, and claims these notes as his property. If they really and bona fide belonged to complainant, and he had actually paid a good and valuable consideration for them previous to their being dishonored, why did he not then come forth and bring the action in his own name. Cantor, the broker, could have been a witness for him; but that it seems was not convenient, for on his examination, his deceptive conduct with Pourie, in receiving the notes after the dissolution of the partnership, antedating them, and extending the time of payment, without any consideration, would all have come out in evidence, if he had declared the whole truth, (which it must be presumed he would have done,) and he would have been condemned from his own mouth. The truth was, however, partially disclosed from the testimony of Mr. H. so far as relates to the defendant Dawson's ignorance of the renewal of the notes on which he was sued; and it is more than probable, that the clandestine surreptitious conduct of Pourie and Cantor, which was laid open by H.'s evidence, was the cause of the jury finding the verdict they did.

The law is clear that every partner is bound by the acts of the other, if it be in the course of trade, and during the existence of the partnership, but not after; and as a note drawn or endorsed by the defendant Dawson, in the name of the partnership after its dissolution, though for a partnership debt, and although he was authorized to settle all

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*the debts, would not have been binding on Pourie, to make him liable for payment, a fortiori, a note renewed by Pourie after dissolution of the partnership in their name, when he had nothing to do with the concerns of it, ought not to make defendant liable. Cantor's conduct in this business, was extremely reprehensible; Pourie's most unwarrantable from first to last: we lay his answer entirely aside; for if noticed at all, we should be obliged to animadvert on it in the severest terms. By reason of the intimate connexion that subsists between partners, and for the sake of commerce, the acts of one partner shall bind the rest; therefore the conduct of Pourie cannot, strictly speaking, be construed a fraud; yet, in a moral point of view, it savours very strongly of one, and Cantor's conduct is materially implicated in it. In such cases, the court will be extremely cautious of affording relief, when the party applying does not make out a very clear case. This case, as far as we can discover, has been fairly and impartially tried at law, before a jury who were fully competent to decide upon and judge of all its circumstances: they have done so, and given a verdict in favor of the defendant. The complainant, or his agent, if he was so, (by whose

acts he must be bound,) let slip his opportunity of applying for a new trial, notwithstanding he had given notice of an intended motion for that purpose, and has assigned no reason for not making it. It is very seldom, and must be under very special circumstances, that this court will interpose, and order a new trial, when the party has neglected the opportunity of applying for it in the court below. Upon a full and attentive review of the case, and consideration of the answer of the defendant Dawson, we do not see sufficient grounds from the circumstances shewn on the part of the complainant to direct a new trial, or to entertain the suit, and therefore it is ordered and decreed that the bill be dismissed with costs.

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2 Desaus. *45

*Case V.

[Present, Chancellors Rutledge, Burke and Marshall.]

ELIZABETH F. JELINEAU per Prochein Amie v. FRANCIS JELINEAU.

(June, 1801.)

[*Husband and Wife* ⟸283.]

The Court interfered to protect and relieve a wife who was ill used, degraded and insulted by her husband; altho' he had not absolutely beaten her, nor forced her out of his house; she having retired to avoid a repetition of ill usage; and altho' the husband made an offer to receive her back again, to avoid maintaining her separately, and to elude the justice of the court.

[Ed. Note.—Cited in Anonymous, 4 Desaus. 100; Rhame v. Rhame, 1 McCord, Eq. 206, 16 Am. Dec. 597; Hair v. Hair, 10 Rich. Eq. 172; Wise v. Wise, 60 S. C. 431, 38 S. E. 794.

For other cases, see Husband and Wife, Cent. Dig. § 1064; Dec. Dig. ⟸283.]

[*Husband and Wife* ⟸298.]

She shall have relief and maintenance according to the fortune of the husband. Referred to the master to enquire and report his circumstances.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1093; Dec. Dig. ⟸298.]

This was a bill filed by the complainant against her husband, charging that he had used her extremely ill, and praying for alimony to be allowed her out of his estate, for the maintenance of herself and child.

The bill stated that the complainant, (a lady from St. Domingo) intermarried in the month of February, 1800, with Francis Jelineau, (also from St. Domingo,) and for some months lived with him in peace and harmony, but soon after his conduct became changed, and her life made wretched, by his ill treatment. That he cohabited with his own slave, by whom he had a mulatto child, on whom he lavished his affection; whilst he daily insulted the complainant, and encouraged his slave to do the same. That her said husband told her she should quit his house, and his conduct compelled her to do so; and she took refuge with a friend, at whose house she has become the mother of an unfortunate child, to whom the means of subsistence have been denied by his unnatural parent. That since the birth of her infant, she has written to her husband, and applied to him through her friends, but their applications have been unavailing. Her husband has repeatedly declared that she should never have a shilling of his money; and in fact has not contributed one farthing to the support of herself or

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his child, since his *conduct drove her from his house; though he is worth 7 or eight thousand (7 or 8,000) dollars. That he has sold his property in Coosawhatchie, and is about to depart the state, and to leave her and her infant unprovided, and totally destitute—the bill prays for relief.

The answer of the defendant admitted his marriage with the complainant, but denies that he has used her ill, or in any way to justify her separating herself from him. The answer states, that she owes her unhappiness to her own conduct; and that if she had behaved towards him in a decent and dutiful manner, she might have continued to live happily with him. The defendant states that at the time he was about to marry the complainant, he informed her that he had a mulatto child, born to him in St. Domingo, (where he stated, it was not disgraceful to have such connexions,) for whom he cherished an affection, and meant to provide; and the complainant promised to behave kindly to said child.

That when the defendant married the complainant, she passed under the name of the widow of Mr. La Barthe, by whom she had a son, about eight years of age; but he has since been informed that he was the son of a Mr. La Fon. But she had lost a daughter some time before her marriage with complainant, whom he has since learnt was the child of Mr. La Barthe. That the defendant hath since learned that the complainant never was married to Mr. La Barthe, but had imposed herself upon him as the widow of that person; which she has in fact since acknowledged to him. That the complainant soon after the marriage, forgot her promises, and used his mulatto child so ill as to distress and wound his feelings, and oblige him to complain to her of her conduct; which only encreased her severe treatment to his child, as well as to her mother, and also her abuse and ridicule of the defendant.

That the complainant took some sugar out of the store, to send to her sister, contrary to the directions of the defendant, who told her he could not maintain two families. Whereupon he told her if she repeated this

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conduct, he *would turn her away. She retorted with insult and abuse, and declared

that all she wanted was that he would turn her away. That the defendant being greatly irritated, took advice from counsel, who informed him that he could not separate himself from her without maintaining her, on which he resolved to make the best of a bad bargain, and not to furnish her, by his conduct, with a pretence of a separation which she desired; but he offered her a sum of money if she would voluntarily separate from him, by deeds duly executed; which she did not accept, but treated him with scorn and contempt, and shut herself up in her chamber a fortnight, inaccessible to him, and inattentive to him, though very sick and debilitated.

That the complainant at length quitted the defendant's house of her own accord, taking with her some of his property, and endeavouring to slander his character among his neighbours.

That defendant never struck complainant, or threatened to do so, though she insulted him almost beyond the bounds of human patience, when he reproached her with her former licentious life, and imposition on him.

Defendant denies that he insulted complainant or permitted the negro slave to do so; and he denies that he desired the complainant to quit his house, or obliged her to do so by his ill usage of her.

The defendant admits that the complainant has had a child born since she left his house; but that from the date of its birth, and the opinion of medical men, he has good reason to doubt its legitimacy, as the said child was born only 8 months & 4 days after the marriage took effect.

The defendant admits that the complainant wrote to him a short time before she filed her bill of complaint; but her letter contained so many false charges, that he took no notice of it—and when her solicitor John Bee Holmes, Esq., applied to him on her behalf for a maintenance, he answered that it was impossible for him to maintain her apart from him; but that his doors were open, and that if she would return and behave properly

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to him, he would *do so to her. Defendant denies that he declared she should never have any of his money, except in resentment of her declaration, that she married him only for his money. But he admits that he has not supplied her with any thing since her departure, she having helped herself when she quitted his house. Defendant denies that he has sold his property, or has any settled determination to leave the state, though he has some thoughts of returning to France in a year or two.

Defendant denies that he is worth more than about $3,000, which is insufficient to enable him to maintain complainant separate from himself.

The defendant submits to the court, "That under the above circumstances, he is not bound to provide for her a separate maintenance, though it would be more to his happiness to do so, if he had the ability, than to receive her back. Neither does he think he is bound to receive her again; but should the court think it proper that he should receive and maintain her at his house, he is ready to do so, and to treat her with the same respect that she shall treat him."

The cause came to a hearing in June, 1801, and it was proved that the defendant Jelineau had treated the complainant with great indignity and impropriety, and had degraded her in his language and deportment, below his slave, the mother of his Mulatto child. But there was no proof of his having struck her, or actually turned her out of doors, though he had threatened the last. She left the house, after repeated ill usage and degradation.

There was no proof on the part of defendant, of the charges made in his answer against the complainant.

Dr. Fronty proved that her child was an eight months child.

This case was ably argued by Mr. Holmes for the complainant, and by Mr. Parker and Mr. Pringle for the defendant. But no notes of the arguments have been preserved. The minutes taken by Chancellor Marshall refer to 1st Fonb. 96, and to the case of Oxenden

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v. Oxen*den, reported in 2 Vern. 493, and the important cases connected with it. (See Nichols and Danvers v. John Danvers and others, 2d Vern. 671, and Williams v. Callon, 2 Vern. 752.)

The case of Head v. Head, 3 Atk. 547, appears to have been cited and relied upon by the defendant's counsel, to shew that the court could not give relief in such a case as this. The remarks of Chancellor MARSHALL, (in his own hand writing, on his brief,) are important. He says, "the principle of this case, (Head v. Head,) is an extraordinary one. It compels the wife however, reluctantly, and notwithstanding the most barbarous and inhuman treatment on the part of the husband, to go back to him, merely because he makes an offer in court to take her back. This is called enforcing the marital rights. I observe through the whole current of cases on this head, that the Court of Chancery in England touches this business of alimony and maintenance, with a delicate hand. They leave it to the ecclesiastical courts. Here we have no such institution, and must take it on ourselves."

Chancellor BURKE made the following remarks, (in his hand writing on the same brief,) on the case. "His (the defendant's) invitation to her to return and submit herself to new insults from his mulatto mistress, she as a woman of sense, must feel as a further indignity. His answer tells us that this mistress forms the source of the whole differ-

ence: yet not a word about removing this cause. Had he made this offer, she should make an experiment."

The Court took time to consider, and afterwards Chancellor RUTLEDGE delivered the decree of the court.

It has been strongly contended by the counsel for the defendant, that this Court has not by its constitution a power of decreeing a separate maintenance for a woman although she has been ever so harshly treated by her husband, unless a divorce has been previously obtained, or there be an express or implied

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agreement on their separa*tion, for that purpose; and this doctrine is attempted to be supported by the cases cited from the English law books.

It may be very good law in that country, because there ecclesiastical courts have competent jurisdiction to grant divorces, a mensa et thoro: but in this country, at least in this state, there is no such court; those cases therefore are by no means applicable to our local situation. Hard indeed would be the lot of the fair sex, if they alone were to be excluded from the protection of the laws in this country, and if from the fear of infringing on the marital rights of the husband, the wife must be obliged to submit to all his brutal treatment, without any redress whatsoever. If there were no precedents of the interference of the court of equity in cases of this sort, we must make them, rather than so wanton an abuse of power by a husband over his wife, should escape with impunity.

On examining the law establishing this court, we find it has all the powers granted it, incident to a Court of Chancery; and its jurisdiction is not in any measure restricted, except in cases where the party can have complete and adequate remedy at law.

The cases however of Huger v. Huger, and Wilson v. Wilson [1 Desaus. 219], which have been determined in this court, have established precedents for us to follow. It is true, the separate maintenance in those cases was a provision out of the estate, that belonged to the wife; but it can by no means be inferred from thence, that if they had not had such estate, they would not have been provided for out of the estate of the husband. The complainant made out her case by testimony, so as to entitle her to the attention of this court. That she was extremely ill used, though not beaten by her husband, we need only refer to the testimony of Mrs. P——, who though the sister of complainant, (and may very naturally be supposed to have considerable resentment against the defendant,) delivered her evidence with a calmness and composure, that carried with it the greatest

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appearance of truth. She said that he *had refused to send away the negro woman slave, who was the bone of contention between them. That at dinner one day, he took away the plate from complainant when she was going to help herself to something to eat, and said, when he and the negro had dined she might. He grudged her the bread she ate, and said grass was good enough for her; that he was going to a magistrate to get a divorce, and would buy a horse whip, and whip her well, before she went away. The complainant's letter to him, which was given in evidence, shews a sincere desire to be again reconciled, and to return home to him. How did he treat it? He has sworn in his answer to her bill, that it was unworthy of an answer. He has also in his answer lavished his abuse on her in the most unqualified and scandalous manner. His charge of the child, which she bore him, being illegitimate, appears to be as unfounded as it is cruel. It is a wanton attempt by him to bastardise his own issue, and to brand with infamy on the records of this court, the name and character of his injured wife. But the charge has been completely refuted and destroyed by the testimony of Dr. Fronte. At the same moment that he avers he is not obliged to take her back or to maintain her, and that he would be happier without her, he has the confidence to say, if the Court order him to receive her, he is ready to do so.

He attempted to prove, (notwithstanding what he had sworn in his answer) that they lived happily together, and examined two witnesses for that purpose.

The first knew nothing, and the second very little. He said he believed they lived happily together, and the next moment declared that she cried very much when she related to him the conduct of defendant towards her, which he the witness was to communicate to Mr. Morgandollar, whom she went to consult with on the subject. There can be no doubt that the complainant ought to have some provision made for her and her child's maintenance.

It would be absurd after what he has

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sworn to in his *answer, to suppose they could ever live happily together; he at one time offered to maintain her, and now offers to make some provision for the child. Let it be referred to the master to make inquiry into the circumstances of the defendant and report thereon.

2 Desaus. 52

Case VI.

[Present, Chancellors Rutledge, Burke and Marshall.]

NICHOLAS POWER v. Dr. JAMES LYNAH, Executor of Thomas Eustace.

(June, 1801.)

[*Executors and Administrators* ⇐298; *Wills* ⇐489.]

The court decreed that the identity of a devisee and legatee, coming from abroad, was sufficiently proved by evidence and circumstances. But the legatee should give security that the estate should be returned at his death, if the limitation over in the will, on the event of his dying without leaving any heirs, should be hereafter decreed to be a good limitation.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1217; Dec. Dig. ⇐298; Wills, Cent. Dig. §§ 1037–1046; Dec. Dig. ⇐489.]

The complainant filed a bill, charging that the late Thomas Eustace made and executed his last will and testament, whereby he devised and bequeathed his real and personal estate to his wife for life; and on her death, to his two brothers John and Alexander Eustace, and their heirs and assigns; but if they should die without leaving any heirs to enjoy the property, then to his friend Nicholas Power, of Waterford, in Ireland. If the said brothers, and N. Power should die without leaving any heirs, or their heirs should not be heard of in ten years, after the death of his wife, the testator directed the property to be sold, and the proceeds distributed among the poor of Charleston. He appointed Dr. James Lynah sole executor, who, on his death, qualified and proved the will as executor, and possessed himself of the estate. The widow has been dead near ten years; and though great pains have been taken by complainant, to find out the brothers of the testator, they have never appeared, and no person has produced any proofs of relationship to them.

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*The bill claims the estate, and an account thereof from the executor.

The executor admitted the will, and that he had possessed himself of the estate, and was ready to account.—He admitted that no persons had appeared who answered to the testator's brothers, though proper enquiries had been made for them and their heirs.

He knows nothing of the complainant N. Power, and prays he may be put to the proof of his identity.

At the hearing, the only question made, was, as to the identity of Nicholas Power.

M. Power, Mr. Phelon & M. Corbett, proved that they knew Nicholas Power well. He had been an innkeeper in Waterford for many years.

The court delivered its decree as follows:

From the testimony which has been given in this case by M. Power, Corbett & Phelon, the court is of opinion, that the identity of the complainant's being the person to whom the testator Eustace intended to bequeath his estate after the death of his wife and brothers, as mentioned in his will, is fully proved, as far as circumstances and strong presumptive evidence can go, and the nature of the case will admit.

It is therefore decreed that the estate shall be delivered up to him by the defendant, upon complainant's giving security for its being returned at his death, if the limitation over in the will, on the event of his dying without leaving any heirs, should be hereafter decreed to be a good one; that question not having been now agitated.

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2 Desaus. 53

Case VII.

[Present, Chancellors Rutledge, Burke and Marshall.]

MARY GIST, and Others, Representatives of B. Cattell, v. the Heirs and Representatives of Col. W. CATTELL.

(July, 1801.)

[*Equity* ⇐87; *Executors and Administrators* ⇐263; *Wills* ⇐796.]

The statute of limitations does not run against cestuis que trust, in favor of the trustee, or those volunteers claiming under him.

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Where *the statute is not a bar, it must be a strong case to induce the court to permit mere lapse of time, to operate as a bar to the claims of heirs or legatees for an account and settlement of an estate; especially where there have been minorities, and impediments to the course of justice. The heirs and legatees of the original testator, are entitled to be paid in preference to the creditors and legatees of the trustee or executor, where the original estate can be followed. A person waiving a claim on the ground of a supposed benefit, may revive it, on failure of that benefit. So a widow taking a legacy, and waiving dower, may again set up her claim to dower, if the debts take away the legacy.

[Ed. Note.—Cited in Speake v. Kinard, 4 S. C. 56; Powers v. McEachern, 7 S. C. 300.

For other cases, see Equity, Cent. Dig. § 242; Dec. Dig. ⇐87; Executors and Administrators, Cent. Dig. § 975; Dec. Dig. ⇐263; Wills, Cent. Dig. § 2065; Dec. Dig. ⇐796.]

The bill filed in this case, was to compel an account and settlement of the estate of the common ancestor of the family, Wm. Cattel, under and conformably to his will, made in the year 1752.

It is unnecessary to state the case fully, as the only point decided by the following decree was, that the complainants were not barred by the lapse of time, or by the operation of the statute of limitations, as was contended by the defendants counsel; and that the complainants were entitled to a settlement.

The facts on which the court grounded its judgment, are sufficiently stated in the de-

cree itself, to enable the reader to perceive the principles on which it is founded.

After a full argument on the points above Stated Chancellor MARSHALL delivered the decree of the court.

The bill in this case, is brought by the heirs and representatives of Benjamin Cattell, against the representatives, executors, and legatees of the estate of Wm. Cattell, for an account, and for a discovery of property claimed under the will of the ancestor Wm. Cattell, made in 1752, and under a decree of the then Court of Chancery, founded on that will, and made in 1756. Notwithstanding the extensive discussion this case has undergone, the variety of points stated, and the diversity of grounds taken by counsel, we find that it must at length terminate in an account before the master. It is in its nature, a mere matter of account, though it becomes necessary, previously to estab-

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*lish some principles or positions by which the reference must be regulated.

Col. Wm. Cattell was the heir at law of the testator, at the time of the decree in 1756. The estate in Stanyarne's tract of land, Deer Island tract, and the house at Ashley Ferry, which had been devised to Peter, (who was then dead,) was limited by the decree to testator's six grand children, as tenants in common for life, and after their deaths respectively, then to testator's heir at law, in fee.—With respect to the lands of Charles, the decree limits the estate in the following manner:—To such of the grand children as might be living at the death of Charles, as tenants in common for life, and after their deaths respectively, to testator's heir at law, who shall be then living, in fee. The decree therefore, has made a different disposition of the fee in the respective estates; giving it to the heir at law generally, as as to Peter's lands, and to the person who might be heir at law, with regard to Charles's lands, when any of the life estates fell in. Col. Wm. Cattell then had a vested remainder in Peter's lands; and two of the grand children having died in his life time, the fee vested in him.

There has been much controversy in this case, on the subject of the lapse of time. The reasons must be forcible, and the circumstances of a strong character, to induce this court to interpose it as a bar, admitting the case not actually barred by the statute. But neither the principle, nor the cases cited, apply to this case; because Benjamin Cattell did not arrive at age till July, 1772. His uncle John Cattell, the executor and trustee, died in 1774. The revolution commenced in 1775. The declaration of independence was in 1776; and the limitation act was suspended during the war, and for some time after. Benjamin Cattell died during the war, viz: in 1782. The complainants were all infants, nearly till the time of filing the bill: therefore Laches is not imputable to them. Besides, this is a trust estate, against which the limitation does not run or operate. No

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doubt the lapse of years, under which *this claim has been buried, has greatly obscured many points of the cause, and thrown doubts on transactions, which, in former days, might have been cleared up by the most satisfactory evidence. But it is for the complainants to make out their accounts before the master, by evidence and documents: If they do not, they will fail.

The defendant Bowman cannot possibly render an account, never having possessed Wm. Cattell's books or papers. Complainants deny that they are possessed of any, and offer to answer any interrogatories on the subject, to save the delay and expense of a cross bill. They must establish their own case.

From the decree of 1756, it will appear what part of the grand father's estate William and Benjamin, the grand sons, were entitled to. The tax return of John Cattell, the executor and trustee, in 1767 or 8, shews what estate he had in his possession, belonging to William and Benjamin. The list of debts which were due to William Cattell, the testator, in Col. William Cattell's own writing, shews what money had been received by John Cattell, the executor and trustee, and also, by Col. Wm. Cattell. The will of John Cattell shews, that Wm. Cattell was his sole executor and residuary legatee; and the inventory of his estate, returned by Col. Wm. Cattell, will shew what he derived from his uncle, so as to make it liable in his hands, to satisfy the complainants claims, (when they are established) prior to any of Col. Wm. Cattell's creditors or legatees.

There is no evidence even of a presumptive nature, before the court, that Col. Wm. Cattell ever settled his brother's claims with him. On the contrary, it appears that in 1777, Benjamin Cattell had determined to prosecute his demand, but was dissuaded from it by their mutual friends. Col. Wm. Cattell dying in 1778, and leaving Benjamin his executor and residuary legatee, there was then no person whom he could sue, or against whom he could prosecute a claim, as the residuary estate was devised to himself. It has been contended that he waived his

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*claim, by accepting the estate. Supposing that to be the fact, (which does not appear, for all his transactions were purely as executor) he could only be deemed to have waived it, under an idea, that he was to have an equivalent: but that failing, of course his claim must revive, and be satisfied out of the estate of John Cattell, which came into the possession of Col. Wm. Cattell, as far as it can be traced, or may be sufficient; he

having a prior and superior equity to either Col. Wm. Cattell's creditors or legatees.

It was urged that Mrs. Bowman, in consequence of having received this legacy, had not demanded her dower in the lands of Col. Wm. Cattell, although by the will, she is not barred; and if this legacy was resumed, she would set up her claim of dower, which was paramount all creditors. This is true, and must be admitted. If defendant thinks proper to relinquish the legacy, and claim dower, or set up her claim of dower by way of discount, the court will order it to be ascertained.

It is unnecessary in this stage of the business, to say any thing as to the mode of refunding, or of the other legatees. This must await the result of the account before the master.

As to the injunction granted in this case, on the bond given by Col. Wm. Cattell and Benjamin Cattell, to the estate of Thomas Lynch, it is ordered that it be dissolved.

Desaussure and Ford, for complainants.

Pringle, for defendants.

NOTE.—See the case of Hercy v. Dinwoody; 4 Bro. C. C. 257. Hoveden v. Lord Annesly; 2 Scho. & Lef'r 630. Smith v. Clay; Ambler, 645. Delorain v. Brown; 3 Bro. C. C. 633. Beckford v. Cloze; 3 Bro. C. C. 644. Webster v. Webster; 10 Ves. 93. Earl of Pomfret v. Lord Windsor; 1 Ves. 472.

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2 Desaus. 57

Case VIII.

[Present, Chancellors Rutledge, Burke and Marshall.]

PHILIP LEVEN HART and Others v. the Executors of PHILIP HART, Deceased.

(November, 1801.)

[*Wills* ⇐527, 676.]

Where there is a plain and positive devise, the Court will not raise an implied trust in executors, to favour a particular devisee.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1140, 1592; Dec. Dig. ⇐527, 676.]

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[*Wills* ⇐527.]

*Among other legacies to the testators relations, there was one "to the children" of his nephew, S. M. H. and then a devise of the residuary estate to his several relations, "above mentioned," with bequests, share and share alike. These children take but one share of the residuary estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1140; Dec. Dig. ⇐527.]

[*Wills* ⇐519.]

A legatee by codicil is not entitled to a share of the residuary estate bequeathed to his relations named in the will, of whom he was not one.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1073; Dec. Dig. ⇐519.]

The real estate decreed to be sold, and then divided among the residuary legatees, some of whom were aliens.

[*Aliens* ⇐13.]

[Since the treaty with Prussia (article 10) allows citizens and subjects of the two countries to sell real estate which descends to them in the country of the other power, Poles who were subjects of Prussia were allowed to take under the residuary clause of a will.]

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 54; Dec. Dig. ⇐13.]

Philip Hart, a citizen of Charleston, made and duly executed his last will and testament, on the 3d day of Feb. 1796, in the presence of three witnesses, with a codicil thereto, of the same date, wherein and whereby he bequeathed as follows: To his nephew, Abraham Levy Hart, one thousand guineas: to his nephews P. L. Hart and A. M. Hart, £500. each; to his nieces H. M. Hart and Ella M. Hart, £100. each; to his sisters children, M. D. Shiff, and J. D. Shiff, £100. each; to the children of his nephew, Simon Moses Hart, and to the survivors of them, share and share alike, £400.; to his sister Hester's daughter, Galle, £100.; to the widow of his brother, Moses Hart, £200.; to Keram Kagames, (a religious institution) in Hamburg, 1500 marks. To the Synagogue in Charleston, £200. and to the Poor House, and Orphan House, £100.

He then says, "as to the rest of my estate, (if any there should be remaining,) after paying all my just debts, and the abovementioned legacies," "it is my will that the same be equally divided between my several relations abovementioned, with bequests share and share alike." And by the codicil to his will, he bequeathed to his nephew, Simon Moses Hart, £400. The testator died soon after, leaving his said will in full force. Thomas Roper and Robert Dewar, qualified on the will, as executors thereof. Abram Levy Hart, the other executor named in the will, died soon after his uncle Philip; and his relation Simon M. Hart, has administered on his estate.

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*The estate consisted of a considerable personal estate, and some real estate.

Most of the legatees were foreigners, inhabitants of Poland, and alleged to be within that part of Poland occupied by Prussia, in the partitions of that country.

The executors paid the pecuniary legacies; but having some doubts as to the real estate, on account of most of the legatees being aliens, whose claims to the real estate were opposed by Simon Moses Hart, a nephew of the testator, on behalf of himself and his three children, who are citizens, they required a bill to be filed in this court, in order to have the sanction of its judgment. A bill was accordingly filed by the legatees, who were foreigners, not naturalized, against the executor, for a sale and division of the real and personal estate, that the will of the testator for the equal division of the whole residue of his estate, real as well as personal,

might be carried into full execution. The bill also made Simon Moses Hart a defendant. The complainants insisted that there was a trust by implication in the executors, to give effect to the will. And the bill prayed for relief.

The executors, in their answer, admitted the facts stated in the bill, and submitted to the court the effect of the proofs of the relationship of the complainants. They admitted that having paid the legacies, they are in possession of other personal property, and some real estate, (two lots of land in Charleston, and a tract of land in the country;) and some of the legatees have applied to them to sell the lands, and to divide the money as the residuum of the estate, in the manner directed by the testator, as and concerning the rest and residue of the estate. That the executors having doubts as to the real estate, especially as Simon Moses Hart insists that the other legatees being aliens, he alone, and his children, being citizens, are exclusively entitled to the real estate of the testator, the executors pray the direction and judgment of the court for their guidance.

Simon Moses Hart, one of the nephews of

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the testator, *and the legatee in the codicil to the will, in his answer set up a claim to the whole real estate of which the testator died seized, in his own right, or in the right of his children, they being natural born citizens of this state; and he being naturalized on the 11th of Oct. 1796, soon after Philip Hart, the testator's death. That all the other legatees are aliens and incapable of taking real estate; and there was no power in the executors to sell the real estate, and convert it into personal; nor was there any implied trust.

At the hearing it was contended for the complainants, that the intent of the testator was manifestly to dispose of the whole estate. Indeed the very words of the will are "as to the rest of my estate, it is my will that the same be equally divided between my several relations abovementioned, with bequests, share and share alike." The word estate is sufficient to carry everything which a man hath. See Co. Litt. 345, and 2 P. Wm's. 335, 523. Cases Temp. Talb. 157.

But how was this to be effected? There are two city lots of land, and one tract in the country. These are indivisible among so many legatees; almost all of whom, as the testator well knew, resided in Europe; and therefore it could be only by a sale, and a division of the proceeds, that the intent of the testator could have effect. There must therefore be an implied trust, that the executors should sell the real estate, convert it into money and divide that conformably to the will. The court will strain a good deal, and adopt any reasonable construction, rather than declare that a forfeiture is incurred. See 1 Fonb. 442 3, 2 Fonb. 58. It is clear that the testator meant that his whole estate, real and personal should, after payment of debts, and enumerated legacies, go to the residuary devisees. This intent will be carried into effect if possible. It is possible, if the court will direct the executors to sell it, and divide the money. See 2 Bro. C. C. 277. The Court will raise a trust in the executors to give effect to the intent.

In many cases executors are declared trus-

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tees to pay *debts. See 1 Vern. 296, 411. 2 Vern. 106, 228. Cases Temp. Talbot, 157, 163, 283. 1 Bro. C. C. 81. 3 Ves. jur. 7, 152. 7 Bac. 138 9.

Executors are also trustees of the residue, for the next of kin, where no disposition is made of it. And by parity of reasoning for the residuary legatee, where the occasion requires it. See 2 P. Wms. 523, 186. 3 P. Wms. 295. 4 Ves. jur. 21, 76, 117, 725. Nor is it certain that the complainants are incapable of taking and disposing of real estate in this country. They are Poles, and are alleged to be now subjects of Prussia. And by the 10th article of the American treaty with Prussia, the citizens and subjects of the two countries are at liberty to sell real estates which descend upon them (or devolve doubtless by will) in the country of the other power.

At any rate the defendant Simon Moses Hart, cannot take and hold the real estate, if alienage be a bar, for he was not naturalized till the death of the testator. See 1 Bacon, 132, title alien.

Mr. Parker for the defendant S. M. Hart, and his children.

The counsel admitted that the word "estate" used in the will, would carry the whole estate, real and personal. But he contended that there was not any direction in the will, that the property should be sold by the executors for the benefit of the heirs. And unless there be an absolute direction, the court will not raise a trust for that purpose, in favor of residuary devisees, who are aliens, to the prejudice of the heir at law, or person entitled by operation of law. The law which excludes aliens from taking and holding lands devised to them, (which makes them purchasers—2 Bro. C. C. 189,) would be eluded, if the court would raise a trust in the executors, and direct sales of the land, and the money to be paid over to aliens.

The complainants then being aliens, cannot take any benefit of this devise of lands, and they will go to his nephew, Simon Moses Hart, who is a naturalized citizen; or if his naturalization, after the death of the testa-

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tor be too *late, to his sons, who are natural born citizens. For if a man dies, leaving sons, and the eldest be an alien, the law passes him by as though he were not in ex-

istence, and his younger brothers take in exclusion of him. 3 Salkeld. 35.

With respect to the right of the foreign devisees to take the benefit of the will under the treaty with Prussia, because part of Poland has been annexed to Prussia, it has not been proved that these devisees were inhabitants of that part of Poland, which has been permanently annexed to that kingdom; and if they were, we have no proof that they being Jews, are entitled to hold landed property. It is well know that the Jews are not permitted to hold real estate, or immoveable property, in most of the kingdoms and states of the continent of Europe, where they are subjects: and the proof lay upon the complainants to get rid of the legal objection of alienage, by shewing that they were subjects of Prussia, and could hold lands in that kingdom; else they could not have the benefit of this peculiar provision in the Prussian treaty.†

Chancellor RUTLEDGE delivered the decree of the court.

The testator, P. Hart, after giving several pecuniary legacies, makes a residuary clause, in the following words: "And as to the rest of my estate, if any there should be remaining, after fully paying all my just debts, and the above mentioned legacies, it is my will that the same be equally divided, between my several relations above mentioned, with bequests, share and share alike." Various questions arise under this residuary clause.

1st. Whether there is not a trust by implication created in the executors, by the words of this clause?

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*2d. What share of the residuary estate, the children of Simon M. Hart will take?

3d. Whether Simon M. Hart takes any part of it?

4th. If a trust by implication is not created, what part of the real estate of the testator, Simon M. Hart would be entitled to, the complainants being aliens, and as such, not capable of inheriting real estate?

The first question was the most strongly contended: and it was insisted for the complainant, that the words of this clause would create a trust by implication in the executors, in order to enable them to sell the real estate, (if the personal was not sufficient) to pay the debts and legacies, and for the purpose of making a division among the residuary legatees, agreeably to the intention of the testator. A variety of cases were adduced, to shew that words of desire, request or recommendation, will raise a trust by implication, to execute the intention of testator. Upon a review of those cases, (though they are very good law,) it will be found that they are not applicable; for in all of them, the testator has given an estate for life, or a certain term, to a particular person in the first instance, and then follows his request or recommendation to that person to dispose of the estate in a particular manner, to certain persons named or described by testator. That is not the case before us, for the residuary clause in the will is as plain as words can make it: it is in the common phraseology of residuary devises or bequests, and cannot, we think, but by a most forced construction, create an implied trust in the executors. The estate, if any there should be remaining, being given expressly and directly to the legatees above mentioned; and therefore it is not necessary for the intervention of trustees, to carry the intention of testator into effect; for if the residuary legatees cannot agree on a division, this court, on application, will decree it.

In this particular case, it is necessary to contend for an implied trust, being in the executors, to enable them to sell the real estate, and convert it into money, for the purpose of appropriating a part of it to the complain-

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ants, who *are aliens; and but for that circumstance, it is presumed this suit would never have been instituted; but surely it would be carrying the doctrine of implied trusts further than the court is warranted in doing, to put a forced construction, as is contended for in a plain clause of a will, to favor a particular legatee.

With regard to the second question, the court are of opinion, that the children of S. M. Hart take but one share under the residuary clause because they are not named individually, but collectively, in the particular bequest in the will.

3d question—The court are of opinion, that S. M. Hart is not entitled to a share as residuary legatee, he not being one of the relations in the will above named.

4th. Simon M. Hart can only take such part of the residuary real estate of the testator, as his father, whom he represents, would have been entitled to.

The court decreed that the real estate be sold by the master, and the money arising from the sale, be divided among the residuary legatees, as they are respectively entitled thereto.

Costs to be paid out of the estate.

Desaussure, Ford and Pringle, for complainants.

Parker, for defendants.

† Mr. Parker offered to have a young man of the name of Hart, sworn, to prove that Jews in Prussia, are not permitted by law to hold land, but for a limited time, (leasehold) and that they are excluded from many other privileges.

This was not considered a sufficient authentication of the Lex Loci, and Chancellor BURKE remarked, that the celebrated Ephraim was treasurer to the king of Prussia, who reposed unlimited confidence in him, and removed most of the disabilities of the Jews.

During the sitting of the Court which commenced in October, 1801, and continued throughout November, the ill health of Chancellor Burke, prevented his attending the Court more than three days; and he was never able to attend afterwards, till his death in the year 1802.

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*Case IX.

[Present, Chancellors Rutledge and Marshall.]

THOMAS SMITH v. JOHN E. POYAS.

(November, 1801.)

Life Estates ⟸13.]

A devisee for life restrained from cutting down the woodland of the estate, and from planting the new grounds.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 21, 32, 42; Dec. Dig. ⟸13.]

Life Estates ⟸13.]

Restrained also from using the timber for any other purposes than fuel, fencing, &c.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 21, 32, 42; Dec. Dig. ⟸13.]

Life Estates ⟸17.]

Devisee for life, bound to contribute one fourth of the expence for repairing the buildings.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 37, 38, 42; Dec. Dig. ⟸17.]

Life Estates ⟸5.]

Commissioners to estimate and report the expence of necessary repairs.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 25; Dec. Dig. ⟸5.]

Life Estates ⟸5.]

Tenant for life to deliver up title deeds to devisee in fee.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 11, 12, 21; Dec. Dig. ⟸5.]

[This case is also cited in Moon v. Moon, 2 Strob. Eq. 332, on the doctrine of waste by life tenant.]

By a decree of this court given in June, 1788, (vide 1st vol. of these reports, page 156,) it was decided that Mrs. Poyas was entitled together with her sisters, under her fathers will and a codicil thereto, to a residence on his Goose Creek plantation, and to plant thereon, during their lives, after which the estate was to go to the complainant in fee simple.

Mr. and Mrs. Poyas believing themselves entitled to clear the wood lands, and to plant the new land, began to clear and to plant according to their own opinion of their rights.

The complainant being of a different opinion filed his bill in this Court, to obtain an injunction restraining them from clearing the wood land, and planting the new grounds; and to restrain them generally in the use of the timber; and to oblige the defendants to keep the buildings in repair. At the hearing, the fact of the clearing the wood land was established; and indeed the defendants insisted on their right to do so.

After the cause was argued, Chancellor RUTLEDGE delivered the decree of the court.

It is ordered and decreed that the defendant be enjoined and restrained from committing further waste on the plantation or tract of land in bill mentioned, by cutting

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down *the trees or clearing the oak land or felling the trees or the pine timber land, except what may be necessary for fuel or other plantation use, or fencing in the fields. The injunction not to extend to old fields cleared or planted in the lifetime of testator. That complainant and defendant each make choice of one person who shall choose a third to examine the state or condition of the dwelling and out houses on the plantation, and estimate the sum that will be necessary to put them into tenantable repair, and make their return thereof to this Court by the first day of the next term. That the defendant be chargeable and liable for one fourth part of the expence of repairing the said buildings, and forthwith repair the same, as far as the expence with which he is chargeable, may extend. Also that defendant do forthwith deliver to complainant all the title deeds and grants for the said land, which he has in his possession. And lastly, that the costs of suit be paid by defendant.

Desaussure and Ford, Ward and Parker for complainant. Pringle for defendant.

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Case X.

[Present, Chancellors Rutledge and Marshall.]

The Executor of MARY SMELIE, v. BENJ. REYNOLDS, and Others, Executors of Wm. Smelie.

(January, 1802.)

[*Wills* ⟸30.]

A man married a lady possessed of some personal property, for which she was indebted by bond. He paid the debt, and also executed a deed, by which he gave the property to his wife, to take effect after his death. There was no trustee named. Afterwards, she made her will, which was written by her husband. She bequeathed several legacies, and the bulk of the property to her husband for life, and at his death, to her daughter by a former marriage. The husband proved the will, and accepted and held the property under it till his death, and did other acts of confirmation. It was decided that the will, tho' there was no agreement in writing to permit it, was valid, and would carry the property to the legatees against the heirs of the husband.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 64; Dec. Dig. ⟸30.]

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*The bill of complaint charged that in 1783, William Smelie married Mary Lowrey, who, at the time of the marriage, was possessed of a considerable personal estate: that

she had one child, the issue of her former marriage, who afterwards married Abraham Waight, now dead.

That William Smelie, in August, 1787, made a certain deed, by which he gave to said Mary Smelie, after his death, all the estate that belonged to her at the time of her marriage with said William, to her and her heirs for ever. That said Mary, at the time of her marriage with Wm. Smelie, was possessed of eighteen negro slaves. That said Mary on the 30th of October, 1787, made her last will, and left to her daughter Sarah Maxwell Waight, several negroes by name to her and her issue. She also bequeathed to Sarah Hutchinson, one negro and £100 currency.—The remainder of her estate she left to her husband Mr. Smelie, during his life, and at his death, to her daughter and her issue, and in failure of issue, to return to her heirs for ever.

That Mary Smelie died in the year 1788, leaving her will in full force. That complainant, with the assent of William Smelie, qualified under said will; that having obtained a warrant of appraisement, he went on said plantation of William Smelie, who delivered to complainant 18 slaves as the estate and effects of testatrix. That complainant took an inventory and appraisement of said slaves, and delivered to Sarah M. Waight, with the assent of said William Smelie, the negroes bequeathed her. And he also delivered to said Wm. Smelie, the negro left Sarah Hutchinson, and the rest of said slaves to be held by him agreeably to the tenor of said will.

That Sarah M. Waight married B. Stiles, and is since dead, leaving three children now living. That William Smelie died in December, 1800, having first made and executed his last will, and appointed B. Reynolds, W. Hayne, and John Seabrook, executors, who qualified thereon. That the complainant demanded the negroes from the executors, who

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refused to deliver them. The bill prays *that they may be compelled to deliver them to complainant, and to account for their work and labor since Mr. Smelie's death.

To this bill, the defendant, Benjamin Reynolds, the principal acting executor of William Smelie, put in an answer. The answer of B. Reynolds admits, that at the time of the marriage of Wm. Smelie with Mary Lowrey, that she was possessed of some personal property purchased at the sale of her former husband's estate; but the whole purchase money was not paid at the time of her marriage with Wm. Smelie.

The answer admits that W. S. made the deed as stated in the bill, but denies the validity of it, as there were no trustees, and the deed was from husband to wife: and as the deed was executed on a supposition that the property was unembarrassed; whereas William Smelie was obliged to pay the balance of the purchase money, and therefore the property vested in him by purchase. Defendant denies the right of complainant to take the property by virtue of the deed, as it was not to take effect until after William Smelie's death, and was intended for the benefit of Mrs. Smelie; but on her death, the gift having been to her and her heirs and assigns, the property became vested in W. Smelie, the husband, as answering the description in the deed, and legally entitled to his wife's property. The defendant avers that William Smelie told the defendant and others, that he did not consider the deed to be valid, as he had signed it under the impression that the property was unincumbered, and that he never would give up more than he had already given up, alluding to negroes named in will of Mary Smelie.

That William Smelie sold one of the negroes that had belonged to Mrs. Smelie, previous to her marriage with him. The defendant admits Mary Smelie made a will, but denies its validity, as the said will does not appear to have been made under the authority of any settlement or other deed. With the assent of William Smelie, the defendant admits complainant may have gone on the

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planta*tion of Wm. Smelie, and that he may have made an inventory; but defendant contends Wm. Smelie was ignorant of or had a misconception of his rights, and that such permission ought not to be binding or considered as an assent on the part of said Wm. Smelie, as said William Smelie declared to defendant that he had acquiesced, supposing complainant legally authorized by virtue of authority from the ordinary. The defendant states that W. S. had told him that complainant had made application for the purchase of the negroes mentioned in the inventory, and had offered half of the value; but that he the said W. S. refused to part with them but for their full value.

Defendant contends that permitting negroes named in the will of Mrs. Smelie, to be delivered to Mrs. Waight and Hutchinson ought not to be considered as an assent on part of said W. S. as those acts were done immediately after the death of his wife, when ignorant of his rights, and he might of his own bounty have consented to these dispositions. The defendant admits the death of W. S. his making his will, naming executors who have qualified. He admits the demand of the complainant, and his refusal; also, the marriage of Mrs. Waight with B. Stiles, and issue left as stated in bill.

At the hearing in November, 1801, the following statement was agreed upon by the parties, as a part of the case. That Mrs. Mary Lowrey purchased at the sale of her deceased husband's property, certain slaves, for the price of which she executed and gave

her bond. She afterwards married Mr. William Smelie. On the 30th March, 1804, her brother, Mr. Hugh Wilson, and her husband Mr. W. Smelie, took up her bond, and gave their own in place of it, conditioned to pay £571 with interest.

This bond has been since paid off as follows: on the 24th May, 1788, by Mr. Smelie, £239 18s. 6d. On 1st May, 1796, by Mr. Smelie, £110 1s. 3d. The balance of the bond paid by Hugh Wilson.

The complainant produced in evidence the

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original will *of Mrs. Mary Smelie, drawn in the hand writing of her husband Mr. Wm. Smelie.

Mr. Hugh Wilson (who was admitted to be sworn, by consent,) testified that his sister, Mrs. Mary Smelie made her last will, with the consent of Mr. Smelie, her husband, and by his authority, expressed verbally.

The introduction of such evidence was opposed, but admitted by the court.

Mr. Wilson then proceeded to state that when his sister was ill, Mr. Smelie sent for him, and told him she was about to make her will, which was done accordingly. Mr. Smelie himself wrote the will, and kept it; and after his wife's death, carried it to the Ordinary, and had it proved and recorded. A time for the appraisement of the property was fixed: and Mr. Smelie delivered up the property, and said he had no claim to it. He delivered the negroes bequeathed to Mrs. Waight, and paid the legacy to Mrs. Hutchinson.

Mr. Smelie always called the property his wife's: though he knew the negro slaves had not been fully paid for by her, and he had given his bond jointly with her brother for the purchase money. He proposed to the witness to purchase his (Smelie's) life estate, for his wife's daughter, who was to have them after his decease.

On cross examination, Mr. Wilson said that Mr. Smelie some time after his wife's death sold one of the slaves of her estate; and offered for sale an entire family, without restricting it to his life estate in them. He mentioned it to witness, but did not ask his permission.

Mrs. Chisolm testified that Mr. Smelie, a short time before he died, told her he had sold one of Mary Smelie's negroes; and said he had sold her because worthless and diseased. She always heard him call the negroes of his wife's estate, her property.

Mr. John Smelie testified that he was appointed one of the appraisers of Mrs. Mary Smelie's estate by Mr. Wm. Smelie, who said the property was to be appraised as her estate, and not his. He always heard Wm.

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Smelie speak of *the property brought by his wife, as her own property, and to go to her daughter by her former marriage. He offered to sell his life estate in the negroes, to Mr. Hugh Wilson, who told him his price was too high.

Mrs. Bouchonneau testified that she often heard Mr. Smelie tell his wife he did not want her property, and that she should give it to her daughter—was present when Mrs. Smelie signed her will. Mr. Smelie wrote it; but it was she who insisted on giving him a life estate in her property.

Mr. William Smelie's will was produced in evidence. It was dated in the year 1798, with a codicil dated 6th Dec. 1800. In that he gave to his last wife the property he got by her.

Mr. Ward and Mr. Pringle argued for the complainant, that Mr. Smelie had completely divested himself of his marital rights, and agreed to a settlement to the separate use of his wife. That though the statute of frauds is the rule of the court, yet there are exceptions to it; and parol evidence is admissible to explain. See 1 Powell, 432.

The evidence is very full to prove that he never considered or called his wife's property his own; but meant it always to be her separate estate. As to the separate estate of the wife, see 1 Fonb. 106, 7.

It was said that Mr. Smelie was ignorant of his marital rights, and acts done in ignorance of rights, are not binding. But this is not so. He seems to have been intelligent and beneficent; and his language and conduct all shew that he was aware that he might take his wife's property to himself, but deliberately declined to do so; and left it to her own disposal chiefly for the benefit of her daughter, to whom by his marriage he stood in the place of a parent; and the court will consider this as a gift to her.

Gifts to a wife, without trustees, will pass. See 1 Atk. 270. Lucas v. Lucas. And an agreement on marriage may be made without

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trustees. 2 Ves. sen'r. 666 8. Pau*let v. Delaval. See also 2 P. Wms. 244, Cannel v. Buckle; and 2 Vesey, jun. 488, 49. 3 P. Wm's. 388, Slanning v. Style. The husband is considered trustee of the wife's separate estate, where no trustee is named.

The will was drawn by Mr. Smelie himself. This shews that he considered the property as his wife's separate estate, and being in his hand writing, was a sufficient assent in writing, if that were necessary, which however it is not. Consent may be implied, and even subsequent approbation will be sufficient. See Burn. 47, 8.

The answer does not deny the deed as illegal or invalid, but rather as defeasible by Mr. Smelie's paying great part of the purchase money for the property of his wife; yet he was at liberty to do so, if he pleased, and he ought still to hold and consider it as his wife's separate estate. He has done so,

and even confirmed it by his will: and who is there who can control his acts.

Mr. Edwards and Mr. Desaussure argued for the defendant. They insisted that no contract between husband and wife is binding, without the intervention of trustees. They are not separate persons at liberty to contract. The deed therefore was not valid. The case of Mrs. Haig v. the executors of Haig, decided in this court in 1794, (see vol. 1, of these Reports, p. 348) is strong to shew that the wife cannot take property to her separate use by direct gift, without the intervention of trustees.—There was also a want of consideration, for the marriage had been consummated, and the marital rights had attached. Powell on Contr. 230.

If the deed can take effect, it must be as a gift. The deed was executory, and donee died in the life time of the donor—therefore void. If it was to operate as a will, then by the death of Mrs. Smelie, in the life time of the husband, this was lapsed. 1 P. Wm's. 84.

If the deed be inoperative, the will of the wife does not help the complainant—for a wife cannot make an effectual will or testament without the consent of her husband,

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and *that must be in writing. 4 Burn. 46, 78. 1 Bacon abr. 291. Godolphin, 30. Our stat. of 1734, excludes femes covert from making wills.

But the deed by Mr. Smelie was void, for it was made direct to the wife, without trustees, after marriage, and to take place in futuro.

A man cannot grant any thing direct to his wife, or enter into covenant with her. 2 Bla. 442. Co. Litt. 112, 113. 1 Fonbl. 93. 1 Vern. 385, Moyse v. Eyles. 3 Atk. 72, Beard v. Beard. All agreements in consideration of marriage, must be in writing, or they are void. 1 Fonbl. 179; and even then, if not to be executed within a year, they are void by the statute of frauds. 1 Atk. 270. 3 P. Wm's. 334. 3 Bro. C. C. 340, 381.

The defect of the want of a trustee is decisive—for it is only through a trustee that a husband can grant to his wife. 2 Bla. 442, note 16. Hargr. Co. Litt. 30. 2 P. Wm's. 77, Burton v. Pierpoint. 1 P. Wm's. 125, Harvey v. Harvey.

It is a maxim that a gift of personal property to take effect in futuro is void. 2 Bla. 441, 2.

In Darley's case, 3 Atk. 399, 400, lord Chancellor Hardwicke lays it down that a mere voluntary promise of a husband to a wife, and executory only, has never been carried into execution by the court. That the slaves were absolutely the husband's by virtue of the marital rights cannot be denied. To this it may be added, that he even paid the greater part of the purchase money for them.—Hence, a resulting trust to him, independent of the marital rights. If a man purchases even lands in another's name, and pays his own money, it will be a resulting trust for himself; though no deed be made declaring the trust.

See 7 Bac. 142. 1 Vern. 366. 3 P. Wm's. 321, 3.

Besides, in construing this informal paper, it is clear that it was to have effect, in case Mrs. Smelie survived her husband. The words are, "I give, after my decease, to Mary Smelie," which amounts to saying, in case

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she *survives me. But that event did not occur—she died before him.

The deed gave no power to the wife to make a will; and she had no power without such provision. By law a feme covert has no authority to make a will—and even where, by agreement before marriage, a wife is to be allowed to make a will, it must be duly executed and conform to the power to make it effectual. 1 P. Wm's. 739. 2 P. Wm's. 258. All the cases where marred women have been permitted to make valid wills, are cases where the husband bound himself by covenant or bond, to permit his wife to make a will. 7 Bac. abr. 244. 2 Vern. 329. 2 P. Wms. 623. 2 Ves. sen'r. 61, 75, 612. 3 Atk. 155.

Not one of the decided cases go so far as to say, that parol proof shall be allowed to establish a husband's verbal assent to his wife's making a will, or without a previous agreement in writing.

Acts of confirmation must be shewn to have been with full knowledge of the rights of the party confirming.

The court took time to deliberate, and afterwards Chancellor RUTLEDGE delivered the decree of the court.

Complainant's bill states, that his testatrix had one daughter by a former marriage, and being possessed of a considerable personal estate in 1783, she married defendant's testator, Wm. Smelie. That not having made a settlement on her daughter, when she married Mr. Smelie, he on the 6th of Aug. 1787, executed a deed, giving to her after his decease, all the estate that belonged to her at the time of marriage. That soon afterwards, viz., in 1786 or 87, she made a will, disposing of the principal property she was possessed of at the time of her marriage, some part thereof to her daughter; a negro and 100*l.* to S. Hutchinson, and the remainder to her husband during life, and after his death to her daughter; and she appointed her husband and complainant executors. That the complainant, with the assent and privity of Mr. Smelie, proved the will, and qualified as ex-

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ecutor. That defen*dant's testator delivered up the personal property to complainant, to be subject to the dispositions in the will of his wife. That it was appraised with his

consent: the legacies were afterwards delivered over to the legatees, and the remainder was delivered to the said Wm. Smelie for his life, agreeable to the directions of the will. That Wm. Smelie is dead, and complainant has applied to his executors for the personal property, (so as aforesaid bequeathed to him for life) which they refused to deliver.

The defendants admit that complainant's testatrix was possessed of some personal estate at the time of her marriage with the testator: the whole consideration money, for which had not been paid, and which he afterwards satisfied. He admits the deed, but denies the validity of it, there being no trustee named in it: also denies complainant's right to take personal property, as it was not to be effected till after testator's death. Admits that Mrs. Smelie made a will, but denies the validity of it, as it was not made under the authority of any settlement or deed; or with the assent of Smelie, without which, she had no right to make any will that would be binding. Defendants contend that Smelie's assent to the delivery of the negroes to the other legatees ought not to be binding, as he was either ignorant of, or misconceived his rights.

The evidence produced in this case was, the will of Mrs. Smelie, which was admitted: also, that it was written by her husband Mr. Smelie. It was proved that after it was executed, he kept it in his possession, and sometime after her death, went with the complainant, and delivered it to the ordinary. That the complainant received the personal property as executor from Mr. Smelie, and re-delivered part of it to him as a legatee under the will. That the legacies were delivered to the respective legatees by complainant, and Mr. Smelie himself paid the 100*l.* legacy to Mrs. Hutchinson. J. Smelie, another witness, deposed that Wm. Smelie, the husband, appointed him one of the appraisers of the personal property, which he called his wife's estate.

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That it was pointed out by Smelie, who *said it was to be appraised as her's and not his. Mrs. B———u was present when he drew the will, and desired his wife to give the property to her daughter, and that he wanted nothing. Mr. Smelie made his own will in January, 1798, and a codicil in December, 1800; in neither of which has he disposed of this property.

For the defendant, it was contended that agreeably to the settled principles of law, the husband and wife are considered as one person: that she has no will of her own: that he by marrying, acquired the absolute right to her personal property, and she cannot dispose thereof, unless a power to do it is reserved to her by articles, or a settlement before marriage; which, however, was not done in this case. That the deed was void, being made after marriage, without the intervention of trustees. That to make a will valid, she must have permission in writing; and that subsequent acts of confirmation by the husband, do not strengthen it or make it good. That if the will should be deemed good, defendants should be at liberty to hold the personal property for the money paid, for her debts, and for this property particularly. It was insisted for complainant, that gifts between husband and wife, after marriage, would be supported in this court, though not at law, without the intervention of trustees; so as they do not affect or prejudice the rights of creditors. That if a husband consents to his wife's making a will, he should not afterwards dissent, and that an assent in writing is not necessary.

This is a very singular case, it cannot be assimilated to any in the books, and probably such another may never occur; it must therefore be determined on its own particular circumstances.

It is not pretended that the power of disposing of her property was reserved by articles or settlement before marriage. On the contrary it is admitted, that she married without any settlement.

This then comes under the idea of a voluntary settlement, or rather a voluntary permis-

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sion of the husband af*ter marriage, for the wife to dispose of the property she brought in marriage. Creditors cannot be affected by it, as the husband left property to pay his debts. On this ground it must stand or fall. If creditors will not be affected, call this paper a will, or a deed of appointment, or any other name you please, if he has given such assent to the disposition as would satisfy the mind of the court, that he was consenting thereto, it ought to be binding and conclusive.

As to the deed of August, 1787, that is out of the question; she clearly had no right to make any disposition, unless she survived him.

The case then rests altogether on the instrument of writing made in Oct. 1787, (which has been called the will of the wife,) and the simple question is whether there was such an assent by him to her making that disposition of the property as would bind him, and consequently all others claiming under him. That it is not absolutely necessary the assent should be in writing is plain, from the case of Lucas and Lucas, 1 Atk. 270, where a verbal promise made by the husband to the wife in her lifetime, and delivery of property after her death, was held sufficient to vest the property in the daughter, and he could not afterwards invalidate it. And in another case of Brooks & Tunner, among other points, it was determined, that if the husband consent that his wife should make a will, and she does so, and dies, if after her death he comes to the executor and seems to approve her choice of him as an executor, and seems satisfied in the main with the will, this is a good assent, and makes it a good will;

though when he sees and reads the will, he is therewith displeased, and opposes the probate of it: and his subsequent disagreement after the former assent shall not hurt the will.

Compare the case before the court with those above cited, and we shall see that it is much stronger than either of them. Defendant's testator, several years after his marriage, when he is fully acquainted with all the circumstances relative to the property

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he received with his wife, *and after he had made himself responsible for payment of part of the purchase money, undertook to draw, and actually drew a will for his wife, disposing of the property he got with her in marriage; nominates himself an executor therein, and directs it on the back to himself, and the other executors; gets it executed by her; keeps it in his own possession, and some time after her death, carries and delivers it to the ordinary to be proved.: The other executor qualifying at the same time, he being present, and assenting thereto.

Shortly after he delivers the property to the other executor; he himself nominates an appraiser, and not only permits the executor to deliver the legacies to the respective legatees, and himself pays a pecuniary legacy to one of them, but receives back such part of the property as his wife had bequeathed to him for life. When he drew the will, he relinquished his claim to every part of the property, saying he did not want it, and desired his wife to give the whole of it to her daughter. And finally, 12 or 13 years after her death he makes his will, and a codicil, in neither of which does he dispose of any of the property that he received with his wife.

If an assent in writing was absolutely necessary, we are of opinion that the very act of drawing the will, having it executed, keeping it in his possession and himself delivering it after her death to the ordinary to be proved, ought to be deemed as a full assent to the will, and to the dispositions of the property therein mentioned, and binding on him and those claiming under him. That the subsequent conduct of defendant's testator in giving up the property to the other executor, to be delivered over agreeably to the will, he himself paying the pecuniary legacy, receiving back some of the property given him for life, and not disposing of any part of it by his will or codicil, are all confirming acts of his assent to the disposition made in the will, which neither he nor those claiming under him ought at this late day to be allowed to invalidate. That his executors should not

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be permitted to set up the demand *they have done for the money paid by him on account of this property, because he was fully apprised of the situation of it, had made himself personally responsible for it several years before the deed of 1787, or the subsequent disposition of it by his wife, and never brought it forward as a claim against complainant or his testatrix. It is therefore ordered and decreed that the defendants do forthwith deliver up to the complainant such of the property as hath come into their hands or possession, which their testator received from complainant, under the will of his wife, and also account for the work and labour of the negroes, since the death of their testator.

Costs to be paid by defendants.

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Case XI.

[Present, Chancellors Rutledge and Marshall.]

PAUL HAMILTON v. ISAAC PEACE and Others.

(January, 1802.)

[*Principal and Agent* ⇐64; *Wills* ⇐78, 79.]

A person wrote instructions to his attornies, to collect the debts due to him, and to divide the money among themselves. They did so in part; but having bonds for large sums, which they could not collect immediately, they divided these bonds among themselves.

He afterwards wrote other instructions to them to go on collecting, and to divide the money among themselves, and four others, who were his near relations.

After his death, they refused to do so, and claimed the whole under the first instructions.

Decided that the first instructions, by whatever name called, were so far revocable, that all the funds not actually collected before the second instructions, should go among the seven named in the last.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 119; Dec. Dig. ⇐64; Wills, Cent. Dig. § 199; Dec. Dig. ⇐78, 79.]

The late Paul Hamilton, uncle of the complainant, was an inhabitant of this state, advanced in life, and possessed of considerable property, when the revolutionary war commenced. He was unfriendly to the separation of the colonies from Great Britain; and his conduct in the course of the war exposed him to the resentment of his countrymen. He was amerced twelve per cent. on the value of his estate. When the British troops

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evacuated *Charleston, he left his country, and went to the Island of Bermuda. He had previously lost his only child by death; and his nearest relations were his nephew Paul Hamilton, another nephew, of the name of M'Cleod, and three nieces. His nephew, called after him, Paul Hamilton, was ardently attached to the American revolution; and though a youth under age, had distinguished himself gallantly in the partizan war which unhappily desolated the country towards the close of the struggle. His conduct offended his uncle, who, though a respectable man, had strong passions and prejudices. In this state of mind, and under these circumstances, Paul Hamilton, the elder, made his will at Bermuda, in the month of April, 1784; and

on the 1st day of May, 1784, he drew up and signed a certain instrument or paper, which he headed and called instructions, directed and addressed to his particular friends, Isaac Peace, Alexander Chisolm and Norman M'Cleod, (which last was also his nephew,) in which, after giving certain explicit and positive directions and instructions relative to the sale, application and disposal of various parts of his property, real and personal, in this state, he expressed himself as follows: "The above said several requests being fully and completely complied with, strictly adhered to, donations paid, and your continuing in punctually remitting to me in Europe the yearly rent arising as aforesaid from my house and lot in Church Street, Charleston, my will is, that my nephew, Norman M'Cleod shall continue to live and occupy my plantation on Edisto Island, together with the slaves, now on the same, to wit: Sambo, August, Sanco, Jack, Sarah, with the stock of horses, cattle, hogs, &c. in short all the implements on the premises; then it is my pleasure, and I hereby will and request that my said attornies, Isaac Peace, A. Chisolm and N. M'Cleod, do mutually, unanimously agree with each other to collect, ascertain and receive the rest, residue and remainder of my personal estate, wheresoever and whatsoever. And as they receive the same, each to render an account to the other, and mutually

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and in a friendly *manner divide the same equal and amongst them, share and share alike. This is my express desire, that they do, and continue to do in full confidence, that they my said attornies will yet oblige me in acting in the said friendly and faithful manner in future, in complying with my desire, as my attornies during my life, if they survive; whose friendly and faithful conduct, I have in time past, so happily, so amply experienced."

In a letter written by Mr. Hamilton to Isaac Peace, dated 5th June, 1786, he says, "Rice cannot, I believe, be shipped to make a saving remittance; yet it is better than indigo, and I think better than any bills, so should you be so happy as to receive in and be able to furnish me in future with what remains from, as per instructions from Bermuda, per Normand, to wit: The first payment, £700. for the James Island plantation, and the yearly rent, be it what it will, of my town house, I wish no more. It will be sufficient for me. You know I have received by bill on Champion & Dixon, in part of said £700. £500, and now in rice, per Capt. Ball, say £95. 14s. 11d. making £600. or near it, of the £700. paid by Rivers: so there remains only about £100. of that allowance as per instructions aforesaid, with the rent added, of my house as you may get it paid. This I say is the utmost I desire shall be remitted me here as may suit you to receive it convenient for you. If you should fail even that, I must be satisfied, and shall be, as I am convinced you do as well as though I was present. All this I explain to you to confirm to you, that I do not deviate from my instructions, and the same will be enough for me. As you desire to know if you shall make me another shipment in rice, I answer dont exceed the above if you should receive from Rivers and others; but you shall remit, please let it be in rice or cash, or either, (no bills,) so pray apply all you may receive of my estate, of any person above this allowance to myself, to your own benefit, as directed by the instructions, immediately, and it will give me pleasure to hear you can help yourselves and families, who I esteem. Shew

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this to *Chisolm and Normand, as my requests to each of you are jointly."

In another letter, dated 20th Feb. 1788, he says, "You hint the remitting me and giving me notice, in time to make insurance. I thank you, and should you do so, let it be only a moderate amount, even if you fortunately get payment of Rivers and others. I do not require more than you jointly think proper to send me; but as per my desire by instructions per Poinsett, I only wish to be kept free from any claim whatever to answer the two trifles at Bermuda. See the event of the amercement, and then divide part as in your power amongst yourselves, as directed, and in such mode as you jointly or by majority of two agree."

The attornies of Mr. Hamilton acted under these instructions, collected in some of the debts due to him, and made him some remittances, and divided among themselves some of the money collected. Not, however, being able to collect in all the monies due on the bonds of Mr. Hamilton, they thought themselves at liberty, under the instructions abovementioned, to divide among themselves, the bonds themselves. Accordingly on the 1st of May, 1788, they proceeded to make such division, and made an allotment of the bonds to the amount of about 4000l. sterling, as appeared by a paper headed "division of bonds, 1st May, 1788, the gift of P. Hamilton to I. Peace, N. M'Cleod, and A. Chisolm," specifying particular bonds to each individual.

It does not appear that any information of this division of the bonds was given to Mr. Hamilton, with whom, however, the attornies kept up a friendly correspondence.

Mr. Hamilton went to Europe from Bermuda, and resided in England; and in the course of time his resentments and prejudices against his nephew Mr. Paul Hamilton the younger, were softened, if not wholly removed; and he felt disposed to take him into favor, and to give him with others herein-

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after mentioned, the benefit of that part *of his debts which had not been actually collected in, and divided by his attornies, ac-

cording to his instructions in the year 1784. In pursuance of these intentions, he wrote a letter to I. Peace, A. Chisolm, and N. M'Cleod, dated London, 15th Sept. 1791, in the following words:

Letter from P. Hamilton to I. Peace, A. Chisolm, and N. M'Cleod, dated

"London 15th September, 1791.

As time produceth all things, and a few years occasion changes among us of the human race, Divine Providence has spared me to live and see seven years since I sent my instruction from Bermuda by N. M'Cleod, for your conducting and settling my affairs, by calling in my debts, and distributing as directed then by said instructions, of which I have a copy in hand, experience has taught us and others, that the sanguine hopes entertained then, that law and justice would immediately after the peace succeed, and debtors be disposed to pay their debts, but that we have been mistaken.

I am now advanced in years, and reviewing the changes of circumstances since the date of the above instructions, the present situation of my relations in Carolina, and their issue and each particular as matters stand now with you there, and with me here, and well knowing your willingness to pardon my weakness, and to comply with my will; It is now as I conceive, I have latterly already expressed it, my will, that you, my attornies, Messrs. Peace, Chisolm, and M'Cleod, together with my three nieces Christiana, Dorcas and Ann, with my nephew Paul Hamilton, be equal partakers and sharers of all my debts due there, as well as due from Thomas Rivers, for my James Island land sold him, as all other debts of whatever kind. And that you, the said seven persons, shall enjoy equally and as speedily as the same can be collected in, or as you may mutually agree to divide the same debts among you.

My last will and testament executed here, corresponds with and expresses distinctly these my new instructions. You, my now three attornies, in case of my decease, are

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*then my executors for all my property in Carolina, while I nominate others here, so that each party is positively restrained from giving trouble, or meddling with the other. On my decease, my executors here are to transmit one of the two executed wills of the same tenour and date, with other papers to you, with a certain sum of money, also to be divided betwixt you and the said seven. Two drafts of my will I have executed for said purpose. No debts otherwise are to be claimed or paid in Britain from Carolina property—nor in Carolina from my property in Britain.—The above instructions and my said will and testament are my will, and I hope will be satisfactory to all concerned, and to the world before and after my death.

Thus much my friends, which in all probability I may never change or alter while I live.

May we ever be enabled to say God's will be done.

Yours affectionately, Paul Hamilton."

This was accompanied by a letter of the same date to the same persons, and intended to be a more private communication. It is in the following words:

Copy of another letter from P. Hamilton to I. Peace, A. Chisolm, and N. M'Cleod, dated.

"London, 15th September, 1791.

You will readily see on your perusal of the instructions enclosed, that I wish to ease my mind, by trying to satisfy the world, and individuals also, especially now in age.

As it hath been impossible for you to collect in and distribute my pecuniary property as yet, as formerly instructed, I now mean to pass over the froward conduct of my junior name sake and nephew Paul Hamilton, and place him just equal with, and let him be one of you seven, as expressed, in taking one seventh of all that you, my attornies can collect in future, or may have lately collected.

Friend Peace to be made whole for his advance of amercement. No claim to be unpaid; divide what's due from Thomas Rivers,

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as well as all old accounts, amongst *you seven, mutually and equally, and as soon as you are able. Please let my nieces and Paul know this my desire. I wrote you some time ago of selling my house in Gibraltar Row, and of my purchase, and now residing in No. 4, Cumming Place, Pentonville, City Road, London. Please let this be your direction in future, &c. P. H."

It does not appear that these letters were communicated by the attornies to Mr. Paul Hamilton, jun. Nor is there any proof that they expressed to their constituent Mr. Paul Hamilton, senr. that they were dissatisfied with his new instructions; or considered his first instructions as irrevocable, and conveying absolute rights to them.

Indeed it is certain that no such pretensions were set up during the life time of Mr. Hamilton, and made known to him, for in his letters to his nephew Paul Hamilton, (with whom he opened a correspondence) in 1793, 5, and 6, he tells him he hopes he will soon enjoy a seventh part of all his pecuniary property in South-Carolina. But it appears that the instructions of May, 1784, were not put on record until the instructions of September, 1791 were received; soon after which, to wit: in December, 1791, the former were placed on record, and not the latter. Mr. Paul Hamilton, the elder, died some time in the year 1798, and one of the attornies communicated to Mr. Paul Hamilton, jun. in a letter of 23d Oct. 1798, the will of his uncle, and the instructions of 1784.

Subsequent to the death of Mr. Hamilton, the attornies set up the pretence that the in-

strument or instructions of Mr. Paul Hamilton, in May, 1784, contained an immediate, absolute, and irrevocable gift to them—of the pecuniary property of the donor, whether collected on the bonds or not; and that they had made a division among themselves of the bonds in 1788, which was conclusive on all parties.

Mr. Paul Hamilton, jun. taking a different view of the subject, filed a bill in equity against Messrs. Isaac Peace, Alexander Chisolm, and Norman M'Cleod, to compel *them

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to account for those debts which had not been actually collected in and divided, before the new instructions of his uncle, in the year 1791. The answer denied the right of the complainant to call them to any account, and insisted on the absolute gift of the uncle in 1784.

At the hearing, the instructions of 1784 and of 1791, were given in evidence. Also, many letters from Mr. Hamilton to his attornies, and some of their answers.

Also, his letters to his nephew Paul Hamilton, in 1793, 5, and 6—in which he expresses his hope that he would soon get a seventh part of his personal estate in Carolina.

Also, a paper, stating a division of all the bonds on which monies were due to Mr. Hamilton, made by the attornies among themselves, on the 1st May, 1788, allotting to each certain specified bonds.

Several witnesses were also examined. Mr. Glover testified, that Mr. Paul Hamilton the younger, took a very active part in favour of his country, in the revolutionary war. He entered the service at 16 or 17 years of age. It was known that Mr. Paul Hamilton and his uncle differed on politics; which created disgust and dislike in the mind of the uncle.

Mr. Rivers testified, that he was well acquainted with Mr. Paul Hamilton, the elder, and knows his hand writing. He proved the letters of 15th Sept. 1791, and those of 1793 and 1796, and the instructions, to be in the hand writing of Mr. Hamilton. The witness became a purchaser of part of Mr. Hamilton's property, to the amount of 1700 guineas, of which 700 were paid down, and the balance payable by instalments. He made some payments before 1791, and some since 1791, to Mr. M'Leod and Mr. Chisolm, who held the bonds.

Paul Hamilton, the uncle, lost his only child (a son) about the time the British troops invaded this state. He and his nephew differed in political opinions.

Mr. George Tunno testified, that he saw Mr. Paul Hamilton the elder, in London. He committed to the care of the witness cer-

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tain papers, which he said were of *consequence, and which he read. The witness left England on the 1st October, 1791, and the papers were delivered to Mr. Peace, in Nov. 1791. The purport of these papers was that his blood relations should have his property equally. Witness informed Mr. Paul Hamilton, the nephew, of these facts. When the witness saw the elder Mr. Hamilton, it appeared that he had heretofore thrown off his nephew; and that this was on account of the decided part Mr. Hamilton, jr. had taken in favor of his country. He did not state to the witness in conversation that he had changed his mind as to his nephew.

It was argued by Mr. Desaussure and Mr. Gaillard for the complainant, that this instrument, paper or instructions, of May, 1784, under which the defendants claimed the property of Mr. Hamilton, senr. as an absolute gift, irrevocable by the donor, was of a very doubtful and ambiguous nature. It certainly had some features of a deed, as well as some of a will. The writer himself heads it, instructions to his attornies, with directions for their conduct. But it is manifest that he and the defendants also considered the subject as under his control. They continue to correspond on the subject; and he did actually in 1791, make a different disposition of such of the debts as had not been actually collected, received and divided. And the attornies, though he lived many years afterwards, never disputed his power to do so, or remonstrated with him, as attempting to make a new disposition of what he had previously disposed absolutely to them.

This acquiescence shews the light in which they viewed the subject. They did not dare to avow to their friend, that they claimed the whole, and that he could not dispose of his own property. The court will the more readily give this construction to so doubtful a paper, when it is remembered that this prejudice and exclusion of a nephew, the nearest to him in blood, and bearing his name, was the wretched offspring of a miserable difference of political opinion, which shut up his heart against the merit of a distinguished relative, and excluded him from all share in

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*his fortune, for the benefit of persons, two of whom were entire strangers to his blood, and there was no valuable consideration given. And the conduct of the defendants, in concealing from the nephew, the uncle's altered temper and intentions towards him, which time and better feelings had brought about; and in concealing from the uncle their intention to resist his last instructions in favor of his nephew, and to claim the whole under the first instructions, does not entitle them to any favor. The court will therefore treat this paper of May, 1784, as an anomalous thing, of no distinct character: and consider it, as the maker of it manifestly did, a thing entirely under his control and revision. If so, it was revocable, and being so, has been revoked by the instructions of Sept. 1791.

Papers of this doubtful kind, partaking partly of the nature of wills and partly of

the nature of deeds, have been frequently construed wills. See 7 Bacon, 300. Title wills and testaments. Swinburn, p. 6. T. S. wrote a letter, which was construed to be a will. 1 Modern Rep. 117. A deed indented and executed between two parties, was construed a will. A deed referring to a will, is to be taken as a part of the will. This was the execution of a power. See Methuan v. Duke of Devon. 1 P. Wm's 529, 530. In Hodges v. Peacock, 3 Ves. jr. 735, a written paper, signed and entitled, "Instructions to my friends and executors," was considered as a part of the will, and proved with the will.

The court will mould the deed or instrument in such manner as to give effect to the true intentions of the donor. The court construed a feoffment to be a will, to give effect to the deed. See 2 Ves. jun. 226.

In Ousley v. Carrol, decided in the Prerogative Court, (noticed in 2 Ves. sen'r. 440,) a writing in the form of a deed, using the words, giving and granting, was construed to be a will. So in the case of Shargold v. Shargold, also decided by the Ecclesiastical Court, (see 2 Ves. sen'r. 440, 1.) a deed of gift, but not to take effect till the death of the maker, with sixpence delivered as a sym-

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bol, was de*cided to be a will. See also Swinburn on wills, part 1, sec. 10, page 74.

But it was contended, that call this paper by what name you will, some acts were to be done directly; and the defendants were expressly directed to collect in the money due to Mr. Hamilton, and to divide it among themselves immediately; and that this has been done, as to the money collected, and also as to the bonds; which being in execution of an express order, is final and conclusive. This, however true it may be as to the money actually collected and divided, (and there is no wish to disturb that, under any name the paper may bear) cannot be available as to the bonds.

The power was to collect in and divide the money—not the bonds. The division of the bonds was a premature act, not done in pursuance of the power, and is void. All the bonds which remained uncollected, till the new instructions in Sept. 1791, must go in pursuance of these new directions.

Mr. Pringle and Mr. Cheves argued for the defendants.

The instrument or writing of 1784, is an absolute gift or grant. 2 B. Com. 440.

The requisites of a gift or grant, in the case of personal property, are words of transfer, possession, assent. 1 Pow. Mort. 27. 14 Viner, 19.

The previous gifts are not conditions, but trusts in the defendants pro tanto. The subsequent words relative to the collection and receipt of the debts, are only modal and directory, and create no condition. 1 Powell on Contr. 267.

The effect of these words is done away by the subsequent letters.

All dispositions of property are resolvable into the following:

1st. Absolute sales.

2d. Conditional estates.

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*If it be a conditional estate, yet it is not revocable. 2 B. Com. 441, 42.

The nature of a conditional estate is, that it shall be defeated only for a breach of the condition.

The caprice of the donor is not one of the conditions on which it is held.

Conditions are precedent or subsequent. The difference is stated in 2 Bla. Com. 154, 163.

If an interest depending on a condition precedent, has in any case been considered revocable, it was.

1st. In no case where an interest in a specific thing was conveyed, but in cases of contract.

2d. Where the contract had not been at all acted upon, or the condition in no sort or part performed.

3d. Where the conveyance only gave a naked power, not coupled with an interest.

4th. Where there was no consideration. 6 Viner, 482, 83.

But if the interest in the present case be conditional, it is so on a condition subsequent.

The condition is always subsequent, where possession, (the interest being a personal chattel or chose in action) attends the gift or grant.

Possession, with words expressing a gift or grant, conveys the interest immediately, and vests the estate, which is inconsistent with the nature of a condition precedent.—Such a condition would be repugnant to a vested interest, and void. 1 Pow. Contr. 262.

It is like a feoffment of land, with livery of seisin.

If possession did not carry an immediate and vested interest, then it would be a limitation, not a conditional estate, which would suppose a vested interest in some other person, having a particular previous estate, which could not be without possession.

If A. gives B. 20*l.* in hand, on condition that he go to Rome, and there transacts certain business on his account, this is a condition subsequent. But if A. promise B. 20*l.* on condition that he go to Rome, and there

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do cer*tain business on his account, this is a condition precedent.

Possession in the one case, makes the difference.

But a condition subsequent, can not be annexed to personalty; and therefore the interest must be absolute.

Bac. Cond. (D.)

Condition subsequent, is founded on the

idea of a reversion, of which there is none in personal property.

If this were considered as a contract, it is such an one as the donor would be compellable to perform. 2 Bl. Com. 441.

As to consideration, see 2 Bl. Com. 445. 1 Pow. Contr. 340, 43.

3d. Gifts causa mortis.

4th. Devises or bequests by last will.

By enquiring under which of these the present disposition does not come, we will ascertain under which it does come.

If an estate is not in its original grant or creation, so given as on some contingency to cease and determine, as in the case of conditional estates, or to shift, as in the case of a limitation, where, in the first case, it reverts to the donor, and in the second, it goes over to a remainder man, it will be absolute. See the case of Main and wife v. Dickinson, decided in this court.

The gift was absolute, and has been fully executed. It would be quite inconsistent to allow this to be revocable.

The grant being complete, and the property in possession of the donees, they were at liberty to divide the bonds as well as the money, when collected.

The court having taken time to consider, Chancellor RUTLEDGE afterwards delivered the decree of the court:

The questions in this case are whether the paper writing in the bill referred to, signed P. Hamilton, now deceased, dated 1st May, 1784, disposing of certain parts of his estate in this state to the persons therein named, was or was not of an executory nature, and revocable, or whether it was not absolute and

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indefeasible? And if revoca*ble, whether the instructions of Sept. 1791, did not absolutely revoke the former, at least as to such parts as had not been executed agreeable to the directions therein contained? As to its being of a testamentary nature, although from some of the technical expressions, it might be said to embrace that idea, yet as the acts to be done by the persons, were to be executed as speedily as possible, and in the lifetime of Mr. Hamilton, it cannot be considered as a testament or will; nor is it a deed, because it wants some of the requisites essential to a deed. In fact it is nothing more than what Mr. H. intended it to be, viz: Instructions to his attornies. Viewing it then in that light, it cannot but be considered in its nature, as altogether executory, and therefore countermandable or revocable. That Mr. H. looked upon it as revocable, appears upon the face of it; for at the beginning he calls it his instructions to his attornies, for their guide in conducting his concerns; and desires them to be executed as speedily as may be.—He then proceeds to direct what acts they are to do, all of which being done, he concludes with requesting that they do mutually agree to collect and receive in the rest of his personal estate, and as they receive, each to render an account to the other, and mutually divide the same equally among them, share and share alike. As a further proof that he, and the defendants also, considered the paper in no other light than as instructions, they write to him on the subject of his affairs; and he in his letters of July, 1786, and February, 1788, directs them what to do, and adds, to divide what they may receive as per instructions. As a more convincing proof that he thought he had still a controuling power over the acts of the defendants, and to dispose of such parts of his estate (his debts particularly) as had not been received; he by his instructions of Sept. 1791, directs his debts to be divided between his attornies, his three nieces, and the complainant, in equal shares, which instructions he accompanies with a letter to the defendants, to that effect, and by a letter of the same date to com'plt. he says

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he has wrote to his attornies, *and of which they no doubt would communicate his mind and desires to him as per instructions by Mr. Tunno. Then for the first time the defendants take the alarm; and immediately after the receipt of the letter and these instructions, they conceive the first instructions to be irrevocable, and have them put on record. What was their subsequent conduct? Did they acquaint the complainant with the contents of the new instructions? They did not. Did they remonstrate with their constituent on his change of sentiments, and set up a claim to that property, independent of his controul? We should suppose they did not. It is rather presumable that they seemed to acquiesce in conforming to the subsequent instructions, and kept him in the dark respecting their real intentions; for if they had held the same language to him, which they now do to complainant, it is impossible he could have wrote the subsequent letters that he did to complainant in the years 1793–5 and 6; particularly that of 1795, wherein he writes complainant that he hopes he will soon enjoy a seventh part of all his pecuniary property due here. There is a mystery in this business which ought to be developed. The defendants have carefully concealed the letters which were wrote to them by Mr. Hamilton, subsequent to July, 1788, and their answers thereto. They do not even pretend that they ever informed him that a division had taken place, which it was natural for them to have done. Such conduct was highly unbecoming towards their benefactor, and merits censure, and ought not to be countenanced or supported by the court. As therefore their claim is founded on the first instructions, it was incumbent on them to prove that they had literally complied with them, to entitle themselves to the benefits thereof. So far as they were executed previous to the receipt of the new, and con-

formable to the directions of the first instructions, those acts are undoubtedly good; but by making a division of the bonds, &c. instead of first collecting and receiving the money due on them, and then dividing it, they have totally deviated from their instruc-

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tions. As there*fore the original bonds, &c. were still outstanding, and the monies had not been received and divided, when the new instructions were received by them, we are of opinion, that the first instructions were thereby countermanded and revoked, and therefore decree that the defendants do account for all such monies as they have received on account of the debts due their constituent, the late Paul Hamilton, deceased, subsequent to the receipt of the instructions of Sept'r. 1791, to be divided agreeably to those instructions. Costs to be paid by defendants.

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Case XII.

[Present, Chancellors Rutledge and Marshall.]

CRUGER and Wife, and Others, v. THOMAS HEYWARD, Executor of Daniel Heyward, Dec., and Others.

(January, 1802.)

[*Parent and Child* ⊂⊃3.]

A father is bound to maintain and educate his minor son if he be of ability, though that son has a considerable estate aliunde: and he must account for the rents of his son's estate, though his own had been much injured by the war.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. § 55; Dec. Dig. ⊂⊃3.]

[*Wills* ⊂⊃603.]

A devise of real estate to a son B.; but if he died without issue, to a grandson D. and his heirs for ever; the limitation over is not too remote; and the estate will go to the representatives of D. though he died before B.

[Ed. Note.—Cited in McCorkle v. Black, 7 Rich. Eq. 419, 420.

For other cases, see Wills, Cent. Dig. § 1353; Dec. Dig. ⊂⊃603.]

[*Wills* ⊂⊃610.]

In a similar limitation of personalty, (in the same clause of the will) the first devisee B. takes the whole; and he dying without issue, it is distributable.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1381; Dec. Dig. ⊂⊃610.]

[*Wills* ⊂⊃686.]

A devise to D. and on his dying without issue, to the heirs of T. and W. D. died without issue, at which time T. had but one son, but has had other children since. According to the maxim that nemo est hæres viventis, the heirs of Thomas cannot be known till his death. On that event, his heirs will be entitled to a moiety of the estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1632; Dec. Dig. ⊂⊃686.]

[*Wills* ⊂⊃506.]

[The word "heirs," used in a will, may be construed "children," where such was the evident intent of the testator.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1093; Dec. Dig. ⊂⊃506.]

[*Wills* ⊂⊃590.]

[Where real and personal estate are bequeathed in the same clause of the will, with limitation over, the fact that they are named in the same clause will not affect the construction given to the bequest as to the different classes of property.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1293; Dec. Dig. ⊂⊃590.]

Mr. Daniel Heyward made and duly executed his last will and testament on the 7th June, 1776, and made among other devises of his estate, the following dispositions:

He devised to his son Thomas, in trust for

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his, the tes*tator's grandson Daniel, his plantation on Savannah river, called Varnezober's with all the slaves thereon, till he attained the age of 21 years: then to him and his heirs for ever: Also, the slaves on the plantation where the testator resided, which were not otherwise disposed of. But if his grandson Daniel should die under age, then he gave the real and personal estate to the heirs at law of his son Thomas, when they should attain 21 years of age.

He also devised to his son Thomas, in trust for his (the testator's) son Daniel, during his natural life, the use of the lands, slaves, stock, &c. enumerated in his will, viz. An island, called Callewashie, and sundry other tracts of land; also, his house in Beaufort, and several slaves: At the death of his son Daniel, the testator devised the lands to be divided between the heirs male of his body; and for want of such, between the heirs female;—and the slaves, between the heirs, male and female: but in case of no such heirs, then the land and slaves to be divided between the heirs of his (testator's) sons Thomas and William.

By another clause in his will, the testator devised the remainder of his estate real and personal, to his sons James and Nathaniel, to be equally divided between them.

He also gave to his son Thomas, and his other executors, "full powers to act, do with, and dispose of the yearly produce of his estate as they should think proper, for the benefit of his heirs abovementioned."

By a codicil, dated the 15th July, 1777, and duly executed, the testator devised to his son Benjamin, (who was born after the making his will,) the island called Callewashie, with the slaves, stock, &c. thereon. "But in case he die without issue, then he gave it to his grandson Daniel Heyward, and his heirs for ever."

By another codicil, dated the 28th July, 1777, and duly executed, the testator devised Coles island, (which was originally granted to Russell,) and the slaves thereon, to his

son Thomas, in trust, for the use of testator's son Daniel, during his natural life; and at his death, the lands to be divided between

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the heirs male of his body, and for *want of such, between the heirs female; and the slaves between the heirs male and female: but in case of no such heirs, then the land and slaves to be divided between the heirs of his sons Thomas and William.

The testator died in the month of October, 1777, leaving his said will and codicils in full force. His eldest son Thomas proved the will, qualified thereon as executor, and possessed himself of the estates of the testator.

The testator's son Daniel, died in the year 1778, without issue.

His son William married after his father's death, and died in the year 1786, leaving issue.

The testator's grand son Daniel, (son of Thomas,) died in the month of February, in the year 1796, having attained the age of 21 years, & leaving a widow and a daughter.

The son Benjamin died in September, 1796, under age, and without issue.

Mr. Thomas Heyward, the eldest son, and acting executor of the testator, educated and maintained his son Daniel, the grandson of the testator, who was so particularly provided for by the will; and afterwards had a number of other children by a second marriage. His fortune was greatly injured by the war, in which he took an active part, having been a member of congress at the time of the declaration of independence. But his affairs were not so reduced, but that he was able to support and educate his son Daniel, equal to his fortune under his grandfather's will.

The testator's grandson Daniel, made and duly executed his last will and testament a few days before his death, whereby he directed, that until his daughter Elizabeth M. Heyward should be married, or attain the age of 21 years, his wife should enjoy the profits of all his estate, if she remained so long his widow; and when his daughter should marry or attain 21 years, then the profits of the estate should be equally divided between his said daughter and his wife, as long as she should continue his widow.—But that immediately after the sec-

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ond marriage or death *of his wife, the rest, remainder, and residue of his estate should go to his daughter and her heirs forever. His daughter to be educated liberally out of the estate. The widow of the said Daniel Heyward proved his will, and qualified thereon as executrix; and some time in the year 1799, intermarried with Mr. Nicholas Cruger, complainant in this cause.

Mr. and Mrs. Cruger have filed their bill against Mr. Thomas Heyward, the executor for an account and settlement of the rents and profits of the Varnezober estate, from the death of the testator to the time of the delivery of the plantation and slaves to his son Daniel, which took place three months before he was of age, in Feb. 1795.

The bill also insists, that on the death of Benjamin Heyward, (in Sept. 1796,) under age, and without issue, the Callewashie estate vested in the representatives of the grandson Daniel, according to the provisions of the will of the grandfather; and that the said Thomas Heyward, the executor, is accountable for the rents and profits from the death of the said Benjamin.

The bill further insists, that on the death of the testator's son Daniel, without issue, the Cole's Island estate which was devised (on that event occurring) to and among the heirs of the testator's sons Thomas and William, became the property of the children of William Heyward, and of Daniel, the only child of said Thomas, who was in existence at the death of testator's son Daniel, and the executor is accountable for the income of the estate.

The bill prays for an account and for relief, according to the rights of the complainants.

The defendant Thomas Heyward, in his answer, admitted generally the facts charged in the bill, with respect to the execution of the will and codicils stated, by his father Mr. Daniel Heyward, decd. and as to the members and state of the family. He stated that he had taken and held possession of the estates; but had given up the possession of Varnezober's to his son Daniel (the devisee) in the autumn of the year 1794;

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and that Daniel had drawn all the *profits of the crop of 1794, as well as of 1793. That his said son Daniel never required an account from him, and he believes never would have done so; and if he had, the defendant believed there would have been little or no balance due to him, because the plantation had been ruined and broken up by the war, and re-established slowly, and at great expense after the war; and because the defendant had paid all the expenses of the estate, as well as of his said son Daniel's education and support. That he took no discharge from his son, for he had never taken one from his younger brothers, when he delivered up their estates to them. The answer admits that the defendant's son Daniel died at the time stated, and left in full force his will, as stated by complainants; and that his widow qualified as executrix, and has since intermarried with Mr. Cruger.

That Benjamin, the youngest child of defendant's father, died in Sept. 1796, under age, and without issue;—whereby a difficulty arises as to the Callewashie estate.—That said estate having been devised by defendant's father in case of Benjamin's death without issue, to the said Daniel, (son of the

defendant) and he having died in Benjamin's life time, a question is made, whether the said estate vested in the heirs of said Daniel, or in the surviving residuary legatee.

That the Callewashie estate having been given in the first case to Benjamin, the income was employed for the use of Benjamin during his life, and a balance is due to defendant from the estate.

The defendant denies that the heirs of his son Daniel are entitled to any part of the estate which had been devised by defendant's father to his own son Daniel, and on the event of his death, without issue, (which had happened) to the heirs of testator's sons Thomas and William: because the maxim of law is, that nemo est hæres viventis; and defendant's son Daniel dying in the life time of defendant, neither he or his representatives are entitled.

Mr. N. Heyward's answer admitted the

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will of his fa*ther Mr. D. Heyward, and the facts stated in bill of complainants; but denies the claim of complainants to the Callewashie estate, and the crops thereof, as the limitation was too remote, and could not take effect in law; and that the death of Daniel Heyward, junr. (grandson of testator) during the life of Benjamin Heyward, prevented said devise from taking effect, and the said estate sunk into the residuum of the testator's estate, and passed under the residuary clause to this defendant; or became on Benjamin's death without issue, the property of his surviving brothers and sisters.

Mr. and Mrs. Brailsford, (she being the testator's daughter Maria) in their answer admitted all the facts; and they set up a claim to a distributive share of the slaves bequeathed, with the Callewashie plantation to Benjamin Heyward, and in the event of his death, under age, and without issue, (which occurred,) then over to testator's grandson Daniel. They insisted that the estate vested in Benjamin, and that the limitation over to Daniel was too remote and void. Consequently on Benjamin's death, the negroes are distributable among Benjamins surviving brothers and sisters, of whom Mrs. Brailford is one.

At the hearing of the cause, Mr. Gaillard argued for the complainants.

The defendant Thomas Heyward has not pleaded any release in bar. He has none; and he must account for the rents and profits of the Varnezober estate; and he cannot charge the expense of his son Daniel's maintenance and education, as he (Thomas) was able to educate him out of his own estate. 1 Bro. Ch. Case 387. Hughes and Hughes.

The next question relates to Callawashie, and the negroes attached to it.

The word it, used in this will, is the word that ninety nine men out of an hundred would have used. In almost all the devises, he attaches the negroes to the lands:

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*The testator has also used the word it, carrying lands and negroes to Daniel, in the case of Varnezober's.

If then "it" has the extensive meaning of carrying negroes and lands in that case why not in the case of Callawashie. It is the same phrase.

There is no other clause, in the will, where "it" occurs, except in these two cases; and these are the only cases of single plantations.

The next point is, whether the limitation over Callawashie, and the negroes to Daniel, are too remote. The intent must guide, if consistent with rules of law. Fearne, 4th Ed. 371, on Con. Rem. The words of the will must be construed to mean, "a dying without issue, living Benjamin," at least as to personalty. See also Fearne, 356—Court is enclined to lay hold of any circumstances to confine the dying without issue, to dying without issue, living at death of devisee. 2 Fonb. 93. The court anxiously hunts for circumstances to tie up the dying without issue, within the permissible limits.

There is no real difference between dying without issue, and dying without leaving issue, and the cases which distinguish them, are frivolous. For the construction of the words, "dying without issue," see these cases; 1 P. Wm's. 564, Pinbury v. Elkein. Ibid, 432, Target v. Gaunt. Ibid. 534, Hughes v. Sayer. Ibid, 666, Forth v. Chapman.

The same words used in the same will may be construed differently, as to real and personal estates. There are sufficient words of restriction in this will. Fearne 355.

If the devisee dies under 21, then the testator gives it over, this is a good limitation; and the 21 years makes no difference. Fearne 359. The word "then" is sufficient to restrict. But there are cases contrary to this. 2. Atkins, 308. Beauclerk v. Dormer.

If the court construe the word "then" as sufficiently restrictive, it will give entire operation to the will. If otherwise, not. 1 Bro. Ch. C. 188, 190. Bigge v. Bensley, was decided against the Chancellor's opinion, and

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*yielded to the authority of Lord H. in Dormer v. Beauclerk. He does not rely solely on the word then. But on other words of the will. 3 Burr. 1622. The intention is to prevail, if consistent with the rules of law. 3 Burr. 1634. In construing a will, the words supplied must be to support the intent; not to the defeat.

In 1 D. and East, 593, Judge Ashurst's opinion was, that an express legal limitation is conclusive. But if it be only by implication, then the court may follow the intent. 3 P. Wms. 259. Atkinson v. Hutcheson.

In the case before the court, there is only an implied estate tail in Benjamin.

As to Callawashie itself, the will contains a good devise over. The Statute de donis is not of force.

It is then a fee simple, conditional at common law, in Benjamin. It will then go over to Daniel. 2 Black. 109, doctrine of fees conditional at common law. Benjamin having a conditional fee, he might have made it absolute; but did not. The testator, if the condition was not performed, might enter. Testator has given over to Daniel, this right of entry, and he takes it, and his representatives are entitled to hold. See Powell on devises, 31.

The residuary devisee cannot take; for the words rest, residue, and remainder, are relative terms, and mean what was not given.

The next point relates to the devise of Cole's Island, or Russell's, &c. &c. to his (the testator's son) Daniel and the heirs of his body, male and female, as expressed in the will. "But in case of no such heirs, then the said land between the heirs of my sons Thomas and William for ever, and also the slaves."

The word "heirs" in this will is synonymous with children.

His use of the words "male and female heirs," shews he meant children, not heirs at law, in the technical sense.

If the words heir at law are meant tech-

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nically, then the *daughter of Daniel, the testators grandson is the heir at law of the original testator.

The children living at the death of Daniel Heyward, the testators son, are the persons truly entitled.

The last clause of the will shews in what sense the testator uses the word heirs. The income is to be improved for his "heirs," by which he meant, children. 1 P. Wms. 564, Pinbury v. Elkeins. Limitation over is good in this case.

Estate directed by the will to be divided among the children of Thomas and William. These words from a sufficient limit. Fearne, 368. Keily v. Fowler.

To extend it beyond these would make the limitation too remote and void. Therefore the court will construe it living at the death of Daniel, the son; to let in Daniel the grandson.

But if the court thinks the limitation of Callewashie as to the negroes, was too remote, then the estate vested in Benjamin: And if so, is distributable, and complainants are entitled to a share. Fearne, 345, Con. Rem. Ibid, 368, Beauclerk and Dormer. Ibid, 374.

Mr. Parker also argued the cause, but I have no accurate note of his argument.

Mr. Desaussure on behalf of the defendant Thomas Heyward, argued as follows:

The questions which arise, are the following:

1st. Respecting the devise of Varnezober's on Savannah river, and the slaves thereon, to testator's grandson Daniel. An account is demanded of the rents and profits. Are the complainants entitled?

2d. The devise by the codicil of 15th July, 1777, whereby testator gave Callewashie, and the slaves, &c. thereon to his son Benjamin; but in case he died without issue, then he gave it to his grandson Daniel, and his heirs for ever—Who are entitled, on Ben's death without issue, to Callewashie and the slaves?

3d. The devise by the codicil of 28th July,

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1777, where*by testator gave his tract of land originally granted to Stephen Russell, (called Cole's Island) to his son Daniel, under the same limitations as he had given other property to said son Daniel, by his will: also the negroes thereon.

Who are entitled under this clause? As to the first question, we admit the devise to the grandson Daniel of Varnezober, and the slaves. And we admit that defendant Thomas Heyward qualified and acted as executor.

We state the circumstances which prevented crops, and the improvement of Varnezober; the delivery of the property to the grandson Daniel, and his acquiescence, without an account. The answer explains the causes of this acquiescence. They were, because of the injuries done to Varnezober by the enemy; and of its desolate and unproductive state, and its renovation by T. Heyward.

2d. The second question arises respecting Callewashie, and the negroes thereon, and the crops thereof, since Benjamins death.

The complainants claim being for Callewashie and the negroes and the crops—let us examine by the words of the devise,

1st. What was intended to be passed?

2d. Whether if intended to be passed, the limitation is not too remote?

3d. Whether Benjamin had not such a vested interest, as gave him the crops?

1st. The words are to his son Benjamin, Callewashie, with all the slaves, &c. thereon. "But in case he die without lawful issue, then I give it to my grandson Daniel, his heirs and assigns for ever."

The word it, clearly refers to Callewashie, and to that alone; to read it so, it is correct and proper. To make it refer to land and negroes, would be extravagant. The mere force then of the word it, does not carry the negroes.

If this reasoning be correct, then the complainant must resort to some supposed intent. It may be argued that he considered the negroes attached to the lands, and so meant them to pass by the word it, with the land.

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But we have *no reason to think so. For in many of the limitations over, he separates the lands and the negroes. See the will, and particularly the limitations over. And where he does not separate them, he gives them distinctly, naming both. See instances in the

will marked; and there is only one instance to the contrary.

The law does not give such enlarged meaning to words so limited.

A gift of the "overplus of the estate," to a man's wife, carries only the personal estate. 2 Eq. Ca. Abr. 320, sec. 7. A man possessed of 5 messuages, devises 4 of them; and all the overplus of his estate to be at his wife's disposal. The 5th messuage did not pass. 2 Eq. Ca. Abr. 320, sec. 8.

A devise of all goods, do not pass books, jewels, pictures, &c. 2 Eq. Ca. Abr. 322, sec. 12.

A person seized of lands in fee in A. and possessed of a term for years in B. devises all his lands, tenements and real estate in A. and B. to C. and his heirs. This will not pass the term. 2 Eq. Ca. Abr. 326, sec. 34. 3 P. Wms. 26, Rose v. Bartlet. Cro. Car. 293. Chapman v. Hunt, 1 Vesey, 271, 2, 3.

2d. If it was intended by the testator to pass both land and negroes to his grandson Daniel, whether the limitation over is not too remote for either or both?

A personal estate was devised to A. and in case she died without issue, then to B. Resolved that the devise over to B. is void, and the whole decreed to A.

2 Eq. Ca. abr. 322. Sec. 10.

Devise to one and his issue, or to one, and if he die without issue, remainder over to another, the devise over is void; and the whole vests in first devisee.

Ibid, sec. 14; see sec. 30, 1, p. 325; sec. 39, p. 327.

The word "issue," takes in all issues in infinitum. 1 Vesey, 200, 1, 2.

When once an estate, (which in real estate would be an estate tail) vests in the first taker, that instant all the subsequent limitations

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became void. 1 P. Wms. 98. See *note (1) to case of Higgins v. Dowler. See 4 Vesey, jun. 717. See the case of Beauclerk v. Dormer. 2 Atk. 308 and 376. 1 Burr. 272, 3. 1 Vesey, jun. 286, Everest v. Gell. 3 Vesey, jun. 99, (in point,) Chandless v. Price. 2 Bro. C. C. 33, Glover v. Strotoff. Fearn. Ex. Devises, 167, 230, 249. 2 Fonbl. 72, 81, 2.

It is a rule that when a contingency is limited to depend on an estate of freehold, which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder. Fearn. Ex. Dev. 16, 17, 203, 5.

Executory devises are essentially different from contingent remainder, 50, 1, 73, 7, 8, 9.

Limit of executory devises as to real or personal, 82.

Wherever an executory devise is limited to take effect, after a dying without heirs, or without issue, subject to no other restriction, the limitation is too remote and void.

Fearn. Ex. Dev. 116, 144, 154, 167, 171, 4.

Exceptions to the rule, 179, 180, 182, 186, 187, 8, 190, 1, 197, 200.

The words of a will must be read with reference to the rules of law. Fearne 243.

The principal cases for complainant are 3 P. Wms. 262, Atkinson v. Hutchinson. 1 P. Wms. 98, Higgins v. Dowler. 1 P. Wms. 663, Forth v. Chapman. Ibid, 747, Pleydall, See note, p. 750. But they do not apply, or have been overruled by other decisions.

If as I have contended, the testator did not intend to pass the negroes by his codicil to his grandson Daniel, or the words do not pass them, or the limitation is too remote, then arises the question—did the estates vest in Benjamin, and on his death, are they now distributable among Thomas, Nathaniel, William's children, and Mr. and Mrs. Brailsford; or do they pass by the residuary clause to Mr. Nathaniel Heyward?

See 4 Vesey, junr. 708–9. 716. Brown v. Higgs.

"General residuary clause passes all that is not sufficiently disposed of, as in case of

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lapse." Testator has given *to the residuary legatee all that is not sufficiently disposed of.

A leased house, the bequest of which being to a charity, fails, passes under a general disposition of the residue, and does not belong to the next of kin as undisposed of.—See 4 Vesey, jun. 732–5. Shanly v. Baker.

A legacy out of the produce of Copyhold estate, directed to be sold, failing, was held to pass by the residuary clause against the heir. 4 Ves. 802, Kennel v. Abbot.

Residuary bequest of personal estate includes every thing, as a void legacy or one lapsed. 1 Vesey, 320–1–2. Durour v. Motteux.

But it may be objected that these cases all go on the ground of a total failure of the legacy. Whereas there was a disposition which took effect, that the estate (Callewashie and negroes) was vested in Ben; and it is only the limitation over to Daniel, which is too remote and void.

Answer—It is of no consequence how it fails. The devise and bequest to Benjamin had ran its course. He had but a life estate in the first disposing part. The very claim of the next of kin is, that the limitation over has failed—therefore they claim. But the law is, that on failure of a legacy, the residuary legatee takes. (Sed vide, the cases which say the first taker of personal estate, takes all.)

As to the crops and income of the Callewashie estate, from the death of the testator to the time the contingency happened, and the estate vested, they clearly belonged to Benjamin, or at least he was entitled to a maintenance out of the income. It was a devise from a father to his son, and that son had no other maintenance or means of support. The court would have allowed the income to be so applied, if requested, and it will sanction what has been done by the executor. Even in the case of parents who are

bound to provide for their families, the court will authorize the education and maintenance of a child out of the estate devised to him, if the father be incapable of doing it.

But Benjamin had no father living, nor no

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other estate, *the income of which could be applied to his use during his minority. It would be very hard to starve him who was the direct object of the devise, for the remainder man. In such a case the court will be anxious to relieve Benjamin. See 1 Wilson, 140. 4 Burn's. E. L. 314. 1 P. Wms. 783, Acherly v. Vernon; 2 P. Wms. 21, Harvey v. Harvey; 1 Bro. P. C. 228. 1 Bro. C. C. 119, 298. 2 Bro. C. C. 75. 3 Bro. C. C. 90, 471. 3 Bro. P. C. 337.

The devise over is not an invincible objection to Benjamin's taking the profits. 2 P. Wms. 21. 2, 419, 504. 2 Atk. 473. Amb. 448. 1 Bro. C. C. 82, 104. Maintenance is so much regarded that the principal is sometimes allowed to be broken in upon. 1 Vern. 255. 2 P. Wms. 22.

We come now to the third great question.

The consideration of the devise of the land, (Cole's island) and the bequest of the slaves thereon to the testator's son Daniel, by the codicil of 28th July, 1777. The words are—"my island or tract of land, (called Cole's island) originally granted to S. Russell, I give to my son Daniel, in the manner mentioned in my above said will, together with the slaves, stock, &c."

This refers us to the words of the will, where the testator disposes to his son Daniel as follows—

"I will to my son Thomas, in trust for my son Daniel, during his natural life, the use of the following land, slaves, stock, &c. thereon, and thereunto belonging; and at his death I give them to be divided by my executors hereinafter named, the land between the male heirs of his body lawfully begotten, and for want of such, between the female; and the slaves, &c. between both male and female, and their heirs for ever, viz. One tract of land or island, called Callewashie, containing 550 acres, (various other tracts); one Mustee fellow Dick, and one fellow Jemmy, with one fourth of stores and lot at Cook's landing, Oaketty; but in case of no such heirs, then the said land between the heirs of my sons Thomas and William for ever; and also the slaves."

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*The son Daniel having died without leaving issue, the property will go under the said clause of the will.

We insist that the complainants cannot take, as representing the grandson Daniel; for he cannot be considered the heir of his father whilst living. Nemo est hæres viventis. 2 Bla. Com. 169. See the cases on this point.—Fearn. Con. Rem. 389. Fearn. Ex. Dev. 77, 8, 9. 1 Co. Rep. 66. Archer's case; A devise to Robert, remainder to the next male heir of Robert, and to the heirs male of the body of that heir male. This is resolved to be a contingent remainder during the life of Robert.

Now there was more designatio personæ in this case than in Mr. Heyward's, where there can be no pretence of a designatio personæ. Co. Litt. 246. Fearn. Ex. Dev. 18, 22. See 2 Fonbl. 72, 77, 80, 93, 149, 73. Fearn. Con. Rem. 389, 392, margin 456. 1 Inst. 378.

Remainder may fail as to one moiety, and be good as to another. Fearn. Con. Rem. 391, 2, 3, 394, 5, 6.

Where goods are devised to A. for life, and after her death to the heir of D. he who was heir of D. at his death, is entitled. 1 Vernon, 35.

For cases of designatio personæ, which prevent the operation of the maxim, nemo est hæres viventis. See 2 Ventris, 313. 2 P. Wms. 340. 1, 2.

It turned on the words "now living."

If we should be answered that though Mr. Daniel Heyward, jun. could not be the heir of his father Thomas then living, and who has actually survived him, these words of the will may be construed into a designatio personæ, and he and they claiming under him, may take in this way.

We reply that the cases decided are totally unlike this. The testator did not intend it so, for he has made many such limitations in his will, where the persons spoken of had no children living. In the case of William, he limits in the case of his dying without heirs of his body, his estates to the heirs of his sons Thomas and Daniel—and Daniel had then no child, and never had any.

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*In the case of testator's grandson Daniel, he limits, in case he dies under age, the real and personal estate given him to the heirs at law of his son Thomas, when they should attain 21. He knew then that Thomas had no other child than Daniel. Thus it appears to be used by the testator as a general phrase, and not as a designatio personæ. And the maxim applies, "nemo est hæres viventis."

On examining the cases where by a designatio personæ, the maxim, nemo est hæres viventis ceases to apply, it will be found that there is something very special in them all.

In some it will be found that the words, "heir now living," qualified the case. 2 Vent. 313, 311. 1 P. Wms. 229.

In others a provision was intended expressly for children, and the words "heirs of the body" have been construed children. 2 P. Wms. 340, 1, 2. See also 1 P. Wms. 229, 233. 2 Bla. Rep. 1010.

In this particular case the testator says, "but in case of no such heirs, then the said land between the heirs of my sons Thomas and William for ever, and also the slaves."

That he did not mean to designate Thomas's son Daniel by the words "heirs of my

sons Thomas," is evident from this, that he uses the same words with regard to William, who was then unmarried, and had no lawful issue. And so in another clause, "between the heirs of my sons Thomas and Daniel."

Another circumstance to shew that testator, when speaking of his son Thomas's heirs at law, had not a particular living child in view is, that in the devise of Varnezober to his grandson Daniel, (son of Thomas) he goes on and says, that if Daniel dies under age, he gives it to the heirs at law of Thomas.

Chancellor RUTLEDGE afterwards delivered the decree of the Court.

In this case there are three questions for consideration.

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*1st. Whether the defendant, T. Heyward as trustee under the will of his father, must account for the profits of the estate (called Varnezober's,) devised to his son Daniel, or whether they should be applied towards his maintenance and education, during his minority?

2d. Whether the limitation over, of the plantation, called Callewashie, and the negroes, after the death of Benjamin without issue, is good, or whether it is not too remote and void?

3d. The testator devised certain lands and negroes to his son Daniel during life, afterwards to be divided between his heirs male and female, as therein particularly mentioned, and in case of no such heirs, then the lands to be divided between the heirs of his sons Thomas and William for ever; & also the slaves. Daniel died without issue. The question is, whether Daniel, the son of T. Heyward, when in life, or his representative, is alone entitled to a moiety of the estate so devised to Thomas's heirs; T. Heyward being still alive.

Upon the first question there can be no doubt but that the defendant being a trustee, must account for the profits of the estate, (called Varnezober's) during his sons minority. Although the court are fully impressed with the idea that the defendant's son might never have called him to an account, and we feel the strongest inclination under the particular circumstances of this case to direct that the profits of the estate should be applied towards his sons maintenance and education, yet as it has not appeared in the discussion of this case that the defendant was unable to maintain and educate his son, and as the cases in the books are pointedly against such allowance being made (even in cases where an allowance is directed by the will) where the father is of ability to do it, we think we are bound by such decision, and cannot decree the profits to be applied for such maintenance. The cases in this court, where maintenance has been allowed, have all gone upon the principle that the fa-

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thers were not in a situation to afford *a suitable maintenance to their children. However under the peculiar circumstances of this case, we think it is both just and equitable, that defendant be at liberty to bring in to account by way of discount, a charge for the work and labour of such of his negroes as he employed in erecting buildings and otherwise improving and putting in order the plantation belonging to his son.

As to the second question, respecting the limitations over of the Callewashie plantation and negroes after the death of Benjamin without issue, it has been contended for complainant that Benjamin had only a conditional fee in the lands, and the reversion remaining in the testator, he might dispose thereof on the contingency of Benjamin's dying without issue, and therefore that the devise over to Daniel and his heirs was good. That the bequest of the negroes being in the same clause, they were attached to the lands, and the same construction ought to hold, respecting them; and that the words, in case he should die without lawful issue, should be construed as restricting the limitation to the dying without issue, at the time of his death; so that the limitation over of the personal estate is not too remote; that the court will lay hold of any circumstance, the most trivial to restrict those words, to the dying without issue, at the time of the death of the first devisee, to effectuate the intention of testator. That it was apparent from the words of the will that the testator intended the lands and negroes should go the same way by his coupling them together.

For defendant it was insisted that Benjamin had only an estate for life, or at most a fee conditional by implication in the lands; and that Daniel the grandson, dying in his life time, the devise over could never take effect: that it therefore became a part of the residuary estate, to which the defendant N. Heyward was entitled by virtue of the residuary clause in testator's will; that the words of the clause ought not to be restricted to Benjamin's dying without leaving issue at his death, being general and unlimited; and therefore that in this case, the absolute prop-

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erty *in the personal estate vested in Benjamin, and must be distributed according to law: that where the words in a will disposing of real estate, would give the devisee an estate tail expressly or by implication, the same words used in a disposal of personal estate, would vest the absolute property in the first taker.

The importance of this question arises more from the magnitude of the object in contest, than any great intricacy in it. The subject has been most elaborately discussed, and almost every case that could be found has been brought forward by the counsel. The infinite number of them tend more to

perplex than elucidate the subject, and to shew the various opinions that have been entertained by the courts respecting such devises, and how anxious they have been to lay hold of any words in a will however trivial to discover the intentions of testator, and restrain the words dying without issue, to mean dying without issue living at the death of the first taker, in order to give efficacy to the devise over. This devise includes both real and personal estate, and therefore two questions arise out of it. 1st.—What estate Benjamin took in the lands, and 2d, what in the personal estate? There is no doubt if the statute of intails was of force in this state, but that Benjamin would have had an estate tail in the land; for it is laid down clearly in the books, that if lands are devised to one, and if he die before, or without issue, or not leaving issue, it is devised over, these limitations create an estate tail: but that statute not being of force, the estate he took was a fee conditional at common law; the reversion of the estate still remaining in the testator, which he had a right to dispose of, and which he has done in this clause to his grandson Daniel and his heirs. It therefore can never be considered as a part of testator's residuary estate undisposed of by will, to which defendant Nathaniel is entitled, but must go to the legal representative of Daniel. As to the 2d question, respecting the personal estate, it is clearly settled, that where the words in the case of a real estate would give an estate tail, or an

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estate in fee conditional, a *limitation of personal estate by the same words, will pass the whole interest therein, unless there are some circumstances in the will which confine the generality of the expression, dying without issue, to the dying without issue then living, or living at the death of the first taker. If, however, there are no circumstances apparent to shew it was the intention of the testator to restrain the generality of those words, such devise over has been held void as being too remote. In almost all the cases previous to Beauclerk and Dormer, there were some circumstances in the will which confined the generality of the expression to dying without issue then living, or without leaving issue. In that case which seems to have settled the point, the words were general. "I make Miss Dormer my sole heir and executrix, and if she die without issue, then to go to Beauclerk; and the devise over was held to be void. In the case before us, the words are general: the devise is of Callewashie, with the negroes to Benjamin, but in case he die without lawful issue, then to my grandson, Daniel and his heirs. It runs upon all fours with the case of Beauclerk and Dormer, and there is no one circumstance in this that occurred in the others. We are therefore of opinion, that the whole interest in the personal estate vested in Benjamin, and it must be distributed agreeable to law.

The third question is on the devise over to the heirs of Thomas and William, of the estate devised to the testator's son Daniel, on his dying without issue. Upon this clause of the will, the single question is, which of the children of the defendant Thomas are to take? From the confused and inaccurate penning of this will in several of the clauses, it is with the greatest difficulty that the testator's meaning can be come at, and it is only by referring to another part of the will, that we can with any degree of certainty ascertain that he means children, when he speaks of heirs; because in the legal acceptation of the word heir, a man can have but one heir, and he cannot be known till his father's death. The clause we refer to is that, where-

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*in he directs his executors to dispose of the produce of his estate for the benefit of his heirs, which word, in the case of Beauclerk v. Dormer, the court construed to mean children.

All cases on the construction of wills, depend on the particular penning of the wills themselves, and the state of the families to which they relate. If we take into consideration therefore, the situation of the testator's family at the time of making his will, it will be found that his son Thomas had only one child, and that his son William was unmarried. The benefit intended by the testator, to their heirs was clearly future and contingent; because till the death of his son Daniel without issue, nothing was given to the children of Thomas and William; till then, nothing vested.

When the testator's son Daniel died, Thomas had but one child, (at least it is not stated that he had another alive) and William had not any; therefore the estate could not then vest; but it having been given to Thomas in trust, he continued in possession till the death of William, at which time it was ascertained who were the persons meant to be provided for by the testator; a division was accordingly made, and William's representatives received their moiety of the estate so devised. We have reviewed with accuracy most of the cases cited on this point, but do not think that they apply to the present. In some of them it has been determined that children born after testator's death could not take, unless there be a prior bequest of the estate for the life of another, (which is the present case.) In that case, all the children born in the life of the tenant for life will take: but in this case none of the persons intended to be benefited by the devise were in esse at the death of testator or tenant for life, except Daniel, the grandson, who could not by any construction answer the description, or be within the intention of the testator, who undoubtedly had likewise in view,

the future children of his sons Thomas and William. We are therefore of opinion, that Thomas being still living, it is uncertain how

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many *children he may have who will be entitled to share the other moiety of the estate in question. Until his death, therefore, no division can take place. On that event the representative of his son Daniel will come in for his proportion.

It is therefore ordered and decreed that the defendant Thomas do account for the profits of his son Daniel's estate, (Varnezober's) during the time he had the management thereof, and be allowed in discount a reasonable compensation for the work and labor of such of his negroes as he employed in erecting buildings and otherwise improving his son's plantation. That a reasonable allowance be charged for the use of the Callewashie plantation from Benjamin's death: that the negroes belonging to Benjamin, be distributed among those who are entitled thereunto agreeable to law.

That the defendant Thomas do retain in his possession the moiety of the estate which was devised to his heirs by the testator, on the event of testator's son Daniel dying without issue.

Costs to be paid out of the estate.

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Case XIII.

[Present, Chancellors Rutledge and Marshall.]

ELIAS LYNCH HORRY, and HENRY DEAS and MARGARET, His Wife, v. THOMAS HORRY and ANN, His Wife.

(January, 1802.)

[*Wills* ⇐462.]

The Court may supply words omitted in a deed, providing for children, to give effect to the intention. But the intention must be clear, and apparent on the face of the deed. It would be too hazardous to insert words on conjecture that they were accidentally omitted.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 981; Dec. Dig. ⇐462.]

[*Deeds* ⇐132.]

[Under a deed conveying a life estate, with remainder "to the only use and behoof of the survivor of" two daughters of the grantor, the children of a daughter dying before the decease of the life tenant have no title, as against the other daughter, surviving the life tenant.]

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 372; Dec. Dig. ⇐132.]

[*Husband and Wife* ⇐31.]

[By a postnuptial settlement, husband and wife conveyed land of the wife to trustees in trust for the husband and wife, and the survivor of them, for their lives and the life of the survivor, and, on the death of the survivor, to the use of A. and B., children of the aforesaid parties, "and their heirs and assigns, forever," in case they should both be living at the death of the surviving parent; but, if either of the said children should die before the surviving parent, then, on the death of such parent, to the use of the surviving child and his heirs and assigns, forever. A. having died before the survivor of the parents, it was *held* that B. took the whole estate in fee.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 193; Dec. Dig. ⇐31.]

The complainants filed their bill in this Court, setting forth that Mrs. Elizabeth Branford, grandmother of complainants was possessed of two lots of land at the cor-

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*ner of Tradd and Meeting streets; that she joined her husband, the late William Branford, in conveying the said land to F. Rose and John Miles, in fee, on the trusts and to the uses following, viz: To the use of Wm. Branford and wife during life, and to the survivor for natural life, in case their children Elizabeth and Ann, should be both living at the time of the death of the surviving parent to them jointly. But in case of the death of either of the said children before the death of the surviving parent, then to the surviving child for ever; and in case of the death of both children before the death of the surviving parent, then if there should be any other subsequent issue to that issue, or in default of such, to the surviving parent absolutely.

That William Branford died, leaving alive his said widow and said daughters.

That his said daughter Elizabeth married in 1770, Elias Horry, by whom she had issue, the complainants E. L. Horry and Peggy Horry, now Mrs. Deas. That the daughter Ann married Thomas Horry in 1771. That Elias Horry died 11th Feb. 1785. That Mrs. Elizabeth Horry died in 1785, leaving her will, dated 10th June, 1785, by which she devised all her estate to her three children, who are the complainants.

That Mrs. E. Branford shortly after the death of her husband entered into the possession of her house, and had the use of it till her death, on 24th March, 1801. That soon after Mrs. Branford's death, Thomas Horry, (defendant) claimed the whole lot of land and house aforesaid, in right of his wife, who he contends is alone entitled to the same, as she survived Mrs. Branford; whereas complainants insist that it could never from any equitable construction be inferred that by the said trust deed, the issue of the deceased daughter were intended to be deprived of the share of said house, due to their mother, had she been living at the time of the death of the surviving parent.

That said Elizabeth Horry attaining 21 years, and having issue, she was cestui que

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use of a joint estate in re*mainder, upon the death of said Elizabeth Branford; and that the same was severed and passed by the said residuary clause of her said will. That complainants have applied to Thomas Horry and F. Rose, heir at law of said F. Rose, surviving trustee, to concur in having the house

and lot partitioned or divided in severalty according to their several rights, and one moiety given to complainants. That defendant has refused to comply, and F. Rose is unwilling to act without the sanction of the court. The bill prays for a division of house and lot, and equal distribution thereof be allotted to complainants.

The defendants in their answer admitted all the facts stated in the bill; but they insist that they are exclusively entitled to the house and lot in question, under the deeds referred to by the complainant; the said Ann being the surviving daughter of Wm. Branford and his wife; and that this was the opinion of Mrs. Elizabeth Branford, the mother, who informed these defendants of it; and this perhaps was the consideration which induced her to bequeath her estate principally to the complainants. And defendant also understood, that for some time the complainants gave the same construction to the said deeds, and made no opposition to the claims of the defendant under the said deeds.

The following is an abstract of the deed on which the question in this case arose. It was a deed executed on the 23d May, 1754, by Wm. Branford and Elizabeth his wife, to Francis Rose and John Miles, in fee, but on the trusts and to the uses hereinafter stated.

The deed recited that Elizabeth Branford was seized in fee of certain lots of land on the north side of Tradd street (and describes them) under the will of her uncle, Benjamin Savage, dated 26 April, 1750.

That Elizabeth Branford being so seized, intermarried with Wm. Branford, and that they then had issue, two daughters, Elizabeth and Ann Branford.

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*Whereupon, in consideration of 10s. and of the love and affection William Branford and Elizabeth his wife bear to their two said children; and for settling said lots of land to the uses therein declared, they the said W. B. and Elizabeth his wife, did "grant, bargain, sell, alien, remise, release, and confirm to F. Rose and John Miles, and their heirs and assigns for ever, (being in their possession under a lease) all the two lots of land, &c. (No. 87 S.) with the houses, &c.

To have and to hold said lots, &c. to the said Rose and Miles, their heirs and assigns, upon the trusts and to the uses and purposes therein mentioned and declared, that is to say:

1st. For the use of W. Branford and Elizabeth his wife, during their joint lives.

2d. To the use of the survivor.

3d. On death of the survivor, to the use of Elizabeth and Ann Branford, the said infants, their heirs and assigns for ever, in case they should both be living at the decease of the survivor of them the said W. B. and E. his wife. "But in case either of them the said Elizabeth Branford and Ann Branford, the infants, should die before the survivor of them, the said W. B. and E. his wife, then at the decease of the survivor of them, the said W. B. and E. his wife, to the only proper use and behoof of the survivor of them the said E. Branford and Ann Branford the infants, living at the decease of the survivor of them the said W. Branford and Elizabeth his wife, and to the heirs and assigns of such survivor of the said E. and A. Branford the infants, for ever."

But in case neither of them the said E. and A. Branford, the infants should be living at the death of the survivor of them the said W. B. and E. his wife, yet, if said E. B. (the wife of W. B.) should leave other issue of her body, begotten by said W. B. and living at the decease of the survivor of the said W. B. and E. his wife, then to the only use and behoof of such other issue for ever. In

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*default of such issue, to the use of the survivor of the said W. B. and E. his wife.

Signed by W. Branford.
Elizabeth Branford.

In the presence of
Samuel Perronneau &
Thomas Lamboll.

This deed was followed by the execution of another deed, by the said Elizabeth Branford, on the 27th May, 1754, before Peter Leigh, the then chief justice of the colony, by which she renounced her inheritance in the said lots of land, in the form then in use —to the purposes of the trust deed.

The cause came to a hearing. Mr. Desaussure and Mr. Pringle argued for the complainants.

The construction of trust deeds must be governed as in wills, by the intention, which is the great guide.

Fearne's Devises 304, 5. 2 P. Wms. 478—(note) 3 Vesey, junr. 732.

Fearn. Cont. Rem. 124, 156. 4th Ed. 343, &c.

1 Fonblanque 395, 6, 434, 438.

The court will construe a settlement according to the intent of the parties, though the literal expression be otherwise.

3 Bro. Chan. Cases, 569, Woodcock v. Dorset, which is strongly applicable to this case.

Cro. Car. 185. Fearn. Ex. Dev. 53. Spalding v. Spalding.

A. devised land to his son John, and the heirs of his body, after the death of Alice, the devisor's wife. And if John died, living Alice, then his (testator's) son William shall be his heir.

John died living Alice; but he left issue. Question—If the issue should take or William.

The court construed it to read, "if John died without issue, living Alice."

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*Judgment for John's issue.

1 Ventris 230—King v. Mellin.

Lord Hale cites and approves the above case in Cro. Car. 185. He says that in that case it was ruled by all the court that it was an absolute estate tail in the first son, as if the words had been, "if he died without issue, living the wife." For he could not be thought to intend to prefer a younger son before the issue of the eldest.

See 3 Bro. Chan. Rep. 253—(note) Cholmondeley v. Meryck.

The court supplies the words "dying without issue," to effectuate the intent in a settlement.

2 Vesey, 195, 6, 7. Targus v. Puget.

The court will, to effectuate the manifest general intent, raise an estate tail, notwithstanding the express estate devised for life, and no longer.

2 Vesey, 225, 232. Robinson v. Robinson.

In the great case of Coryton v. Hellier, determined by Lord Hardwick, the words "if he should so long live," were added, upon full argument—and upon the nature of the thing, though it was not a necessary implication.

See 4 Bro. Chan. Cas. 441 to 460 1. Lytton v. Lytton.

In Smith v. Camelford, 2 Ves. junr. 704, speaking of the case of Adams v. Adams, the Lord Chancellor says, "the justice of the case required that the children defrauded by a gross imposition of the law, should be restored to the right they lost."

"Issue under marriage articles claim as purchasers; but under a will they are only volunteers." 1 Fonbl. 410, 411.

Every cestui que trust, whether a volunteer or not, or be the limitation under which he claims with or without a consideration, is entitled to the aid of a court of equity, in order to avail himself of the benefit of the trust.

1 Fonbl. 412—(note) 3 P. Wms. 222. 1 P. Wms. 426, 7. Hewet v. Ireland.

Provision by deed, for daughters, to be born, shall extend to daughters then born.

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*Husband and wife had issue a daughter, and executed a deed for securing 600*l.* in trust that wife should have the interest during life; and afterwards in trust that the 600*l.* should be paid to such daughter or daughters as shall be begotten by husband on wife. If no such daughter, then to the husband.

The daughter born at making the deed, shall take.

See also Talbot's Cases, 30, 1. 1 P. Wms. 234. Kentish v. Newman.

Articles for settlement—equity supplied the words, "if the wife die without issue;" else the money would have gone over from the issue to other relations.

In the performance of a trust, the chancery has power to alter the disposition of the party on emergent accidents which he did not foresee; and which, if he had foreseen he would in all probability have settled his estate otherwise. 2 Fonbl. 199. 2 Freeman 42.

White v. Barber.—Ambler 701. One devises to his son Thomas, and if he dies under 21, and testator's wife shall be ensient at his death with other child or children, then to such at 21. But if no such, then over to his nephews Cham and Barber.

Two sons were born after the will, and in the life of the testator. Held by the judges and the chancellor, that the children born after the will should take, notwithstanding the defect of expression.

See same case reported in 5 Burr. 2703.

It was twice ably argued, and all the objections made which ingenuity and learning could furnish.

Newland v. Shephard, 2 P. Wms. 193, and Peat v. Powell. Ambler 388, are strong cases of supplying words. See Fonnereau v. Fonnereau. 3 Atk. 315, 318.

Settlements are reformed according to the recital. 1 Vesey, jun. 170, 1.

A mistake in a will corrected by the intent. 4 Vesey, 51, 5.

There are many cases of elder children

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being construed *younger, and vice versa, to do equity and justice among them.

See 2 Vernon 528, 530. Chadwick v. Dolman.

Approved by Lord Talbot. Cases Temp. T. 95.

1 P. Wms. 244, Beale v. Beale. 2 Atk. 456. Heneage v. Hunloch; 2 Vesey 198. Teynham v. Webb; note in 2 Vesey 203. Duke v. Doidge.

In this last case, the eldest son was considered as younger son, to give effect to the deed.

2 Vesey 210, 11. 2 Bro. Ch. Rep. 38, 47.

Portions in a settlement after mother's death, to grow due and payable at 21, or marriage, &c.—One of the daughters having after 21, married, had issue, and died in life of her mother, her portion shall go to her representatives, and not to her sister.

1 Vesey 209, 210. Emperor v. Rolfe.

Great stress will be laid on the words used in the deed, "to the use of Elizabeth and Ann Branford, the said infants, their heirs and assigns for ever, in case they should both be living at the decease of the survivor of them the said William Branford and Elizabeth his wife."

But the cases are clear on this point. See Beale v. Beale. 1 P. Wms. 244, 5, 6.

Provision was made by deed for younger children who should be living at his death. A daughter was born after his death. She shall come in and take a share, being construed to be living.

Sir Robert Burdett v. Hopegood. 1 P. Wms. 485, 6.

One devises, if he leaves no son at the time of his death, to J. S. The testator dies, leaving his wife priviment encsient with a son.

This posthumous son is a son living at the testator's death; and J. S. not entitled.

In 2 Bro. Ch. Ca. 320, 1, the lord chancellor was evidently of the same opinion, against the master of the rolls.

1 Vesey 85. Millar v. Turner. See the case of Archer Smith, decided in this court.

The words were—that on his widow's de-

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parting this *life or marrying, his "whole estate real and personal, should be divided among all my sons and daughters that shall be then alive share and share alike."

One daughter died before her mother, leaving children. They took under the words sons and daughters.†

See also the case of Drayton and Drayton, decided in this court in 1793. The court went great lengths to provide for grand children, excluded by the strict words of the will. (See 1st vol. of these Reports, p. 324.)

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*The case of Doran v. Ross. 1 Vesey, junr. 57, 8, will be relied on by defendants. But even there the chancellor said. "if the recital contained any thing to which this phrase stood in contradiction, I might correct the phrase as has been decided by former cases.

Literal adherence to the words of the deed will exclude the complainants from any share in the house and lots in question; but it is manifest that the parents providing for their children, meant to provide equally for them, and did not mean to exclude the children of one of the daughters who might die before the surviving parent. The words, "without leaving issue" must have been omitted by accident, in the clause providing for the case of the death of one of the two daughters; and the cases will warrant the court in supplying them.

Mr. Ward argued the case for the defendants. He relied on the literal provisions of the deed, which he contended were too clear to leave any doubt, or leave room for construction to supply any alleged omission. But no notes of his argument could be procured.

Chancellor RUTLEDGE delivered the decree of the Court.

William Branford and Elizabeth his wife, by deeds of lease and release, conveyed to certain persons, a lot of land in trust for the use and benefit of the said William and Elizabeth, during their joint lives, and after the death of either of them, to the use of the survivor, during the natural life of such survivor; and after the death of the survivor, to the joint use and behoof of their daughters Elizabeth and Ann Branford, their heirs and assigns, in case they the said Elizabeth and Ann should both be living at the death of the survivor of them the said William and Elizabeth, but in case either of them the said Elizabeth and Ann should die before the survivor of them the said William and Elizabeth, then at the decease of the survivor of them the said William and Elizabeth, to the only use and behoof of the survivor of them

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the said Eliza*beth and Ann, at the decease of the survivor of them the said William and Elizabeth, and to the heirs and assigns of such survivor of the said Elizabeth and Ann for ever.

William Branford died many years ago. Elizabeth the daughter married, had issue the complainants, and died. Elizabeth the wife of Wm. Branford, and mother of Elizabeth, survived her daughter, and died lately. Ann the other daughter, survived her mother, and is still living.

For complainants it was contended that they are entitled to a moiety of the land in question. That the same rules are to be observed in the construction of trust estates as in wills, and that in decreeing of marriage articles or settlements, the court will regard the end and consideration of settlements, and will go so far as to supply words that have been omitted to effectuate the intention of the parties, and will construe marriage articles against the words, for the sake of the

† George Smith made a will on the 17th Feb. 1782, by which he devised to his wife—"the use of all his estate, real and personal, during her widowhood and no longer." And that on his widow's marrying or departing this life, his whole estate real and personal, should be equally divided share and share alike among all my sons and daughters that shall be then alive." Also, that his children remaining unmarried, should receive an education and maintenance out of his estate; and that his children should not receive their share of the estate, "till they shall respectively attain the age of 21 years, in case their mother be married or dead as aforesaid."

He also gave authority to the executors to sell the estate, if desired by his wife.

Afterwards he made a codicil, by which he added another executor, and desired that if his wife should be unable to act as executrix from sickness or otherwise, that his estate should be sold at public auction, and one third of the money given to his wife, and the remaining two thirds to be distributed equally among his children when they should arrive at the age of 21 years.

The testator died on the 17th June, 1784, leaving his will in full force.

His widow and executrix qualified, but all the business was done by Mr. Smith, the brother and executor.

Most of the estate was sold; some still remains.

The testator left several children. One daughter married Archer Smith, and died after her father and before her mother, leaving two children. The mother is since dead.

The bill is filed by Archer Smith for his wife's share of the estate. The executor states the doubt of his right, and the surviving brothers insisted that as his wife died before her mother, she had no right to any portion under the will, though she had attained 21.

The court said it would not bear an argument.

It had been repeatedly decided (in case of Ladson, &c.) that "sons and daughters," will extend to grand children to prevent their being cut off.

intent. That in the present case, the intent of the parties was to give to each of the daughters and their issue, a moiety of the land settled.

It was insisted for the defendant, that the words of the deed were plain and unequivocal; that there was no ambiguity in the expression; and that the intention of the parties was manifest through the whole deed, and there was nothing contained in it to shew that the intention was different from the words. In support of the argument of the counsel on each side, an infinite number of cases on wills and marriage settlements were cited. Most of them have been reviewed and examined, and the general conclusion to be drawn from them is, that the intention of the parties is to prevail. The counsel have argued altogether from analogous cases; for there are none to be found in the books which exactly tally with the present. The only question in this case, is whether the complainants as representing their mother are entitled under this deed to any part of the land settled therein. Trusts being the creation of equity, and one of the peculiar branches of the jurisdiction of this court, they are viewed with a favorable eye. In marriage settlements, the most favorable ex-

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posi*tion will be made of words, to support the intention of the parties; nay, even in voluntary settlements, if the words lean more strongly to one construction than the other, it will likewise prevail. It is however the intention of the parties, appearing on the deed, that always governs the court in construction; not the arbitrary conjecture of the judge, though founded on the highest degree of probability; for if once you wander in the wide field of conjecture, it is impossible to say where the line will be drawn. No two cases would perhaps receive the same adjudication.

This cannot properly be called a marriage settlement, in which all the issue of the marriage generally are provided for, and consequently being considered as purchasers, the most liberal construction is always made; but it is a voluntary settlement made by the parents some years after marriage, of a small portion of the mother's estate for the joint benefit of the two children whom they then had; in which from the very words of the deed the chance of survivorship was actually contemplated.

It is only necessary to read the clause of the deed to determine the question; and nothing but the ingenuity of counsel could have raised a doubt. The trusts created, were for the benefit of the husband and wife during their joint lives, and the life of the longest liver of them, and after the death of the survivor, for the joint use of the daughters and their heirs; so that a joint estate only was given to them in the first instance, in case they should both be living at the death of the father or mother, but if either of them should die before such survivor of father or mother, then the estate is to go to the surviving daughter living at the death of the father or mother. It was insisted that the words without issue, ought to be inserted, in order to carry into effect the intention of the parties. How does it appear in any part of the deed to be their intention? If the not inserting the words, without issue, is an omission, it is unfortunately in the most material part of the deed; but whatever conjecture might

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be made how *it happened, we cannot go out of the deed, but must take it as it now appears. The words are plain & certain; a joint estate is given to the daughters in the first part of the deed which necessarily implies the benefit or chance of survivorship, and the latter clause of it gives the estate to the daughter who shall be living at the death of the father or mother. Taking the whole of the deed therefore into consideration, and construing one part by another, we are of opinion that the complainants are not entitled to any part of the estate in question, and therefore that the bill must be dismissed, with costs; but that the whole thereof vested in the defendant's wife, as the surviving daughter, agreeably to the express plain words of the deed, and the manifest intention of the parties thereto.

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Case XIV.

[Present, Chancellors Rutledge and Marshall.]

JOHN P. RICHARDSON, Executor of James Sinkler, Deceased, v. MARGARET SINKLER, JAS. B. RICHARDSON, and Others, Legatees of James Sinkler, Deceased.

(May, 1802.)

[*Wills* ⇐524.]

Testator directs his funded stock to be kept till his youngest child should come of age, or marry; and then to be divided among his children that might be living, and his wife, if then his widow. A child born after making the will, is entitled to a share of the stock.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1126; Dec. Dig. ⇐524.]

[*Wills* ⇐858.]

Personal property bequeathed to a particular legatee on conditions, does not pass under the residuary clause if the legacy be refused; but is distributable as undisposed property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2180; Dec. Dig. ⇐858.]

[*Descent and Distribution* ⇐112; *Wills* ⇐762, 866.]

A son to whom some estate is loaned by his father to work and improve, and to receive the profits, is not accountable for the profits to

entitle himself to a distributive share of the estate undisposed by his father's will.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 421; Dec. Dig. ⟸ 112; Wills, Cent. Dig. §§ 1972, 2202; Dec. Dig. ⟸762, 866.]

[*Wills* ⟸866.]

A child to whom a marriage portion is given, is not under the circumstances obliged to bring it into account to entitle herself to a share of the distributive estate not passed by her father's will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2202; Dec. Dig. ⟸866.]

[*Descent and Distribution* ⟸109.]

In cases of partial intestacy, the doctrine of hotch pot does not apply.

[Ed. Note.—Cited in Snelgrove v. Snelgrove, 4 Desaus. 292.

For other cases, see Descent and Distribution, Cent. Dig. §§ 416, 419, 420; Dec. Dig. ⟸109.]

[*Descent and Distribution* ⟸45.]

[The statute of distributions applies only where the parent dies entirely intestate.]

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 123; Dec. Dig. ⟸45.]

[*Descent and Distribution* ⟸112.]

[The value of an advancement is to be estimated at the death of the ancestor, not taking the improvements of the real estate or the increase of the personal estate into computation.]

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 421; Dec. Dig. ⟸ 112.]

The bill was filed to obtain the decision of the court on many questions which arose

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among the heirs and legatees *of the late James Sinkler, respecting their rights in his estate, and for the guidance and protection of the executors.

The bill charges that, Charles Cantey being possessed of a large estate, died intestate, on the 10th Oct. 1780.—Leaving among other children, his daughter, Mrs. Sarah Sinkler, (then the wife of James Sinkler,) and a grand daughter, Ann Cantey Sinkler, the daughter of James Sinkler, by his wife then deceased, who was also a daughter of said Charles Cantey.

That by the statute of distributions, the personal estate was divisible into eight equal shares, one of which was to go to the said daughter of James Sinkler, in right of her mother then deceased. That in 1783, there was a division of the personal estate, when James Sinkler drew one share in right of his wife, and one share for his said daughter. That James Sinkler possessed himself of the share of his daughter during his life time, and worked the negroes as his own, and took the rents and profits to himself. That James B. Richardson married the said daughter Ann C. Sinkler, on the 10th May, 1791. That James Sinkler during his life, never settled with J. B. Richardson, or paid any part of the property received for his wife from Charles Cantey's estate; but he gave him on his marriage thirty-two negro slaves as a marriage portion with his said daughter.

That in February, 1798, James Sinkler made a writing purporting to be a last will and testament, in which are the following dispositions, among others; that his estate should be kept together till his debts were paid. Then he gives his wife Margaret Sinkler fifty-one negro slaves by name. He also gave to her, "in lieu of dower, &c. all his household furniture, &c. poultry, carriage and chair, and choice of five geldings, his southernmost tenement and lot in Meeting-street, the use of the plantation whereon he lived, and 250 acres to plant; together with the retreat houses; while she remained his widow; & one third of his stock of cattle, sheep, &c. He gives to his son-in-law Jas. B. Richardson, his northernmost tenement

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in Meeting-*street, together with thirteen negroes by name, and adds, "these, with thirty-two negroes, given my daughter as her marriage portion, makes him fully equal to my other children, and is in lieu of any claim to any part of the estate of Charles Cantey." He orders his funded stock to remain till his youngest child should come of age or marry, then to be divided among his children that may then be living, and his wife, if a widow.

The interest of the funded stock in the interim to the sole use and education of his son William, and daughter Margaret Anna. The residue of his personal estate he gives to his children at twenty-one or marriage. That he appointed complainant one of the executors: that the instrument being subscribed by two witnesses only, has been proved as a testament of personal property in preference to a new will, began but not finished by the testator shortly before his death. That the real estate cannot pass, and of course that part of the provision for J. B. Richardson, in lieu of the claims for Charles Cantey's estate, is defeated.

That after making the testament, and a few months prior to his death, the testator had a son born named James. That the testator died on the 20th Nov. 1800, leaving his widow and daughter Ann Cantey Richardson, (wife of defendant J. B. Richardson,) Charles, William, Margaret Anna, and the young child James, all still living. That the testator acquired some personal estate subsequent to the making of the will, which by the act abolishing primogeniture, cannot pass, but must be distributed.

That the real estate consisted of divers plantations, and town property, all of which has been divided by a writ of partition between all the parties, including the young child James, except the two tenements in Charleston, which the commissioners have recommended to be sold.

That some or all of the provisions made for the wife are in lieu of dower; but as the real devises cannot pass, complainant is unadvised whether she will accept or not, or resort to her dividend under the primogeniture law, or betake herself to dower.

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*That the debts of the estate are not considerable: that some of the children are minors, viz: William, Margaret Anna and James: that complainant is desirous for a division of the estate, and that the rights and interests of all the parties should be preserved.

But that various questions have arisen, which complainant is incompetent to decide. Some are made on behalf of James Sinkler, the youngest child, who is totally unprovided for in the testament. He claims a share of the funded stock under the words of the will, when it shall be divided; also a share of the personal property acquired after making the will, whether slaves purchased or born, or increased by crops, monies, interest money, funded stock, and dividends on interest thereof; also that some provision be made for him out of the lands recommended to be sold; and that in consideration of his condition, no part of the intestate property real or personal, should be applied to the payment of debts: but that the same should be paid in the first instance out of the residuary personal estate given to William and Margaret Anna; whereas the other defendants insist that the funded stock is to be divided between them only, by the terms of the testament.

Again, William and Margaret Anna contend that the testator is not to be considered as intestate, as to any monies he may have acquired or received after making the testament, nor of interest money, nor of money changed into stock, or otherwise put out and called in again, nor of crops, and that a contrary construction would involve great perplexity, and be impracticable.

Again, the said defendants, other than the said James B. Richardson, insist that no provision can be made for him out of the intestate's real estate, which has been recommended to be sold; but that the same, or the monies which may arise out of the sales, are distributable among all the defendants; and contend also that the unbequeathed personal property, particularly the crops, as well by the laws of the land as by the intention of the testator, are the most suitable fund for the debts.

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*That the said James B. Richardson claims the thirty-two negroes given to his wife as a marriage portion absolutely, and not as being in lieu of Charles Cantey's estate, and contends that only the house and lot in Charleston and the thirteen negroes are in lieu thereof: that if this court can by any decree secure the latter to them, they are willing to accept it in lieu thereof; but that otherwise they claim the share of Mrs. Ann C. Richardson of her grandfather's estate, and an account of the profits, and that the slaves be specifically delivered over to them. They also contend that the slaves are not to be brought into hotch pot with the real and personal estate, whereof James Sinkler died intestate: whereas Margaret Sinkler, and the minors William, Margaret Anna and James, insist that the thirty-two negroes were given in lieu of the claims of Mrs. Richardson for her grandfather's estate: that it was well known that the circumstances of the said James Sinkler could not permit him to give so large a marriage portion (without injustice to the rest of his family) if he was yet to be answerable for Charles Cantey's estate, &c. And also, if this were not so, that the claim of J. B. Richardson and wife, for their share of said estate, is barred by law. —That the said Margaret Sinkler contends that some of the negroes of Charles Cantey's estate now sought to be specifically delivered to J. B. Richardson, have been specifically bequeathed to her by the testator; and if they are taken away, that she ought to be compensated out of some other parts of the estate; whereas the other legatees contend that the said bequest being specific, must in such case, be lost to her altogether; and lastly, all the defendants, (other than J. B. Richardson,) contend that J. B. Richardson is entitled to no share of the intestate's real or personal estate, unless the thirty-two negroes are accounted for, and brought into hotch pot, according to the primogeniture act.

At other times Charles Sinkler claims certain crops made by a number of slaves of which his father gave him the use from year to year, one of which crops he has received the money for, but not for the last crop, viz.

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of the year *1800, and that those crops ought not to be brought into hotch pot. Whereas the other defendants contend that the use of the slaves was no gift, but only done for the purpose of instructing him in planting, and that he ought to receive no share of the intestate's real estate till he does so account.

At other times Margaret Sinkler insists the fifty one slaves, the one third of the real estate, and the use of the lands bequeathed to her by her late husband, was a bounty only; and that the household and kitchen furniture and dairy, poultry, carriage and geldings, and the tenement and half lot in Meeting street, were the only property given in lieu of dower: whereas the other defendants contend that the whole was given for and in lieu of dower. That she hesitates to elect, and they insist that she ought to elect, in order that the estate might be settled.

All which involves complainant in anxiety and apprehension of future trouble. The bill prays that the parties interested may answer and interplead that the complainant may be

instructed how to act, and saved from future responsibility in consequence of the jarring claims of the defendants.

The answer of James B. Richardson and Ann his wife, admits that James Sinkler in his life time possessed a large real and personal estate, and that some time in the month of February, 1798, he made and executed his last will in the presence of two witnesses only, a copy whereof is filed with the bill. That testator died on the 20th Nov. 1800, leaving the same in force sufficient only to pass the personal estate and not the devises of land. That after making his will and not long prior to his death, the testator had another child born (a son) named James, an infant of tender years, and not provided for in the will by express words. Defendants wish this court may be able by a judicial construction of the will to raise a provision out of the estate for the infant. That by the terms of the devise, whereby the testator

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gives to J. B. Richardson 13 ne*groes and part of a lot in Charleston and part of a tenement, it appears he intended the provision of this will to go in satisfaction of claims, which Mrs. A. C. Richardson had upon her father for her portion of her grandfather's estate, which James Sinkler received while she was an infant; touching which the defendants beg leave to state, that her said grandfather Charles Cantey being possessed of a large real and personal estate, died on the 10th of October, 1780, intestate, and leaving among other children, his daughter, Mrs. Sarah Sinkler, wife of J. Sinkler, and this defendant, a granddaughter by Mrs. Sinkler, then deceased, who was also a daughter of Charles Cantey. That by the intestacy of Charles Cantey, the real estate descended to his only son Charles, and the personal became divisible into eight parts, each living child entitled to a share, and this defendant, to the other share. That after the debts were paid, the administrators of the said Charles Cantey, proceeded to divide the personal estate, and J. Sinkler drew two shares, one for his then wife, and the other for this defendant. That defendant's father blended her share with his own property; but made no particular purchase as stated, no doubt considering himself responsible as trustee. Defendants admit that after their marriage, which happened about the 10th May, 1791, James Sinkler gave to this defendant, J. B. Richardson, thirty-two negroes, as a marriage portion; but did not intend, as defendants believe, the same to be in discharge of the claims they had upon him, respecting the estate of C. Cantey. They understood he would compensate them in his will, and appeal to the terms of the will to prove this. In the said will, the testator expresses himself, that he meant the property thereby given, to be in lieu of the said claims, and that when the devises were taken together with the marriage portion, it would be a provision more than equal to his other children. The defendant, J. B. Richardson, and his said wife, believe if the interest and profits of Cantey's estate should be added to the gross amount of the portion and the legacy, it would exceed the provision intended by tes-

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tator; yet regarding *the will and opinion of the testator, they would accept of the terms of the will, if all the devises and bequests could pass, and they hereby offer to release their claims on Cantey's estate, if by this court the provisions of the will can be decreed to them; yet if the real estate should fail to pass, the defendants are constrained to seek a compensation for their claims on Cantey's estate, and pray for an account thereof.

In denying that the thirty-two negroes were given in lieu of their claims, these defendants speak so far as they understood. Whether the provision was disproportioned to his then estate (regarding his other children) it is of no weight to determine, as the property of James Sinkler was large, his other children young, and he might expect, as it really happened, it would greatly increase before any further allotment. And defendants hope this court will so regulate the assets of James Sinkler's estate, as well for the payment of this as other debts of the estate, as to preserve a net distribution of such parts of the estate, of which the testator died intestate, so as to augment the dividend to the child, not in the contemplation of the father when he made his will. The defendants admit that the testator acquired considerable personal property after making his will. Defendants say if this court should not decree the thirteen negroes and the tenement to them, they must claim their interest in Cantey's estate, and seek the aid of this court to have the specific property delivered to them, where it can be ascertained. That divers of the negroes bequeathed to Mrs. Margaret Sinkler, are of those that fell to defendant Ann C. Richardson on the division of her grandfather C. Cantey's estate. If these should be taken from her, (Mrs. Margaret Sinkler) the defendants submit whether she would be entitled to compensation out of the residuary personal estate. Whether the provision made by testator for his wife is in lieu of dower or mere provision, defendants cannot answer, as it depends upon the construction of the will which is submitted to the court. That the various matters of

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doubt, and *the conflicting interests in the bill set forth excite, and the peculiar difficulties of the case render it unsafe for executors to act.

That no compromise can be made, as two of the children, viz. Margaret Ann and James, are infants of tender years; and the defendants pray the aid of this court.

Defendant admits that James Sinkler died possessed of a considerable real and personal estate, and that on application to the ordinary, he judiciously recognized the paper, (as filed in bill, and first executed as the late will and testament of said James Sinkler,) that complainant qualified thereunto. They further admit that the said James Sinkler left a widow, and the children named in bill, and submit that the right and interests of such of these defendants as are infant orphans, ought to be protected by this honorable court.

It appears that the property Mrs. James B. Richardson was entitled to from her grandfather C. Cantey's estate, consisted of the following property:

A proportion of a tract of land, the property of her grandmother, which her grandfather held by the curtesy, and which on his death was divided. But on the division of the lands, the allotment to her being of inferior value, the difference was made good to her by the other heirs, who delivered her father Mr. J. Sinkler, five negro slaves on her behalf. When her father Mr. J. Sinkler delivered her 32 slaves as her marriage portion, the above five formed a part of the thirty-two.

She was also entitled to 18 slaves, which her father received as her eighth part of the personal estate of her grandfather; some of whom Mr. J. Sinkler included in his legacy to his wife Mrs. Margaret Sinkler; some he bequeathed to other legatees; one he sold, and the remainder are claimed by the residuary legatees. One only was given to Mrs. J. B. Richardson on her marriage.

It was agreed that the testator had acquir-

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ed considera*ble personal property after making his last will; which as the law then stood, (since altered,) did not pass under his will, though there was a full residuary clause.

It was agreed that Mr. James Sinkler had placed part of his real and personal estate in the possession of his son Charles Sinkler, not as a gift, but to manage, with permission to apply the rents and profits to his own use during his father's life.

The various questions which arose in this case were fully discussed by Mr. Parker for the complainant, and by Messrs. Desaussure and Ford, for the several defendants. But few notes of the argument have been preserved.

It was contended that Mr. Charles Sinkler was compellable to account for the rents and profits of the estate, placed under his care by his father. But it was conceded that the decided cases have established, that the English doctrine of hotch pot does not apply to cases of partial intestacy, as the application of it to such cases might produce and encrease the very evil intended to be remedied by that doctrine, to wit, an inequality among the children of the deceased parent.

It was contended that the provision for the widow was manifestly intended to be in lieu and bar of dower; and that such intention will be operative without an express declaration that the provision by the will is in lieu of dower. It may arise by plain implication.

On the part of the widow, it was denied that there was any such plain implication as ought to bar her.

On the part of Mr. J. B. Richardson and his wife, it was contended that he was entitled to recover all that she had a right to from her grandfather's estate, (which had been received and held by her father Mr. J. Sinkler) without prejudice to her claim to what was given her as a marriage portion, or bequeathed her by the will of her father. But if she was to be put to her election as to the legacy, then she was entitled to an account for rents and profits of her property, kept and received by her father till his death.

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*And it was insisted that at all events, the defendant J. B. Richardson and wife, would be entitled to a distributive share of the undisposed personal estate of Mr. James Sinkler, retaining both the marriage portion and the negroes bequeathed to her.

For the unprovided son James, it was contended that besides his proportion of the real estate, which had not been effectually disposed of by the will of the testator, he was entitled to a distributive share of every part of his father's personal estate which was not effectually given by the will, or which was acquired after the making the will; and particularly, that he is entitled to a proportionate share of the funded stock, which was bequeathed to such of testator's children as should be alive when his youngest child should attain 21 years of age. He is included in the general words, and ought to be allowed to take a child's share, though his father did not contemplate this child, (not then born) at the time of penning the will.

After the argument, and time taken to deliberate, Chancellor RUTLEDGE delivered the decree of the court.

There are four questions for determination in this case: 1st. Among whom the funded stock of the testator is to be divided? 2nd. Whether the thirteen negroes bequeathed to the defendant J. B. Richardson, (if he refuses to take them on the conditions prescribed in the will) are to be considered as a part of the residue of the personal estate, and to pass as such by virtue of the residuary clause, or to be distributed agreeable to the statute?

3d. Whether the produce of the two years crops received by C. Sinkler are not to be considered as an advancement, and brought into account for distribution, allowing him thereout a reasonable maintenance?

4th. Whether the advancement to defend-

ant J. B. Richardson, by the testator, (this being a case of partial and not a general intestacy) is to be accounted for by him in a distribution of the undisposed surplus personal estate?

As to the first question, the testator has in

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express *words directed, that the interest of his funded stock shall be applied to the sole use and education of his son William, and daughter Margaret Ann; and the principal to remain till his youngest child come of age or marries, and then to be divided among his children that may be then living; and his wife, if a widow. Though the testator, at the time of making his will, might not have contemplated any other children than those already born; yet as he made use of those general expressions, that the stock should be divided among his children who may be alive at a certain period, we are of opinion, the after born children (who are totally unprovided for by the will,) if then living, will be justly and equitably entitled to a distributive share equally with the rest.

On the second question, we are of opinion that the thirteen negro slaves bequeathed to the defendant J. B. Richardson, cannot be deemed a part of the residuary estate, and pass under the residuary clause of the will, because they are expressly bequeathed to J. B. Richardson on certain conditions, and not being bequeathed over in case of his refusal to accept them, they must be considered as part of the testator's personal estate undisposed of and distributable.

3d question. Whether the produce of the two years crops received by C. Sinkler are not to be considered as an advancement, and brought into account for distribution, allowing him thereout a reasonable maintenance?

From the evidence of Mr. Carson and Mrs. Sinkler, it is plain that the testator had given the whole profits of certain lands and negroes to his son Charles, (who was his eldest son) to be received and enjoyed by him for his own advantage, without any responsibility; and that the testator was not thereafter to be answerable for any of his debts. His letters to his son, his receipt for money from the factors, and the directions which he gave them concerning a charge respecting some cotton gins which he ordered to be set down to his son instead of himself, confirm

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the testimony of the witnesses: *but it was nevertheless only a temporary, not a permanent provision, to initiate him into the planter's business, and to encourage him to be industrious. Whatever he made therefore was only a reward for his own labor and diligence, and ought not to be brought into account for distribution, his father never having intended it.

4th question. Whether the advancement to defendant J. B. Richardson by the testator, (this being a case of partial and not a general intestacy) is to be accounted for by him in a distribution of the undisposed surplus personal estate?

The principal object of the statute of distributions is, to effect an equal distribution of the personal estate of the testator among his children, and has only in view a general intestacy. The act of assembly of the year 1791, abolishing the right of primogeniture, recognizes the dispositions of the statute, and goes one step further, by providing for a partial intestacy; i. e. as to property acquired after a testator has made his will, not having republished it, directing in such case how it shall be distributed.

The object, both of the statute and act of assembly, being a perfect equality among the children, they have pointed out (the act of assembly more precisely than the statute) the method, in a case of general intestacy, how it is to be effected. When a child has been advanced by the intestate in his life time, but not equal to the shares falling to the other children, the mode pointed out for equalizing him, is (not by bringing it into hotch pot) but by a valuation of the property advanced, as it may be estimated at the death of the ancestor (not taking the improvements of the real estate, or the increase of the personal estate into computation) and the difference is to be made up out of the estate to be distributed so as to make the estates of all equal.

The testator in the present case having by will disposed of all the personal property he then possessed, nothing remained to be distributed. What has been acquired since the will was made, our law directs how it

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should be dis*tributed. It is confessed that the personal property which testator has given to his other children by his will, is considerably more than what he gave to defendant J. B. Richardson and his wife; but as it is not a general intestacy, the court cannot decree the difference to be made up to the defendant J. B. Richardson out of the surplus personal estate, so as to put him on a footing with the other children.† We are therefore of opinion that it is but just and equitable, and decree that he shall retain the negroes which he received from the testator for his marriage portion as he calls it, without any accountability; and that he is entitled to a distributive share of the undisposed surplus of the personal estate, in common with the other children.—The case of Vachell and Jeffreys, as it is reported in Brown's P. C. does not shake the authority of the same case as reported in precedents in chancery, (p. 169.) with respect to the determination of the question on a partial intestacy; the question on the appeal being solely on the right of the two children disowned by the testator, to a distributive share

† 2 Eq. Cases, Abr. 435.

with those he owned. The other case in Precedents in Chancery (182) is opposed to that of Vachell and Jeffreys; but we do not see how the Lord Keeper could give any opinion on that question, it not being a point made for his determination. It is decreed, that the two houses and lots in Meeting-street, belonging to the testator's estate, be forthwith sold by the master, giving the usual notice, on bonds and mortgage of the premises, with personal security if required, on a credit of 1, 2 and 3 years; and the monies arising from the sale to be divided agreeable to law. The shares of the minor children to be placed and kept at interest by the defendant Margaret Sinkler, their mother, for their benefit. The costs of suit to be paid out of the estate.

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2 Desaus. 140

Case XV.

[Present, Chancellors Rutledge and Marshall.]

ZYLSTRA and Wife v. S. KEITH and Others.

(July, 1802.)

[*Trusts* ⟸44.]

The answer denying the allegation of the

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bill, that a purchase was *made in trust, must prevail, as there were not two witnesses, or one witness and strong circumstances in contradiction to the answer.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 66-68; Dec. Dig. ⟸44.]

[*Execution* ⟸247.]

A sale of land made by the sheriff, under executions at law, set aside and the sale declared void, because he had previously sold enough to satisfy the executions.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 690; Dec. Dig. ⟸247.]

[*Mortgages* ⟸529.]

A mortgagee having become a purchaser at a sale, which is set aside, and having entered satisfaction on his mortgage, shall have the same set up again, and supported in equity.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1548; Dec. Dig. ⟸529.]

[This case is also cited in McDow v. Brown, 2 S. C. 112, without specific application, and in Hutchison v. Fuller, 67 S. C. 284, 45 S. E. 164, as an exception to the rule that equity affords no relief for mistakes of law.]

This was a bill filed to compel defendant to discover whether he had not purchased a house and lot of land in Charleston at sheriff's sale, in trust for Zylstra's wife and child; on an engagement to repay defendant the amount which he gave at the sale. And if such trust should not be established, then to set aside the sale as having been made irregularly; the sheriff having previously made sales of Zylstra's property, sufficient to pay the executions.

The defendant by his answer denied positively the alleged agreement to make the purchase of the house and lot in trust. But admitted that he had said, after the purchase, that if Zylstra and his wife would pay him the amount for which he bid off the property, they should have the house. This however had never been done, and the defendant claimed the purchase on his own behalf.

There was no evidence to contradict the answer as to the alleged agreement before the purchase, but two persons, who got all their information from Zylstra and his wife.

It was proved that defendant had permitted Zylstra and wife to remain in possession of the property after the sale; declaring he would reconvey to them, if they paid him the purchase money. But this was altogether voluntary; and there was no proof, or indeed allegation that the money was paid to defendant.

The sale was made by the sheriff, on certain executions in his office; but when examined, it seems that there was more in the sheriffs hands from previous sales than was sufficient to satisfy those executions.

The defendant became the purchaser at the sale; he being an early encumbrancer by

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mortgage, (which however *had not been foreclosed) and on the sheriffs making him titles he had entered satisfaction on his mortgage.

The cause was argued, and afterwards Chancellor RUTLEDGE delivered the decree of the Court.

The scope of complainants bill is to search the conscience of the defendant and to discover from his answer whether the house and lot in bill mentioned were not purchased by him at the sheriff's sale, in trust for complainant's wife and child, in consequence of an agreement made between complainants and defendant previous to the sale; and that he be compelled to hold the premises in trust for them pursuant to such agreement, subject to the debt due by complainant to defendant on bonds and mortgages. This is the principal ground of the bill. Another ground is that the equity of redemption in the premises was never regularly foreclosed; and therefore that the sale by the sheriff was irregular and illegal, the execution under which it was pretended to be sold, having been previously settled; at least the sheriff had money enough in his hands for that purpose.

The defendant by his answer absolutely and positively denies that he ever gave any assurances to the complainants or either of them that he would purchase in the premises, in behalf of complainant's wife and child; or that if he was the purchaser thereof, he would transfer the titles he should receive to any uses or trusts whatsoever; and avers that the only conversation that passed

between them on the subject, was after the sale, when complainant said he hoped defendant would allow him to purchase back the premises at the price he had given; to which the defendant replied, if he paid him his debt he did not know what he might be tempted to do.

To support complainants charge of a secret trust between him and defendant, and to contradict the answer, parol evidence has been adduced, viz. Messrs. Winstanly and House. The substance of their testimony evidently amounts to no more than the information they received from complainant him-

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self respecting the assurances of de*fendant, that he would buy it in for complainants. There is no written evidence of such assurances. The evidence for defendant tended merely to criminate the conduct of complainants, and to shew various acts of fraud committed by him to cheat his creditors, but which however could not affect the defendant, he having a mortgage of the premises prior to that period; nor can they have any influence in the decision of the present question.

This case lies in a small compass; there is no intricacy in it. The principal ground of complainants bill charging the secret trust, has been completely denied by the answer; and the only evidence opposed to the answer, is that of Winstanly and House, (derived from Zylstra himself) which cannot contradict it. It is the established rule of this court, that unless the answer is contradicted by two positive witnesses, or one positive witness, and strong corroborative circumstances, the answer must prevail. The answer is not at all contradicted, and it is only by circumstantial evidence, that it is in any manner impugned. Neither Winstanly or House prove the trust; all their information being from complainant and not a syllable from defendant, previous to the sale, and only one solitary circumstance after it, acknowledging that he had put complainant in possession and that he might have the house back again if he paid him his debt. On the first principal ground therefore the complainant has entirely failed, and he is not entitled to the relief prayed for.

On the second ground, respecting the sale by the sheriff being irregular and illegal, it appears plainly from the evidence, that goods belonging to complainant had been sold previous to the sheriff's advertisement, which were adequate or nearly so, to pay the amount of the executions in his office against complainant; and that those mentioned in his advertisement were of the number that would be satisfied. On what pretence he could sell the property at all, or for cash, is inexplicable. It does not appear, however, that it was at the instance of defendant, because no part of his debt was then due;

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and even in that case he could not *sell until he had sued, obtained a judgment and an order of the court for that purpose; and even in that case, the property could not have been sold for cash. Independent of the terms which the law has imposed in cases of mortgages, of selling on a credit, the convention of the creditors (of whom the defendant was one) that the property should be sold on a credit of 60, 90, and 120 days, ought to have regulated the sheriff's sale; and the discretion which the creditors afterwards gave to a committee, should not have altered the terms; nor does it appear to the court that they did. Upon the whole of this case, therefore, it is evident that the sale was illegal, because from the documents produced, it appears that the sheriff had under his controul a sum of money sufficient or nearly so, to satisfy all the executions in his office, when the sale was advertised. It was irregular, being contrary to the convention of complainant and his creditors, of whom defendant was one; and ought not therefore in any event to have been sold for cash. It has been suggested that defendant has entered satisfaction on his mortgage, and has thereby lost his lien or claim on the property. If the court interferes, it would take care to protect his rights, and set up the mortgage again, upon the ground of defendant's having been under a mistake in what he did. It is therefore ordered and decreed, that the sale of the sheriff be set aside, and the title deeds to defendant cancelled; that it be referred to the master to ascertain what is due and owing by complainant on his bonds and mortgages to defendant for principal and interest; and that he do within six months pay the amount thereof, together with the costs at law and in this court, to the defendant; or in default thereof, that the mortgage be foreclosed, and the house and lot of land be forthwith advertised, and sold by the master for cash.

And that the injunction heretofore granted in this case, be made perpetual.

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2 Desaus. *145

*Case XVI.

[Present, Chancellors Rutledge and Marshall.]

Representatives of JAMES ASKEW v. JOHN E. POYAS.

(July, 1802.)

[*Evidence* ⇐441.]

To a bill praying for the specific performance of a parol agreement for the sale of land, the defendant answered and denied the agreement as charged by the bill; but set up another agreement which he insisted upon he had complied with. The complainant is not at liberty to support the alleged parol agreement by parol evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1778; Dec. Dig. ⇐441.]

[*Partnership* ⇐53.]

Defendant denying the allegation of a partnership in a brick yard, and there being no proof, no account can be directed.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 76, 79; Dec. Dig. ⇐53.]

[*Trusts* ⇐44.]

Defendant denying that he had purchased in complainant's property in trust, and no proof of such fact, the trust will not be raised.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 66–68; Dec. Dig. ⇐44.]

[*Slaves* ⇐8.]

Defendant admitting the hire of some slaves, an account was directed as to them.

[Ed. Note.—For other cases, see Slaves, Cent. Dig. §§ 30–38; Dec. Dig. ⇐8.]

This was a bill filed to compel the specific performance of a parol agreement, for the purchase of a tract of land on certain terms alleged in the bill; and for the formation of a copartnership in establishing a brick yard on the land; and for an account of the profits from the labor of certain slaves placed on the premises by Askew.

The bill also sought a discovery whether the defendant had not purchased certain slaves of Askew at Sheriff's sale, in trust for Askew, on his being reimbursed the price given for them.

The defendant in his answer denied the agreement as alleged in the bill, and set forth another agreement, which he insisted he had fully complied with; but that Askew had altogether failed to comply with his part of the terms. The defendant also denied the allegation of an agreement for a copartnership in the brick yard; but admitted that Askew had some negro slaves on the place whom defendant employed as labourers; and that he was willing to pay a reasonable hire for them.

At the hearing the complainant offered some parol evidence of the agreement as charged in the bill; which the court admitted, but without prejudice. It did not, however, fully support the allegations of the bill.

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Nor was *there any satisfactory evidence of an agreement to enter into a copartnership.

There was no evidence that the defendant had agreed to become the purchaser of the slaves sold by the sheriff in trust for Askew. The sale was proved to have been a fair one, and that defendant became the purchaser on his own account.

Chancellor MARSHALL delivered the decree of the court.

The objects of complainant's bill are, to discover from the defendants oath, whether a parol agreement was not entered into between him and the complainant respecting the land in bill mentioned to the following effect: That the whole of what belonged to complainant (being 201 acres) should be sold; that the defendant should purchase it, and pay 200*l.* for a moiety of it: that the sheriff should make titles to defendant for one moiety, and complainant for the other moiety. That the defendant should also discover whether a copartnership was not entered into between them for the purpose of establishing a brick yard, and carrying on that business, the defendant accounting for the profits of it, or the work of the negroes on it; and that the defendant may discover whether the negroes of complainant sold by sheriff under execution were not purchased in by defendant in trust for complainant. The defendant in his answer denies the agreement as set forth, but says he agreed to purchase 201 acres, a moiety of complainant's land, provided he could get good titles: that he was to pay and did pay 200*l.* for it; and it was agreed that on complainant's repaying him one half of the purchase money, he should have half of the land; that he was always ready to comply with the terms; but complainant never was. Defendant denies that titles were to be taken in his and complainant's name; but when he received them from sheriff, he shewed them to complainant who made no objection to their being made to defendant. He denies that he is liable to account for the profits of the brick yard. He admits a co-

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partnership was contemplated, but *denies that Askew complied with any of the stipulations agreed on. He is nevertheless willing to allow wages for the negroes of complainant whilst there; and denies that the purchase of the negroes was made in trust; but avers they were sold under execution for complainant's debts; and defendant bought them for a valuable consideration, and has paid the money.

This case lies in a very narrow compass: the first question respecting the parol agreement is plain and clear; the defendant totally denies it as stated in the bill; and there is no written evidence to contradict his answer; it must therefore be taken to be true. —To admit parol proof of a parol agreement, in a case not tinctured with fraud, would introduce all the mischiefs and inconveniences which the statute of frauds intended to prevent: and would be in effect to repeal the statute which makes void all parol agreements concerning land. The parol testimony respecting the agreement must therefore be laid aside. The defendant's answer denying the agreement, standing uncontradicted, the bill would be dismissed, were it not necessary to retain it for the purpose of defendant's accounting for the work and labor of complainant's negroes. Defendant having denied the existence of a co-partnership, and there being no proof of it, the complainant is not entitled to an account for the profits of the brick-yard. Defendant having also denied the purchase of the negroes at sheriff's sale in trust for complainant, and it having

been fully proved by Mr. Ford that the sale was a fair one; that he thought and believed defendant was bidding for himself, and that he never heard that he was buying for any one else; and Turner, a deputy sheriff, swearing that defendant absolutely refused Mrs. Askew's request to buy them in for her husband, but said that he would purchase them for himself; and the bill of sale from the sheriff to defendant, being in the common form, he cannot be considered in any other light than as the absolute proprietor of the negroes: but as he admits complainant had some other negroes working at the

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brick yard *for a certain time, it must be referred to the master to ascertain how many there were, and how long employed there, and what will be a proper allowance to be made for their services during that period.

Moultrie, Desaussure and Ford, for complainants.

Pringle, for defendant.

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2 Desaus. 148

Case XVII.

[Present, Chancellors Rutledge and Marshall.]

THOMAS SHUBRICK and ROBERT SMITH, Executors of Thomas Shubrick, v. JAMES FISHER, JOSIAH SMITH, N. RUSSELL and Others, Members of the South-Carolina Insurance Company.

(July, 1802.)

[*Insurance* ⇐55.]

Articles of agreement that the members of an insurance company should each bear his proportion of the losses (without any negative words that they should not be liable for more, in case of insolvency of some of the partners) is an ordinary copartnership; the members are bound in solido, each for the whole; not only as to strangers, but as to members of the company, who have procured insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 68; Dec. Dig. ⇐55.]

[*Insurance* ⇐55.]

An arrangement by 76 solvent shares (out of 100 shares) to pay the whole loss, was not a new agreement to enlarge the liability of the members; but evidence of their own sense of their liability.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 67-69; Dec. Dig. ⇐55.]

[*Insurance* ⇐55, 196.]

A member of the company appointed by the company to collect from the members, is their agent, and if he collects, and does not pay over to a creditor of the company, it is their loss; though that creditor acquiesced in the appointment, and dealt with him as the agent. The insured has nothing to do with the insolvencies. He must be paid by the company.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 68, 435; Dec. Dig. ⇐55, 196.]

The bill stated that James Fisher and the other gentlemen above mentioned, formed a company, called "The South-Carolina Insurance Company," for the purpose of insuring vessels and cargoes. And being so associated made certain articles of agreement, the original of which is in the possession of defendants.

That Thomas Shubrick in his lifetime being the owner of a brig, called the Effingham, then about to sail from Charleston on a voyage to foreign ports, and being desirous to have said brig and cargo insured did on

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13th *Feb. 1777, cause her and her cargo to be insured, by a policy of insurance, by the said company, to the amount of £10,000 currency on goods, and £5,000 on the vessel, on a voyage "at and from the port of Charleston in said state, to any port of France, or in the Bay of Biscay."

That said policy was signed by the said company, (by Edward Lightwood one of the said company, and for himself and the others, and as their agent for such purposes specially constituted,) as appears by said policy marked A. and filed.

That said Thomas Shubrick afterwards, to wit, on the 11th of April, in same year, caused another policy of insurance to be opened, to insure on the body of said brig a further sum of £2000. currency, which was presented to said company, who through Samuel Legare, one of said company, for himself and the others, and as their agent, signed the same in due form, as appears by said policy, marked B. and filed.

That the said Thomas Shubrick shortly afterwards, on the 23d of May in the same year, at Charleston, wishing to insure the further sum of £3000. currency on the said brig and cargo, on the same voyage, had another policy made out, which (through Josiah Smith as agent for the said company, and for himself as a member of it,) said company signed in due form.

That the said Thomas Shubrick paid to the said company as a premium for the risks against which they insured in the aforesaid policies, the sum of £20. for every £100. insured on the said brig and cargo.

That shortly after said policies were signed, the said brig proceeded on the voyage described in the policies, and not having deviated from the true course of her said voyage, was taken, captured by a British armed vessel, and condemned as a good prize to the captors, whereby the whole vessel and cargo were totally lost to the said Thomas Shubrick.

That by said capture and loss to said Thomas Shubrick, the said South-Carolina

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Insurance Company be*came liable to pay the said sums of money in the different policies mentioned, agreeably to their engagements therein contained.

That conceiving the said Insurance Company bound to pay for the losses accruing by the capture aforesaid, not only the said

Thomas Shubrick, in his lifetime, but complainants have often called for payment, and having been frequently refused, were compelled to bring a suit upon one of the policies, against Edward Lightwood, agent as aforesaid, in the Court of Common Pleas; that a judgment was entered against him for the sum of £3037. 11s. 1d. sterling, with interest thereon from the 1st of July, 1793.

That the said Edward Lightwood and Samuel Legare, having since died insolvent; and the said Josiah Smith, another agent as aforesaid, not thinking proper to pay the said losses, the complainants called upon the defendants or their legal representatives to make up and contribute amongst themselves as members of the said company, their several proportions of the losses aforesaid, according to an account delivered them.

But the defendants have refused or declined to make any settlement with complainants: some of them alleging that they had paid into the hands of said Edward Lightwood, monies to pay their respective proportions of said losses; and that they are in consequence discharged from any claim or demand of the claimants, whether they received the money from said E. Lightwood or not.

The bill prays that the defendants may be compelled to pay the complainants the amount of the said losses with interest. And that in case any members of the said company or their estates should have become insolvent, then that each of the solvent members or their estates may be made liable to pay the whole, as being bound in solido, or jointly and severally as for a copartnership debt, or that they may be compelled to contribute amongst themselves the payment of the said losses upon just principles.

The answers of James Fisher, Josiah

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Smith, Nathaniel *Russell, and others, admit that the several person in the bill mentioned, formed the company called the South-Carolina Insurance Company, for the purpose of insuring marine risks; and they signed by their agents the policies of insurance stated in the complainant's bill, and that by the capture of the ship and cargo, a total loss was sustained, for which the complainant's testator had a claim against the said company for indemnity. But they do not admit that the members of said company were bound in solido, as for a copartnership debt: for although they were "jointly concerned," yet it was agreed by the articles of association to which the complainant's testator was a party, (he being a member of the company) that in case of loss, it was to be "borne, paid and sustained by each and every of the several subscribers or members, &c. in average or proportion to the sum or sums of money by them subscribed." They further say that the capital stock of the said company has been exhausted in the payment of losses; and that the individual members are not bound for the loss in the present case beyond their average and proportion, according to the number of shares respectively held by each of them, according to the original articles.

The defendants do not admit that complainants or their testator made any demand of payment under these policies for many years, having neglected them altogether.

They further admit that a suit was brought many years after the loss against Edward Lightwood, who had signed the first policy on behalf of the company, and judgment recovered against him, as stated by the bill.

That although at a meeting of the surviving members of the company, it was stated that there then existed but 76 solvent shares out of the 100, of which the company was composed, and it was agreed that the said 76 shares would pay the whole of the said loss to be proportioned amongst themselves, and the sum of £44. 19s. was adjusted by consent of both parties, (the complainants and these defendants) as the sum which each share was to pay; yet that such agreement was not made on the ground of any sup-

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*posed liability of the said members beyond their own several shares in said company; nor was it meant to extend in any manner the personal liability of said members beyond their several and respective shares in the company; but it was solely intended to divide amongst themselves, a loss which might otherwise have borne hard on the said Edward Lightwood, who has subscribed the policies, and against whom alone a suit had been instituted, and a judgment recovered. And if any attempt should be made to open the said account to extend the liability of the said company, they will hold themselves justified in opening the said account wholly, and availing themselves of all just grounds of defence.

That at the said meeting it was also agreed by the committee who managed the affairs of the company, and by Thomas Shubrick, (one of the executors and complainants) that that said E. Lightwood should collect from the individual members their several proportions of the loss so adjusted, (except seven shares which said T. Shubrick himself undertook to collect) and should pay over the same to the said Thos. Shubrick: and that the said E. Lightwood, by such arrangement, became the agent of the said Thomas Shubrick, and responsible to him for all sums of money so collected: and they would not have entered into such arrangements, but upon the ground that on said Lightwood's collecting, (with the acquiescence of complainants) the persons who should make payments to him under the agreement, would be discharged of all further liability to the company or to complainants.

The defendants further answering say, that in pursuance of such agreement, many of them did pay to the said Lightwood, with said approbation of the complainants, the ascertained and adjusted proportion of the said loss for which they have receipts ready to be produced. And to evince to the court that the said E. Lightwood was the agent of said complainants as well as of the said defendants, they submit to the court that in several instances the said E. Lightwood did

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not receive money from the defen*dants, but procured discounts for the said T. Shubrick, on demands which some of the defendants had against him or his father's estate, which were by his direction admitted in payment; which were conclusive on the said Shubrick; and these defendants hold themselves absolved from all responsibility.

That if said complainants had used due diligence in demanding and receiving payment from the said E. Lightwood, of the sums he collected from the members of the company, the whole might have been obtained from him; the said E. Lightwood having paid large sums of money to his creditors subsequent to such judgment; and if as is alleged, the said complainants cannot now recover the sums collected and received by the said E. Lightwood, the fault is imputable to the complainants.

The defendants further answering say, that even if they had been originally bound in solido, and liable as copartners, (which they deny,) yet they insist that in justice and equity they ought not to be held liable under the circumstances of this case, for more than their average and proportionate loss, according to the number of shares held by each member; because if the complainant had used due diligence in a reasonable time after the said loss, almost all of the said company would have been competent to have paid their proportions; instead of which, if the complainant should succeed, the loss would fall heavily on a few, as about one third of the shares of said company are now insolvent.

The defendant James Fisher, in his answer, admitted the allegations of the bill, but denied that the members of the company were bound in solido as copartners, and insisted that by the articles of agreement by which the company was united together, (and to which complainant's testator was a party) in case of loss, it was to be borne by each member in average and proportion to the sum or sums by him subscribed.

That although it may be said that at the meeting of the company in July, 1793, it was

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stated that there existed but *76 solvent shares out of the 100, of which the stock was composed, and it was then agreed that the loss should be borne by the said 76 shares, and the accounts stated accordingly; yet he had not then seen the original articles for many years, and did not recollect precisely the terms of subscription, and submits to the court that all mistakes ought to be rectified, and the defendant held liable for no more than his original subscription.

The defendant further submitted that he had received from the complainant Thomas Shubrick, the following statement: Estate of John Edwards, dr. to estate of Thos. Shubrick 20th Dec. 1798, to amount of nine shares in the South-Carolina Insurance Company, on sundry policies of brig Effingham, settled and allowed on the 1st July, 1793, say £404. 11s.; interest on do. to 1st of Jan. 1799, £155. 14s. 10d.—making £560. 5s. 10d.

James Fisher dr. to estate of T. Shubrick, 1798, Dec. 20. To amount of three shares in the South-Carolina Insurance Company, on sundry policies on brig Effingham, settled and allowed on the 1st July, 1793, say £134. 17s. interest on do. to 1st Jan. '99, £51. 18s. 3d. making £186. 15s. 3d. That he paid part thereof, and holds a receipt in these words. Received 2d of April, 1799, £600. on account of James Fisher, and estate of John Edwards, signed Thos. Shubrick; which plainly shews that the complainants looked to the individual and not to the company, for payment of the respective proportions of the loss.

At the hearing of the cause, it was argued for the complainants that this was a copartnership, subject to all the rules on that branch of law, and that one great rule is that each of the copartners is liable for all the debts of the copartnership. They are bound jointly and severally; and the members of a company cannot affect third persons by any agreement among themselves diminishing the legal liability.

That the complainants testator, though he was a member of the company, was a perfect

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stranger to it in re*spect to the insurances he procured to be done by the company, on his vessel and cargo; and his representatives are entitled to the full responsibility of the members of the company, as the law establishes it, and not according to the limited liability contended for by the members, under an agreement, the object of which was to establish a rule of proportion among themselves, and not to affect third persons.

That there was no agreement on the part of the complainants to release or in any way give up their right to be paid by the company, the whole loss sustained.

That at the meeting in July, 1793, the defendants were so sensible of the liability of the solvent partners for the whole debt, that they partitioned it among themselves, and as the company had no joint stock, appointed one of their own members, E. Lightwood, to collect the proportions from each. That this was done by the company, for their own convenience, and as the only way of collecting

the money from the members. But this act was the act of the company, and the member appointed to collect was their agent.

The complainants could not and did not object to this act of the company, as it was the necessary means of the collection; but their acquiescence did not constitute Mr. Lightwood the agent of the complainants.

Nor did his settling some of the shares by discounts, amount to any relinquishment of his full claims on the company. Lightwood being their agent, the complainants were willing to allow of settlements in the way most convenient to the members; and when not inconvenient to themselves, the complainants undertook to settle with several of the members; as in the case of Mr. Fisher. But they never gave up their right to demand payment of the whole sum from the company, in case of additional insolvencies among them, or of the non-payment to complainants, of the sums collected by their agent.

For the defendants it was contended that

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this Insur*ance Company was formed on a peculiar plan, by which it was agreed that the members of the company should not be bound in solido, but each for his individual proportion and no more. That all persons dealing with the company, and knowing the terms of their association, would be bound by them. It was a consent to the liability of the members being restricted to the limits stated in the agreement. But that even if this were questionable as to mere strangers, it could not be so as to the members themselves; and the complainants testator could not set up a pretence that the members were liable beyond the extent expressly stipulated by the deed, or agreement of association, to which he was a party himself. He and his representatives are estopped from averring any thing against that deed, or claiming a different responsibility from the members, than that fixed by the deed. See Watson, 29, 50, 361.

Hence then each share was bound for only 100th part of the loss sustained; and complainants can make defendants liable beyond this, only on the ground of a new and distinct contract. The complainants insist that the defendants have made such a contract; and that at the meeting of the company in July, 1793, it was agreed that the 76 solvent shares would pay the whole loss; and that the company appointed E. Lightwood as agent of the company to collect the money from the members, and pay it over to the complainants. And the complainants bill calls for a discovery of these facts. To this prayer for discovery the defendants have answered, and their answer must be taken for true, unless disproved by one witness and strong circumstances. The answer admits that it was agreed at the meeting of the company, that the 76 solvent shares would pay the complainants the whole loss. That this was done to save Lightwood, against whom, as the subscriber of the large policy, on behalf of the company, the judgment had been obtained by the complainants. That the complainants thereupon agreed to suspend their judgment, and agreed that E. Lightwood

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should collect these *assumed proportions from the members, and pay them over to him. That by these arrangements, E. Lightwood became so far the agent of the complainants, that all his collections and receipts were on their account, and absolutely discharged those who made the payments. For though Lightwood was appointed by the company, (and indeed was jointly with Mr. Dawson, treasurer of the company, with authority to them both, to settle all losses and collect monies due) to transact this business, it was with the concurrence of the complainants, who acted and transacted with him in various ways as their own agent; they settled with him by discount; they even superceded him, (which they could do with their own agent, but not with one who was wholly the agent of the company) and themselves settled with several of the members, giving them statements of what they individually were to pay on the loss, and received the money and gave receipts to them.

It is true Lightwood also made collections from the members, and in some cases gave receipts as on behalf, or for account of the company—but this only shews what is not denied, that he was the agent of both parties.

The result is, that the complainants must rely on the original contract of indemnity by the company constituted as it was; or on the new agreement. If he relies on the former, the members are not bound, (as has been shewn) for more than each his own share. And if they had been, the complainants have made their election to pursue Lightwood alone, against whom alone they have brought suit at law, and obtained a judgment, and having done so, they cannot now come on the company.

And if complainants rely on the new agreement, the defendant's answer explains and qualifies that, and is not contradicted or varied by sufficient evidence. By their answer, it appears that Lightwood was the agent of both parties; but that it was to complainants alone he was to pay. The authority of the company gave him power to collect the money. When collected, it was the property of the complainants who had

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agreed that he should receive it on *their account. If he did not pay it over to complainants, it was their loss. The complainants neglected to make him pay as he collected. The laches was theirs, and so must be the loss.

Chancellor RUTLEDGE delivered the decree of the court.

In this case the following questions arise.

First—Whether the members of the Insurance Company are or are not bound in solido to make good the loss sustained by complainant on the policies in bill mentioned?

Secondly—Admitting they were so bound, whether the arrangements made by the surviving members in the year 1793, did not make it a new contract, and complainant acquiescing therein, was bound thereby?

Thirdly—Whether the members who paid to Mr. Lightwood the sums then settled for their shares or proportions of the debt, are not wholly discharged; and Lightwood having since become insolvent, whether the loss should fall on complainant; he being alleged to be the particular agent of complainant?

Fourthly—Whether, as several of the members have become insolvent since 1793, the loss occasioned by such insolvency should not be borne by complainant; he not having used due diligence to obtain payment from them?

On the first point it was admitted, that if complainant's testator had been a stranger to the articles of the company, that no agreements or covenants they made with each other would have been obligatory on him; but they would all have been bound in solido to make good his loss. It was at the same time contended for defendants, that complainant's testator being one of the company, and it appearing by the articles that they each covenanted for himself, severally and not jointly, to make good any loss of the company in average and proportion, to which he subscribed; they are therefore not collectively liable to any individual of the company whose property was insured, because he being a party to the agreement, and knowing the terms of it in case of any insolvencies, he must sustain

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the loss of those shares *which ought to have been paid by the insolvent members.

This would be a hard doctrine, even if it could be supported by the words of the articles; but upon a reference to, and on a fair construction of them, we are of opinion that the inference drawn by defendant's counsel, is by no means warranted.

The articles set out with stating, that the subscribers agreed to join themselves together, and to become jointly concerned as a company of insurers, for the purpose of insuring ships and vessels, and goods of any individual or individuals, subject to the regulations thereinafter mentioned: then follow the various covenants. Among others, that each party doth severally, and not jointly, and not one for the other, covenant, that the company shall be called the South-Carolina Insurance Company; that there shall be a president, vice-president, directors, treasurer and clerk; that any one of the directors signing a policy in behalf of the company, the same shall be binding on all the members, in average and proportion to the sums by them subscribed; that the treasurer shall give security for the faithful discharge of the duties of his office. In case any loss should happen, over and above the sums subscribed and deposited for a capital, such loss shall be borne by each and every of the subscribers, in average and proportion to the sum by him subscribed.

This is the substance of the covenants contained in the articles, which do not differ in any respect from the usual covenants contained in almost all articles of co-partnership.

It is then to be considered whether they ought to have a different construction put on them, as they regard the complainant, from what they would have, with respect to any other individual.

Had there been a clause inserted in the articles, that in case of any insolvency of any member, the survivors should not make good the loss, then the arguments of defendant's counsel would apply most forcibly, and complainant could not have any redress; although a stranger would not have been

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prejudiced by such a clause. It is *not reasonable to suppose that at the time of signing these articles, the idea of insolvency was at all contemplated; for an individual share did not exceed the value of £150. sterling: and there was not a person who signed them who did not possess a property of some thousands of pounds more than he subscribed for. And the company being restricted as to the extent of the sum that they could risque at any one time, there was not a probability and scarcely a possibility of the insolvency of any of the members. It is owing therefore to events that have occurred after a lapse of many years, that this defense is now set up, which would otherwise never have been thought of. The articles state that they jointly associated for the purpose of insuring the ships, &c. of any individual whatever, without distinction. Complainant's testator then having paid the same premium for insuring his vessel that any other person would have done, he stands in point of justice and equity exactly on the same footing with any other individual, and is equally entitled to be paid the amount of his insurance by the company in solido. By one of the covenants, the complainants are pledged to stand to any insurance made by their directors. Mr. Lightwood having signed this policy as one of their directors, the complainant had a right to recover, and did obtain a verdict against him for the amount subscribed, and had he been solvent, would have received the whole thereof from him. And would it be contended that he, acting for the company, could not by filing a bill against the surviving members, have compelled them to indemnify him? Surely not. Nay, so sensible were the surviving members of their liability in solido to pay the debt, that when a suit

was commenced against Lightwood to recover it, they had a meeting in 1793, and settled the proportion that each of them was to pay. Nor can we consider the arrangements then made as a new contract, or a deviation from the original articles, judging as we do that they were primarily bound.

It is unfortunate indeed that they did not pursue the directions of their articles, when

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they chose their treasurer *in 1793, by obliging him to give security; in which case, those who paid their shares would not be injured.

It is insisted that Lightwood was the authorized agent of the complainant to receive the money, therefore the complainant ought to bear the loss of the sums so received.

The contrary appears to be the truth of the case: for we find that Mr. Lightwood, together with Mr. Dawson, were appointed treasurers by such of the members as met in October, 1793, and although they might not have constituted a majority of the company, yet the others seem to have acquiesced in what they did; some by paying the sums which were settled as their proportion, and the rest being willing (as they acknowledge) to pay, had they been called upon. And further, from the testimony of Mr. Ward, it appears that complainant would not authorize him to pay any money to Mr. Lightwood as his agent: so that in no point of view could he be considered as the particular agent of complainant: therefore the loss of the money received by L. ought not to be borne by him; because it was peculiarly incumbent on those who did pay to see that the money was applied properly.

The laches therefore was theirs; for as much as they might have compelled Mr. Lightwood to pay it over if they had thought fit.

The fourth question respects the insolvencies, since the year 1793. There does not appear to be any particular laches imputable to complainant to make him liable for the whole loss. The members who met at that time, appointed their treasurer to settle all losses, and to recover all monies due to the company. The complainant therefore had no business to look for payment from any other quarter than the treasurer. And it was in proof that he had demanded payment from the treasurer Mr. Lightwood, from whom he received a letter, promising to call and settle with him in a few days.

Upon the whole of this case therefore, we are of opinion that the complainant is justly entitled to receive from the surviving mem-

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bers of the Insurance Company, the *sums insured on his vessel and cargo, with interest; nothing appearing on a fair and sound construction of the articles to differ his case from that of any other person: deducting therefrom his proportion (as a member of the company) of all the losses which have happened by the insolvency of members, except the monies received by Mr. Lightwood. There is no reason whatever, why complainant should share in that loss, he not having had anything to do with Lightwood's appointment. The rule of equity being clear, that if one of two innocent persons must suffer, he who trusts most should suffer most. The loss occasioned by L's insolvency, would unavoidably fall on those defendants alone who paid the money; but in the adjustment of it, it must be proportioned to the sums paid by them respectively; for money having no ear mark, it is impossible to ascertain whose it was precisely that he paid to complainant. Ordered, that it be referred to the master to ascertain the sum due to complainant, after deducting his proportion of loss, and the money already received by him. And in the settlement of the account, he is to adjust it on the same principles that were fixed by the jury in their verdict against Lightwood.

The costs to be paid by defendants.

Turnbull for complainants.

Desaussure and Ford for defendants.

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Case XVIII.

[Present, Chancellors Rutledge and Marshall.]

DAVID ALEXANDER, and Others, v. the Executors of JAMES MUIRHEAD.

(October, 1802.)

[*Stipulations* ⇐13.]

The Court opened a stipulation entered into between the insurers and the insured, by which it was agreed that one case should decide all the others.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 67–76; Dec. Dig. ⇐13.]

[*Stipulations* ⇐13.]

It appeared that the evidence applicable to one of the cases, was not applicable to the others. A misrepresentation was alleged as to some of the underwriters—not as to others.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. § 68; Dec. Dig. ⇐13.]

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[*Stipulations* ⇐13.]

*The Court opened the stipulation so far as to let the insurers have the benefit of a trial before a jury, on the question of misrepresentation.

[Ed. Note.—Cited in Fludd v. Equitable Life Assurance Society of the United States, 75 S. C. 319, 55 S. E. 762.

For other cases, see Stipulations, Cent. Dig. §§ 67–76; Dec. Dig. ⇐13.]

[*Equity* ⇐38.]

The case sent down to trial at law, with all the proceedings in equity to be given in evidence. The injunction continued.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 103; Dec. Dig. ⇐38.]

[This case is also cited in McDow v. Brown, 2 S. C. 112, without specific application.]

The bill filed in this case was to set aside an agreement entered into by the complainants, with the defendants, by which it was stipulated that all the suits against the underwriters in the policy of insurance in the case then in dispute, should be determined by the decision which might be made on one of them; and thus to enable the complainants to have a trial on all the cases.

It was found after the loss occurred and after the suits brought, and the stipulation entered into, that different representations, as to the time of the vessels sailing, had been given to different underwriters by the broker and his clerk.

The broker had stated the true time of the sailing to the underwriters, Kirke & Lukens, against whom the suit was brought, which was actually tried, and a verdict found against them. But the brokers clerk, Mr. Watson, had stated a different time to the other underwriters, who have entered into the stipulation bond.

It was supposed this difference, (about 8 days) was so material in a West-India voyage, as would have made a difference in the risque, and in the premium.

The object therefore was to have an opportunity of having those causes tried in which the misrepresentation had been made, so as to have the opinion of the jury, on the materiality of such misrepresentations, though they were said to be unintentional.

The bill stated that complainants being Marine Insurers, subscribed two policies upon the schooner Juno, her tackle, &c. and her cargo; from the port of Charleston to the Havanna, in the Island of Cuba; which insurance was effected for the executors of James Muirhead.

That very shortly after the policies were

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effected, the *complainants were informed that the Juno and her cargo had been lost: and some time after, they were applied to for payment. That by comparing the facts stated by the assured, with the information given when the policies were opened, there appeared to be a material misrepresentation. As it was represented to the complainants by J. Watson, the clerk of Denoon, the broker who applied for insurance, that the Juno had sailed about the last of Dec. 1800, when she had in fact sailed on the 23d Dec. 1800. That the misrepresentation was of such a nature as to avoid the policy; as the Juno would have been deemed a missing vessel, and not insured at all, or at an enhanced premium; and therefore complainants conceive themselves justified in refusing payment. That the executors insisting that no misrepresentation had been made, placed the policies in the hands of H. Bailey, Esq. to commence suits at law. That complainants at that time understanding that the policies had been offered by the same agent, and of course that what had been represented to one had been represented to all of the underwriters, concluded that the trial of any one case would substantially try the whole, they therefore entered into an agreement in writing, that the determination of one of the cases should decide the whole. And they constituted Messrs. Desaussure and Ford, attornies to confess judgment for each of them, if the verdict should be in favour of the plaintiffs; to which stipulation Desaussure and Ford added their engagement to confess the judgment, in the event mentioned.

The complainants supposing the cases to be similar, entered more readily into this agreement to avoid trouble and expence to both parties; but it was never intended by themselves or by plaintiff's attorney to prevent any evidence that might have been adduced, if they had not signed it.

That Messrs. Kirke and Lukens were selected by the insured as the underwriters, against whom to commence the suit for actual trial; and complainants still unapprized

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*of any difference in their cases made no objection. The cause was tried on the 12th June 1801, and David Denoon, the broker was produced by the plaintiff to testify that he in person offered the policy and made the true representations to Kirke and Lukens; whereupon a verdict was given against Messrs. Kirke and Lukens.

The evidence of Watson, which was peculiarly applicable to the other cases could not be adduced on the trial of Kirke and Lukens.

That a motion was made for a new trial; but as by the rules of law plaintiffs are allowed to enter up judgment and lodge executions to bind, subject to be set aside if a new trial should be granted, the plaintiffs in that case entered up their judgment, and tendered the records in all the other cases to complainant's attornies, to confess judgment according to the agreement; which they did; expecting they would be set aside with that of Kirke and Lukens, in case a new trial should be ordered in that cause.

That a new trial was awarded, and judgment set aside in the case of Kirke and Lukens; but the plaintiffs refused to set aside the others, and the complainants were held bound under judgments from the 9th January, 1802, to the 8th of March last, during which time the case of Kirke and Lukens stood as an issue for a second trial. That the complainants applied for redress, but their confession of judgment was pleaded in bar; that they offered to substitute and try any other case, for that of Kirke and Lukens; but were refused. That the judgments originally confessed are still maintained against the complainants, and they are informed the executions will be speedily issued. That complainants were justified in requesting such modification, that some other case than Kirke and Lukens's, should be tried, since in truth their cases had never been tried; nor

the testimony of their witness (Watson) adduced; though so materially different from Denoon's.

That if the true day of the Juno's sailing had been represented, complainants should

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from the nature of the voy*age and the winds that had prevailed, have deemed her a missing vessel, and would not have insured at all, or but for an inhanced premium. The bill prays for relief, and for a writ of injunction.

Desaussure and Ford, solicitors.

An injunction was granted at Chambers.

The defendants answer stated that the complainants subscribed the policies of insurance mentioned in the bill, and defendants say that they are firmly convinced that Andrew Smylie, who as their agent had the policies effected, made a true representation in writing to the broker, when the vessel had sailed, &c. The defendants admit that accounts of the vessel being lost, arrived in Charleston shortly after the insurance was made. But the defendants had not the most distant idea of the vessel being lost, when the insurance was effected.

The defendants admit that shortly after the loss of the vessel and cargo, they applied to the underwriters for payment of the sums by them sustained, when they or some of them doubted their liability to pay the respective losses, alleging that the vessel had been represented to have sailed about the last of December, when in fact she sailed the 23d of said month.

When the underwriters resolved to stand a suit, they proposed that a suit against one should determine the liability of all—and the defendants having agreed thereto, the rule was accordingly signed, wherein the complainants obliged themselves to abide by the decision of some one case to be tried at the then next Court of Common Pleas.

The defendants swear that Messrs. Kirke & Lukens's case was not selected as being more favorable to the defendants than any other on the policies; that they did not know until the trial of the cause, that Denoon the broker, had himself called on Kirke and Lukens, and that the clerks of Denoon called on the other underwriters to have the policies subscribed; nor did the defendants give any instruction to their attorney who should be sued.

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*The defendants say it is impossible to answer the allegations of the bill as to the complainant's views in entering into the stipulation rule. The defendants swear they made no misrepresentation in any matter relative to the insurance; that if any was made, it was done through inadvertence or mistake of Mr. Denoon's clerk; that if a misrepresentation had been made, the complainants could have been injured only in receiving a few dollars less in the premium. The defendants admit that they on the 12th June, 1801, obtained judgment against Kirke & Lukens as mentioned in the bill; and whereon Kirke & Lukens gave notice of a motion for a new trial in that case, contrary to the stipulation rule. It was known by the complainants and defendants, that the Court of Common Pleas being a Circuit Court, could not grant a new trial, or review a verdict which had been taken under its authority. The defendants swear they never contemplated a further trial or decision than was to be had in the said Circuit Court; that they never would have consented to the stipulation, if they could have foreseen that the verdict v. Kirke & Lukens was to have been appealed from. The defendants are of opinion that they were entitled by the stipulation to have judgment confessed, and executions issued against all the other underwriters in the policies, and accordingly applied to Messrs. Desaussure and Ford to have the judgments confessed; when they required as a condition of confessing judgments, that executions should be lodged only to bind, until Kirke and Lukens's case should be finally determined. And as it was understood by all the parties, that after the final decision of Kirke and Lukens's case, no further opposition should be made; the defendants permitted the executions to lie in the sheriff's office without being proceeded on. The defendants admit that the judgments were not set aside, when a new trial was ordered in the case against Kirke and Lukens.

The defendants submit that this court will not intermeddle with the judgments and executions so obtained, or order further examination of the causes, which would enable

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*complainants a second time to attempt availing themselves of the strict rules of law. The defendants admit that application was made to the presiding judge in the Court of Common Pleas, who, on the 12th of February last, tried Kirke and Lukens's case a second time, for an order to set aside the judgments confessed, but the order was refused. The defendants admit that they were applied to by complainants to consent that the judgments should be set aside, or some other case substituted in lieu of Kirke and Lukens's which the defendants refused, because they had been already delayed for about a year in the recovery of their just demand; and because they apprehended the complainants might select some case, wherein the broker's clerk might possibly, through mistake, have made an incorrect representation. The defendants would have considered themselves bound, and would have abided by the decision of the case, if the verdict had been against them. So on the other hand, the complainants should be bound by the decision already given. The answer denies combination, &c.

H. Bailey, defendants solicitor.

At the hearing of the cause, the case was argued by Messrs. Desaussure and Ford for

the complainants, and by Mr. Bailey for defendants.

The court heard the testimony on the point of the misrepresentation; some of which was contradictory. There did not seem to be any fraud in the case; but it appeared that the broker and his clerk had stated different times of the vessel's sailing, to the different underwriters.

The court thereupon opened the agreement or stipulation, and sent the case down to be tried by a jury.

Chancellor RUTLEDGE delivered the decree of the Court.

The objects of this bill are two fold.

1st. To set aside the agreement in the bill mentioned, upon the principle that it was founded in mistake, viz.—That all the cases on the policies were similarly circumstanced: Whereas the truth is, that they were ma-

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terially *different, and evidence applied to that which was tried, (to wit, Kirke and Lukens's case) would not apply to the complainants cases; nor would the court admit the evidence in favor of the complainants to be adduced, as they were not parties to the suit.

2nd. That this court should set aside the policies for misrepresentation, or send the parties to law. Upon the hearing, the court were of opinion that from the words of the agreement, it was not so conclusively binding as to preclude an investigation of the question. It was therefore fully discussed, and a variety of contradictory testimony was adduced.

As there did not appear to be the smallest tincture of fraud in the case, which would give this court a concurrent jurisdiction with the court of law, and the question is simply a question of fact, whether the representation made to complainants was true or not, material or immaterial, which is properly triable by a jury; as a court of law is the proper tribunal for cases of this kind, where they are uniformly tried, and complainants may there have complete and adequate remedy: This court would be cautious of encroaching on the jurisdiction of the other court.—We will therefore direct an issue to try those facts: and that the proceedings in this case be given in evidence at the trial, and continue the injunction in the meantime.

Chancellor Burke died in the summer of 1802; and William Dobein James, then Solicitor of the Northern Circuit, was elected Chancellor, and commissioned on the 14th December, 1802. The Court then was constituted by Chancellors Rutledge, Marshall and James.

2 Desaus. *170

*Case XIX.

[Present, Chancellors Rutledge, Marshall and James.]

FRANCIS HENDERSON and Wife, and the Trustees for his Wife, v. HENRY LAURENS, Executor of Henry Laurens, Deceased. (May, 1803.)

[*Wills* ⇐734.]

Interest on legacy decreed to be paid at 5 per cent. according to the will of the testator, till the time of the payment fixed by the will. After that at 7 per cent. according to the interest of the country.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1847–1872; Dec. Dig. ⇐734.]

The principal of the legacy not to be raised till the further order of the Court.

£400. per annum to be paid to complainant's wife according to deed of separation. And if a further provision of £300. per annum should fail in England, the same to be paid out of the estate here.

[*Husband and Wife* ⇐8.]

[Cited in Myers v. Myers, Bailey, Eq. 29, to the point that a wife is not entitled, as against her husband, to receive the interest of a legacy given to her, except to the extent of a suitable maintenance, notwithstanding she is living apart from her husband, under a deed of separation.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 28; Dec. Dig. ⇐8.]

The bill was filed by complainants for the recovery of a legacy bequeathed by Henry Laurens (formerly president of Congress) to his grand daughter, Frances Laurens, the only child of his eldest son, Col. John Laurens, deceased. He directed that the legacy should be paid her, on attaining 21 years, or day of marriage; and should bear an interest of five per cent.

She has attained 21 years of age; and also married the complainant, Francis Henderson, from whom she has since been separated by a deed mutually entered into, by which it was stipulated that the sum of £400 sterling should be secured to her annually. The bill was to procure the payment of the legacy above mentioned.

The cause was argued, and Chancellor RUTLEDGE delivered the decree of the Court.

It is ordered that it be referred to the master to state and settle the arrears of interest due to complainant's wife, when she became entitled to her legacy, under the will of her grand father; calculating interest at the rate of 5 per cent. agreeable to his will, to that time. That he do allow 7 per cent. interest on the principal of the legacy from the time it became due; and 7 per cent. also on the arrears of the annual interest. That

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so much of the annual interest *of the legacy as shall be sufficient to make up the sum of 400*l.* per annum, agreed to be secured to the complainant's wife by the deed of

separation, shall be remitted to her in half yearly payments by defendant; and the remainder of the interest accruing annually on the legacy, shall be paid by defendant to complainant, Francis Henderson. If the funds in England, which secures to complainant's wife the sum of 300*l.* per annum, shall at any time fail to produce that sum, it shall be made good out of the estate of complainant in this country. That the testator having expressly charged the estate devised by him to the defendant with payment of the legacies contained in his will, and it not being necessary at present to raise the principal of the legacy bequeathed to complainant's wife, the court will not now direct it to be done: but if the defendant shall fail to comply with the foregoing order, as is therein directed, the complainants may apply by petition to the court, in which case, if it shall be expedient, the defendant will then be ordered to raise the said legacy forthwith. The costs to be paid by the defendant.

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2 Desaus. 171

Case XX.

[Present, Chancellors Rutledge, Marshall and James.]

PHILIP GIVENS and Wife v. HENRY CALDER.

(May, 1803.)

[*Specific Performance* ⟸38.]

A parol agreement for the sale of land will not be decreed specifically against the heir of the vendor, though he had given instructions in writing, stating the terms, to an attorney to draw the deeds of conveyance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 113; Dec. Dig. ⟸38.]

[*Frauds, Statute of* ⟸106.]

The deeds were drawn, and the vendor took them home and wrote to the vendee that the deeds were ready, and requested her to attend and settle the business, but he died before the parties met. This is not such an agreement in writing as will take the case out of the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 193, 210, 211; Dec. Dig. ⟸106.]

[*Frauds, Statute of* ⟸129.]

The person contracting to purchase, having deposited part of the purchase money with her

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agent to pay the vendor as soon as he exe*cuted the deeds, and the agent informing the vendor of it, is not such a part performance as takes the case out of the statute.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 287–292, 303, 306–308, 311, 314, 318–320, 322, 325, 326; Dec. Dig. ⟸129.]

[*Frauds, Statute of* ⟸129.]

Nor does the purchaser taking possession of the land, without any known permission of the vendor, make such part performance.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 287–292, 303, 306–308, 311, 314, 318–320, 322, 325, 326; Dec. Dig. ⟸129.]

[*Specific Performance* ⟸39.]

The defendant may have the benefit of the statute without pleading it.

[Ed. Note.—Cited in Suber v. Richards, 61 S. C. 403, 39 S. E. 540.

For other cases, see Specific Performance, Cent. Dig. § 119; Dec. Dig. ⟸39.]

[*Frauds, Statute of* ⟸113.]

[In order to make a letter evidence of a contract for the sale of land, it must distinctly set forth the terms of the contract, or refer to some written instrument in which the terms are set forth.]

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 239; Dec. Dig. ⟸113.]

[*Frauds, Statute of* ⟸158.]

[Parol proof of part performance of a parol agreement is not admissible to take the case out of the statute of frauds.]

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 374; Dec. Dig. ⟸158.]

[This case is also cited in Sebben v. Trezevant, 3 Desaus. 220, on the doctrine of limitation of action.]

This was a bill for the specific performance of a contract for a tract of land alleged to have been made by the complainant Philip Givens, as the agent of the late Mrs. Agnes Kelsal, with Dr. Calder, since deceased.

The bill charged that Dr. William Calder of Edisto Island, being possessed of a tract of land in fee, in Prince William's Parish, containing 818 acres, bounded northwardly by lands belonging to the heirs of John Kelsal, deceased; westwardly, by lands of Ann Kelsal, deceased; southwardly, by a creek, separating Coosaw Island, and eastwardly, by lands called Kean's Neck; and being desirous to sell said tract, complainant, as agent for Mrs. Ann Kelsal, about July, 1797, (after frequent meetings for that purpose) agreed with said William Calder for Mrs. Kelsal, to purchase the said land on the following conditions, viz. That she, Ann Kelsal, should pay for said tract 20 shillings per acre, in the following manner, i. e. £218 cash, and the remainder in 1, 2 and 3 years from the date of the purchase: That for securing the said remainder, the said Ann Kelsal should execute bonds to that amount, and also a mortgage of the said land to said William Calder, who promised complainant to go to Charleston and have the deeds of conveyance of said land, and also the bonds and mortgages aforesaid, drawn, and conveyances executed by him, and deposit them all in the hands of Mr. John Rhodes, merchant, in Beaufort, to be delivered by him to Mrs. Kelsal or agent, whensoever she should have paid the sum of £218 aforesaid, and execute the bonds and mortgage for the remainder. That in pursuance of this agreement, complainant as agent for Mrs. Kelsal, informed the said William Calder that the sum of £218 was in Mr. Rhodes's posses-

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sion, who had been directed to remit *it to Mr. Bold, merchant in Charleston, there to be subject to the said William Calder's or-

der, when he should have delivered the said conveyances to said Ann Kelsal. To this proposal, William Calder assented, and further agreed that said Mrs. Kelsal should take possession of said land, and prepare for the next crop if she thought proper. That Mrs. Kelsal entered on said land without hindrance; and that William Calder shortly after went to Charleston, where he directed an attorney to draw the conveyances and three bonds for £200 each, being the remainder of the purchase money, and a mortgage, &c. securing the payment of the same. That said Calder survived his return from Charleston but a few days, dying intestate, and with the deeds and mortgage aforesaid in his possession.

That said Ann Kelsal died in the month of January, leaving valid her will, wherein after other devises and bequests, she gave, devised, and bequeathed all the remainder of her estates, real and personal, not before disposed of, to the complainant Sarah Givens, who was her niece, for the term of her natural life, and at her death to her issue, by Phillip Givens. That complainant entered on said land as a part of the residuary estate, and now possesses it.

Bill further states, that complainant has long since paid the whole amount of the said purchase to Mr. Bold, to be paid to the representatives of said William Calder, when conveyances should be made by them to the devisees of said Ann Kelsal.

That one Henry Calder, the brother and pretended heir to said William Calder, hath since claimed said land.—Complainant having always been ready to perform the testatrix's part of the aforesaid agreement, and having paid the purchase money to Mr. Bold as aforesaid, wishes to procure good titles from Henry Calder, the brother and pretended heir aforesaid; but said Henry refuses to do it, alleging untruly, that his brother made no such agreement: that said H. Calder has applied to some gentlemen of the bar to issue a writ of ejectment to remove complainants from said land.

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*Bill prays that said Henry Calder may be compelled to answer particularly, whether he did not know of such agreement, of the terms thereof, and of Mrs. Kelsal's possessing said land in conformity thereto? Whether he did not find among his brothers papers, the conveyances spoken of here, the bonds and mortgage aforesaid, prepared for execution; and whether the purchase money of the said land hath not been offered him by complainant? Whether he hath not been requested to execute the conveyances of said land, and perform said agreement? Whether he hath not refused to do so, and for what reasons.

The bill prays that the said Henry Calder may be decreed to a specific performance of the said agreement; and that complainants may continue in possession of the land, uninterrupted by the said Henry Calder.

The defendant Henry put in an answer to the bill.

The answer admits that Wm. Calder of Edisto owned the property described in bill; states that defendant is entirely ignorant of all agreements made by said W. Calder and Mrs. Kelsal's agent, and of the arrangements made for completing the same. He therefore cannot admit the charges in bill, relative thereto. That said agreement stated in bill having been verbal, is void by the statute, 29th Chs. 2d, Chap. 3, of force in this state. That defendant is also ignorant of the agreement of said W. Calder, that Mrs. Kelsal should enter on and prepare said land for the next crop, and of her having entered thereon without hindrance.

That defendant has been informed that neither Mrs. Kelsal nor her agent entered on said land until some considerable time after said W. Calder's death; and even then without the knowledge of his heirs or representatives, and therefore that said entry is only an act of trespass. That defendant knows nothing of said W. Calders having gone to Charleston for the purpose of procuring said titles, bond and mortgage mentioned in bill, and cannot admit that he did; but admits

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that he went to town in August, *returned to Edisto, and then died of a fever very shortly after. That said W. Calder mentioned on his way to Charleston, at the time above mentioned, that he was in treaty with another person for said land, and if he did not decline, should have it.

Admits that defendant on his return from Scotland, found a number of blank papers, and among them deeds entirely unexecuted in his brothers possession, which he never even read, considering them useless. They were with other waste paper destroyed. That if they are to be produced as binding on defendant when he has no legal hold on complainants, then he must be at their mercy, and the terms must be their own. That Mrs. Kelsal died, as is stated in bill, and that the exhibit filed, is a copy of her will. Defendant thinks that a claim made under the residuary devising clause of a will, executed before the time it is said such purchase was made, is not maintainable; that from the circumstances mentioned, complainants claim should not be aided. That defendants cannot admit the asserted deposit of the amount of the purchase money with Mr. Bold to pay for said land, when proper conveyances should be made for it. Defendant denies that said money was ever tendered to him, or that they ever offered to fulfill their contract, until a considerable time after his arrival in this country; although the lands increased daily in value. That defendant, as an heir and brother of said William, has

powers of attorney from the other heirs.—That he has administered on the personal estate of his brother who died intestate, and without issue. Admits that finding said Givens in possession of his land, he has bro't an action at law to eject and recover damages against him. That said Givens applied to defendant for titles a length of time after defendants arrival here, under pretence of the said parol agreements, which defendant declines doing for the reasons before mentioned.

Denies all combination, &c.

The cause came to a hearing, and the evidence was gone into, and an argument en-

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sued. But the complainant's *counsel being prevented by the court from giving any evidence of the contents of a letter from Dr. Calder to Mr. Givens,† which was alleged, but not proved to be lost, the complainants were suffered to withdraw the cause, in order to file a supplemental bill, charging the defendant with having seen the said letter, and with having possession of the title deeds, drawn by order of D. Calder, though not executed.

The complainant accordingly filed a supplemental bill, charging that the late Dr. Calder had, a short time before his death, written a letter to Mr. Givens, informing him that he had caused the deeds to be drawn to convey the lands he had sold him for Mrs. Kelsal, and requesting them to meet him to complete the business.

The bill also charged that the defendant, when he got possession of his brother D. Calder's papers, had found among them the deeds drawn by his instructions for conveying said lands to Mrs. Kelsal.

To the supplemental bill, the defendant put in his supplemental answer.

Answer admits that complainants filed their bill at the time mentioned in their supplemental bill, to which defendant filed an answer on the 30th day of September, 1801.—Admits that complainants have since filed a supplemental bill, in answer to which defendant says: that after he arrived in this country, (in 1798,) the documents and papers of Dr. Calder were delivered to him, and he found among them the unexecuted deeds, bonds and mortgages, spoken of in the original answer: but solemnly declares he did not find among those papers any letters to or from Dr. Calder to Philip Givens, or Mrs. Kelsal, or to any other person relative to the lands in question: nor any memorandum or instruction in writing, except the unexecuted deeds, &c. aforesaid. That the knowledge of the letter from Dr. Calder to Philip Givens,

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defendant acquired from Givens *himself under the following circumstances. On the death of Dr. Calder, defendant came to and arrived at Charleston in April, 1798. Soon after his arrival, defendant was at Fenwick's Island where his brother's negroes planted, when P. Givens made himself known, and informed defendant that there had been a treaty on foot between Dr. Calder and himself, as agent for Mrs. Kelsal, for the purchase of the land which the doctor owned adjacent to her lands. P. Givens stated that the bargain had been nearly closed: that Dr. Calder had, by letter, invited him to settle the business, but the death of the doctor prevented the completion; and Givens then presented to defendant a copy of the letter which he believes was in the hand-writing of his brother, and was to the effect set forth by complainants. That P. Givens spoke at that time as of a bargain rendered incomplete by the death of the parties, and actually solicited defendant to sell him the land: but defendant expressing a reluctance to do so, he solicited the refusal of it, and declared he had taken no possession of it.—That Givens so little valued the letter in question, that he offered to give it up, or a copy of it: upon which defendant took a copy. Defendant knows not what has become of the letter, but supposes Givens being indifferent about the matter, lost or destroyed it. That defendant hearing that Givens intended to demand an execution of the bargain, applied to counsel and shewed a copy of the letter, and to the best of his recollection, (for he lost it,) the opinion of the counsel was, that it was an incomplete contract, and not obligatory. That defendant heard no more on the subject until April, 1799, when Wm. Robertson requested by letter that defendant would make titles to Givens for the lands, which he declined under a conviction that the bargain was incomplete. The answer concludes as usual, and prays to be dismissed, &c.

The cause afterwards came to a hearing.

The following evidence was given on the part of complainant.

Mr. W. Robertson testified that Dr. Calder

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employed *him to draw deeds of conveyance from himself to Mrs. Kelsal and W. Givens, to whom he had sold some land.—In his instructions he stated it to be a tract of about 800 acres, at 20 shillings per acre; part of it to be cash, and the balance payable by instalments. He took the description of the land, and the terms from Dr. Calder's own hand writing. He drew also a mortgage of the land to secure the purchase money. Dr. Calder spoke of it as an actual sale, having made the arrangements with Mr. Givens, and said that by the agreement, the money was to be lodged in Mr. Bolds's hands till the titles were executed. He said he came to town expressly on that business, and was going out of town to meet the parties, and com-

†See 2 Henry Blacks. 263. 2 Atk. 72. 1 Vern. 389. 1 Lord Raym. 731. 3 Term Rep. 151. 4 Term. Rep. 263. Gilb. Ev. 71.

plete the business. The witness delivered all the papers drawn up, but not executed, to Dr. Calder, who left town; and as witness heard, died a few days after at his plantation.

The manner in which the cash part was to be settled or provided, was not mentioned in the instructions.

Mr. John Bolds testified that Mr. Rhodes sent down 260*l.* to pay the cash part of Mr. Givens's purchase of land from Dr. Calder, as soon as the titles were executed. Dr. Calder knew that this money was lodged with him, and asked if it was ready for him, and he answered yes.—The money has lain in his hands ever since. If Calder had called for it, he would have paid it to him. Calder made no reply, but that he had got the papers from Mr. Robertson, and was going to the country to close the matter with Mr. Givens. Thinks he would have held the money for Calder till he heard from him; but if Mr. Rhodes had written to him to return the money, believes he should have done so.

Mr. Rhodes testified that he had, at the desire of Mr. Givens, sent down £260 to his partner in Charleston, Mr. Bolds, to pay Dr. Calder the cash part of a purchase W. Givens had made from Dr. Calder. It has never been withdrawn. Witness knew that Mr. Givens and Mrs. Kelsal took possession of the land, and held it, and exercised acts of ownership over it. Cannot say whether with

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*the knowledge and consent of Dr. Calder, but presumes so.

Mr. Hanahan and Mr. Seabrook testified that they had heard Dr. Calder say he had agreed to sell some land to Mr. Givens. It lay to the southward. They understood the bargain was completed.

Mr. Fickling swore that he had a conversation with Dr. Calder about his selling land to Mr. Givens, and about giving possession to Givens; but cannot be positive that Dr. Calder said he gave Givens leave to take possession, or was present when he did.

Mr. W. Whaley testified on the part of the defendant, that Dr. Calder stayed a night at witness's house on his way down to town in August, 1797, and informed him that he was going to town to see Mr. W. Simmons, to learn from him whether he had declined the purchase of a tract of land he had offered him, (that now in contest) for Givens, the complainant, had informed him that Mr. Simmons had told him he had declined it. Dr. Calder added, that if Mr. Simmons chose it, he should have the land. Mr. Whaley said that he was with Dr. Calder during the greater part of his illness on his return from town, and at his death. He never saw Givens or Mr. Fickling there, and he does not believe they saw him after his return.

Mr. W. Simmons testified that he never told Givens that he had declined the purchase of the land from Dr. Calder, that he did not even know Givens.

Mr. Joseph Alston, Mr. Ward, and Mr. Pringle argued for the complainants, that the contract in this case was very deliberate, and there was no uncertainty. The land sold was known and ascertained; the price was fixed; the terms arranged; the deeds drawn by Dr. Calder's own instructions, and found among his papers at his death; and in consequence of this agreement, and of these arrangements, certain acts were done, sufficient to take the case out of the operation of the statute of frauds. These acts were, the depositing part of the purchase money, with

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*the knowledge and approbation of Dr. Calder, in the hands of an agent, who was ready to pay it whenever the deeds should be executed. And then the purchaser had taken possession of the land and held it, under the impression that the bargain was completed. It was true there was no positive evidence that the possession had been taken by Mr. Givens, with the consent or by the direction of Dr. Calder; but the circumstances are strong to support the presumption that it was with his consent. Some of the witnesses thought so. And indeed the instructions in writing, given by Dr. Calder to Mr. Robertson, to enable him to draw the deeds, amounts to such memorandum in writing, connected with the other circumstances, as would take the case out of the statute.

That in fact this was not an executory agreement, but executed. The letter of Dr. Calder to Mr. Givens, now admitted by defendant in his supplementary answer, shews that he considered the bargain as closed; and there is a marked correspondence between the letter, and the evidence of Mr. Robertson and Mr. Bolds.

There was no room for the jus deliberandi or locus penitentiæ. The contract was perfected, and ought to be carried into specific execution. There is no danger of fraud or perjury in such a case, and it is to avoid that danger that the statute was enacted.

The counsel cited 1 Vern. 364. Staples v. Butcher; 2 Vern. 456. Pike v. Williams; 2 Stra. 783. 3 Bro. C. C. 162. Tawney v. Crowther; 1 Fonbl. 165. 3 Ves. jun. 696. Foster v. Hale; 3 Atk. 1, Lacon v. Martins; 3 Atk. Only v. Walker; 3 Atk 503. Welford v. Beasly; Powel. 291. 1 Fonbl. 171, (in note) 168, 182. 1 Atk. 8, 13. 4 Ves. jun. 686.

Messrs. Desaussure and Ford and Parker argued for the defendant.

They contended that this case ought to be examined on two grounds.

1st. Under the operation of the statute of frauds, 29th Car. 2, chap. 3.

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*2nd. Under its own circumstances, independent of the statute, on the ground of the

incompleteness of the contract, and on the inadequacy of price.

1st. Under the statute of Charles, it has been decided that if an agreement be by parol, and not signed by the parties, or some body lawfully authorized by them, if such agreement be not confessed in the answer, it cannot be carried into execution. But when in his answer, he allows the bargain to be complete, and does not insist on any fraud, there can be no danger of perjury; because he himself takes away the necessity of proving it.

So, if carried into execution by one of the parties, as by delivering possession, and such execution be accepted by the other, he that accepts it must perform his part. 1 Fonb. 165, 6, 7, 8, 9.

The three important circumstances are:

1st. The signing by the parties.

2d. The confession in the answer that the bargain is complete.

3d. Or if possession has been delivered by one party, and accepted by the other as an execution of a complete agreement, or by such other acts as amount clearly to part performance.

In our case none of these are to be found.

Dr. Calder signed nothing.

His brother and heir does not confess the agreement to be complete.

No possession was delivered, but was taken after the death of Dr. Calder, and the pay was equivocal. As to what the law construes a signing. See 1 Fonb. 165, 178, (note C.) 1 P. Wms. 770, also 618, Hawkins v. Holmes, and notes by Mr. Cox. Whaly v. Bagenal, 6 Bro. P. C. 45 to 55. Parol evidence inadmissible to prove the agreement. 1 Vesey jr. 326, 330, 1, 3, 4. Brodie v. St. Paul.

Parol evidence not admitted to prove variation of agreement, though it is acknowledged an agreement existed. 1 Vesey jr. 402, Jordon v. Sawbrien.

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*Parol evidence refused where complainant stated agreement and defendant admitting that an agreement existed, denied that it was as stated. 3 Vesey, jr. 34, 8, 9, 40. Pym v. Blackburn. See all the cases cited in the note to this case, p. 38, 9, 40.

The cases which upon equitable grounds have been exempted from the operation of the statute of frauds are:

1st. Where in consequence of fraud the provisions of the act have not been complied with. See 1 Vern. 296. 1 P. Wm. 618. 1 Vesey 123. 2 Vern. 506. 2 Atk. 98. 3 Atk. 388. Ambler 67.

None such are pretended in this case.

2d. Where the agreement has been in part performed, either by delivery of possession, payment of money, &c. &c. see 1 Vern. 363, Butcher v. Stapely. 2 Vern. 455, Pike v. Williams. 1 Vesey, 82, 218, 297, 437. 2 Bro. C. C. 559, 567, Whitechurch v. Bevis. 3 Bro. C. C. 400. 1 Fonb. 165, 175. 1 Atk. 12, Clerk v. Wright. 3. Atk. Lacon v. Mertins. 6 Bro. P. C. 45, Whaly v. Baginal.

3d. Exception is where the answer admits an agreement. This has prevailed to the extent of binding the defendant by that admission. 2 Vesey, jr. 243, Mortimer v. Orchand.

"It has never been pretended that the admission of an agreement authorized the plaintiff to give (parol) evidence of the terms." 3 Vesey, jr. 39.

The late cases shew that the judges think the court have gone too far in trenching on the statute of frauds.

In Mortimer v. Orchand, 2 Vesey, jr. 243, the Chancellor says, (in 1793,) the bent of my mind is strongly in favor of the wisdom of the statute. Therefore I am rather against the cases which have entrenched upon it.

The present Chancellor (1798) declared he thought that "the Court had gone rather too far in permitting part performance, and other circumstances, to take cases out of the statute." 3 Vesey, jr. 712.

Parol evidence not admitted to prove an

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agreement *made upon purchase of an annuity, that it should be redeemable. 1 Vesey, jr. 241, Hare v. Sharewood.

The answer denies that the agreement is complete.

The confession of an agreement in the answer must be complete, to take it out of the statute of frauds.

So is the text of 1 Fonb. 167, 8, 9. But where in his answer he allows the bargain to be complete, and does not insist on any fraud." And so are the cases cited.

In Moor v. Edwards, 4 Vesey, jr. 23, 4, the Lord Chancellor was of opinion, that "though the agreement is admitted, the statute may be used as a defence to the suit, notwithstanding complainant alleges part performance, by taking possession and improving. A case in Atkins misleads people on this point.

"Saving the benefit of the plea to the hearing gives a right to insist on the statute, as a defence to the suit, p. 24.

As to part performance, taking the case out of the statute, we answer, there was no part performance here, for the possession was taken, not given. It was taken after the death of Mr. Calder.

Now all the cases of part performance are made to turn upon the point, that one party permitted the other to act on the parol agreement. See 1 P. Wms. 770, 1, 2. Note (1.) See cases cited in 1 Fonb. 169, note 4, 171, note e.

The general rule is, (1 Fonb. 175,) that the acts must be such as could be done with no other view or design than to perform the agreement, and not such as are merely in-

troductory or ancillary to it. Gunter v. Halsay. Ambler 586. Whitbread v. Brockhouse. 1 Bro. Rep. 412.

The giving possession is to be considered as an act of part performance. 1 Fonb. 175.

But giving directions for conveyances, and going to view the estate, are not. Clerk v. Wright, 1 Atk. 12. Whaley v. Bagnel. 6 Bro. P. C. 45. 1 P. Wms. 770. 1 Fonb. 165, 6.

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*Payment of money is part performance. Lacon v. Mertins, 3 Atk. 4. See 1 Atk. p. 497. But payment of earnest is not. 1 Fonb. 175. And there was no payment in this case.

Defendant not bound to confess or deny the agreement, as the statute affords a good defence against the performance of it; and it is immaterial whether the defence be set up in the shape of a plea, or by answer. The statute not having prescribed any mode in particular, by which a defendant must avail himself of such defence.

See 1 Fonbl. 171. 2 Bro. Rep. 559, 566, 7, 9. Whitchurch v. Bevis. 1 Bro. Rep. 404, 9. Whitbread v. Brockhurst. See particularly page 409.

By insisting in the answer on the statute, the party shall have the same advantage as upon a plea. 1 Eq. Cas. abr. 19, pl. 3. 2 P. Wms. 144. 1 Ves. 298. 1 Bro. Rep. 413.

Lord Camden's opinion in Cole v. White. If facts alleged to be done in part performance of an agreement, are denied, it is immaterial whether such denial be by plea or answer. 1 Bro. Rep. 416, 418. 3 P. Wms. 244.

Even the cases most favoring the opinion, that Courts of Equity may compel the performance, and consequently the discovery of merely parol agreements, require, that the terms of the agreement should be clear, definite and conclusive; and therefore if the court can collect the jus deliberandi or locus penitentiæ to have been reserved, the contract shall not be considered as complete till reduced into writing, or in part performed. 1 Fonbl. 171. Whaley v. Bagnel. 6 Bro. P. C. 45. Whitchurch v. Bevis. 2 Bro. Rep. 566.

We contend secondly, that under the circumstances of the case, and independently of the statute of frauds, it is in the discretion of the court to refuse to enforce this pretended agreement, on the ground of the incompleteness of the agreement; and the uncertainty, and on the inadequacy of price, and on alteration of circumstances.

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*That it is in the discretion of the court, see 1 Fonb. 178. 1 Vesey, jr. 565, Cooper v. Denne.

The agreement being incomplete, there was room for the locus penitentiæ. The letter of D. Calder to Givens, refers to a future meeting to compleat the business.

That uncertainty of terms is a good ground to refuse to decree specific execution. See 3 Vesey, jr. 184, 5.

Lord Chancellor says, "I lay it down as a general proposition, to which I know no limitation, that all agreements in order to be executed in this court must be certain and defined, equal and fair, and proved as the law requires. 3 Vesey, jr. 420. Lord Walpole v. Lord Orford.

That inadequacy of price will induce the court to exercise its discretion in refusing to compel specific performance. See 1 Fonb. 116, &c. &c. 2 Bro. P. C. 396.

Slight circumstances will be laid hold of. 1 Bacon, 109, 117. Title agreement.

Alteration of circumstances also will induce the court not to enforce specific performances. 1 Fonb. 384. 5 Viner's abr. 538, pl. 18. One of the parties was dead, who could explain the transaction. His heir is entirely ignorant. Meanwhile the land has risen three fold in value.

With respect to the performance of a contract, the time is material. Therefore a bill for specific performance was on gross laches of plaintiff, dismissed with costs. 4 Vesey, jr. 686, 9. Harrington v. Wheeler.

Lord Chancellor says, the case in 1 Amb. 12, Gibson v. Patterson, is fairly reported; time is material.

Agreements are not to be made out partly by parol and partly in writing. 1 Fonb. 174.

There is no instance of such an imperfect agreement decreed to be specifically executed against heirs of the supposed vendor. He certainly received no money and gave no possession; for he died immediately on his return from town without seeing Givens.

Dr. Calder's not signing the deeds in pres-

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ence of his at*torney, nor before his death, proves that he thought the matter open till he should see Givens and Mrs. Kelsal, who were to execute on their part.

Mr. Givens is not entitled to any favor. He attempted to mislead Dr. Calder, with respect to Mr. Simmons.

Dr. Calder not receiving the money, when Bold told him it was ready; but only desiring him to keep it; that he was going to meet Mrs. Kelsal and Givens, proves he did not consider it concluded.

Chancellor RUTLEDGE afterwards delivered the decree of the court.

The complainant's bill states, that he as the agent of a Mrs. Kelsal now deceased, in July, 1797, entered into a parol agreement with Dr. W. Calder, now also deceased, for the purchase of a tract of land on the terms and conditions in bill set forth. It states further, as a part performance of the agreement, that the sum agreed to be paid down was deposited with the complainant's agent, to be paid to Dr. Calder, when he should execute and deliver the titles to Mrs. Kelsal. Also, that Dr. Calder assented to Mrs. K's

taking possession of the land, (which she did) and preparing for the next crop, if she thought proper.—That Dr. Calder went soon afterwards to Charleston, had titles drawn, and shortly after he returned home, (viz. in the month of August,) and died without compleating his contract. The bill therefore prays a specific performance by defendant as the representative of Dr. Calder.

The defendant in his answer says, he is entirely ignorant of any agreement made by Dr. Calder with complainant as agent of Mrs. Kelsal for the land, and therefore can neither admit or deny the charges in the bill. That being at any rate only a parol agreement, it is void by the statute of frauds. The defendant is ignorant of Dr. Calder's agreeing to Mrs. Kelsal's entering on the land previous to his making titles thereto; but has been informed that neither she nor her agent entered thereon till some time after Dr. Calder's death. He does not admit the de-

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*posit of the money as a part performance, and denies that it was ever tendered to him, or that complainant offered to fulfil his contract, till a considerable time after defendant arrived in this country. The defendant not having confessed the agreement, nor admitted the allegations of part performance, as stated in bill, either of which would have been sufficient to induce the court to decree a specific execution of the agreement, (because where defendant confesses the agreement, or acknowledges part performance, there is certainly no danger of fraud or perjury, which were the objects contemplated by the statute) it was necessary for the complainant to support his case by proof. This he has attempted to do by the adduction of parol evidence as to the part performance; first, by payment; next, by delivering possession of the land, & thereby to take the case out of the statute. He also attempted to prove by parol evidence, the contents of a letter written to him by Dr. Calder; but that not being admitted, the counsel on both sides went into the cause and argued the case very fully. The complainant immediately after the first hearing, filed a supplemental bill, wherein he recites the letter alleged to have been written by Dr. Calder to complainant, and calls for an answer from the defendant, whether he has not seen such a letter in Dr. Calder's hand writing. Defendant by his answer acknowledges that the complainant had shewn him a letter which he believed to be in the handwriting of his brother, though he had not seen or corresponded with him for many years. The letter in substance is to inform complainant that all the writings for the land he had bought were ready, and the sooner he came and settled the better; and desired Mrs. Kelsal should go with complainant, and take her security with her. The parol testimony of Mr. Fickling was produced to prove that he had seen the letter, and had a conversation with Dr. Calder about the sale of land, and giving possession to complainant; but he does not positively swear that Dr. Calder told him that he had given possession to complainant, nor does he know if Dr. Calder was present when

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complain*ant took possession, or that he gave complainant authority to take possession.

Mr. Whaley on the part of defendant, swore that Dr. Calder on his way to Charleston, in August, 1797, slept at his house, and informed him that he was coming to town to see Mr. W. Simmons, and to learn from him whether he had declined the purchase of the land now in contest: complainant having informed Dr. Calder that Simmons had declined it: that if Simmons had not told complainant so, he should have the land if he thought proper: that Whaley was with Dr. Calder after his return, during the greater part of his illness, and when he died: he never saw either complainant or Fickling there, and does not believe they saw the doctor after his return.

Mr. Simmons swears that he not only had not made such a declaration to complainant, but that he had not seen nor ever heard of complainant. The cause has been re-argued on the supplemental bill and letter, and the arguments ought to have been confined simply to the point, whether the letter written by Dr. Calder to complainant varied the case, without going into parol proof of possession. In determining on this case, we must reverse the order of things, and take up the last question first, by disposing of the letter set forth in the supplemental bill, and determining whether it varies the case. According to adjudged cases, it is clearly held that in order to make a letter evidence of an agreement for the sale of lands to take it out of the statute, it ought distinctly to set forth the terms of the agreement, or at least refer to some written instrument in which the terms are set forth, and that the party accepted such terms. Does the letter alluded to specify any thing? It does not. It only informs complainant that the deeds were ready when Mrs. Kelsal was disposed to perform her part. There was no obligation on her to do it. No evidence has been offered to shew even that she authorized complainant to negotiate the business. There was therefore no mutuality of contract.—That letter then,

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though the contents are admitted, does *not vary the case. As to the delivery of possession, there is no actual proof of it, for complainants own witness does not positively swear that Dr. Calder told him either that he had given or even authorized complainant to take possession. And from the evidence of Messrs. Whaley and Simmons, it is rather to be presumed that no possession was ever given or even authorized. The case therefore stands precisely on the same grounds it did

upon the argument on the original bill and answer.

It is a singular case, and there is not one like it in the books, for the parties to the agreement, seller and purchaser, are both dead, and the person who now comes forward to claim a specific performance of the agreement in his own right as the residuary legatee was the agent of the purchaser. It rests with him to make out such an agreement as best suits himself, and that too against a person who could not possibly know any thing of the transaction, being a total stranger in this country. We do not mean to charge complainant with suggesting in his bill any untruths; but a case of this sort may occur, and it would be scarcely possible for a defendant circumstanced like the present, to controvert the facts, if parol evidence was to be admitted. If ever there was a case therefore in which the statute should be rigidly adhered to, and the party have the benefit of it in its greatest latitude, it is the present.

The judges of the court of Equity were formerly very astute in laying hold of circumstances, in order to enforce parol agreements, and to take them out of the statute, whereby it is problematical whether they have not done more injury than real good. For though by a strict adherence to the letter of the statute, a present inconvenience might have been sustained, the mischief would soon have worked its own cure, and the parties would have reduced their agreements to writing, agreeable to the directions of the law. There would not then have been so many cases on the subject, various in their circumstances, and the decisions on them (as

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has been observed by a very ingenious *writer) not immediately reconcileable. The modern adjudications however are corrective of the former; and we find judges of the present day, declaring the bent of their minds strongly in favor of the wisdom of the statute, and against the cases that have intrenched upon it, and accordingly framing their decisions conformable to the intention as well as the letter of the statute. The question now before the court we believe has never been fully discussed. The present decision will therefore establish a precedent, and with it the law on the subject. The numerous cases that were cited have been carefully reviewed, and after mature consideration of them, we are clearly of opinion, that in the case of parol agreement, not tinctured with fraud, if the defendant chooses to avail himself of the statute, it is not necessary that he should by answer confess or deny the agreement, the law having declared it void. Neither ought he to be compelled to confess or deny part performance of it, although charged in the bill. That to permit parol proof of a parol agreement, would be in effect to repeal the statute, and introduce all the mischief, inconvenience & uncertainty it intended to prevent. That to admit parol proof of part performance of a parol agreement would be equally improper, and is not warranted by any of the cases in the books; for it is clearly held that if the part performance alleged be possession of land or the payment of money, the complainant must prove delivery of possession in the first case, or receipt or written evidence of payment in the other, to entitle him to a specific execution of the agreement. All the parol testimony therefore which has been adduced in the case to prove the parol agreement or the part performance of it, is made inadmissible and must be laid aside.

The case thus standing without proof on the part of complainant, the facts of part performance, namely, payment of part of the purchase money and delivery of possession, not being admitted, but denied by the answer as fully and explicitly as defendant could do so,

The bill must be dismissed with costs.

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2 Desaus. *191

*Case XXI.

[Present, Chancellors Rutledge, Marshall and James.]

MAINE and Wife v. Adm'r of DICKINSON.

(May, 1803.)

[*Executors and Administrators* ⟸56.]

The complainants bill was for a discovery and account. They claimed under a voluntary deed of gift, to a niece. The defendant relied on a release, and a receipt of a later date, as full settlements of the estate.

It was in proof that no money was paid at the time of signing the release and receipt, and no actual consideration was established; which reduced the case to a question between two volunteers. Decreed that the first deed should prevail, and defendant to account for the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 308; Dec. Dig. ⟸56.]

Chancellor RUTLEDGE delivered the decree of the Court.

Complainants bill is for a discovery and account of the estate of J. Dickinson. They claim so much of the widow's part of it, as she has not received from the administrator, by virtue of a deed of gift to complainant's wife, dated 20th May, 1798. Defendant opposes the claim to discovery in his answer, files an account of money paid her, and concludes finally by pleading a release from the widow, Mrs. Dickinson, and a receipt for £730. in full for the widow's proportion of the estate, dated 23d November, 1799.

The complainant's wife was Mrs. D.'s favored niece. The deed was executed when she was in good health. It is stated to be in consideration of natural love and affection, and to the intent to vest the absolute prop-

erty of the negroes and all the rest of her property in complainant's wife at her death, and it was recorded in July, '98, previous to complainant's marriage. Complainant's witness, Miss Conyers, deposed that she frequently visited Mrs. D. during her last illness, (she died in January, 1800,) and the night before her death, the complainant, Maine asked her if she would have the deed back? She answered no! If it was not a good one, he might have another made.

Dr. Stevens, the defendant's witness, swore that when she executed the deed to defend-

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ant, she was in a destitute *situation, and very sick. That she executed the release immediately as it was presented; the other paper two or three days afterwards. That she was perfectly satisfied, took time to consider of it; and expressed her thanks to defendant, and Mrs. Shrewsbury for their attention. That when she executed the second paper, defendant promised to take care of her, that she would not want. That she was very sick when she signed the release and receipt, and there was no money paid when she signed the receipt for £730. on 23d November, '99. It is necessary here to remark that defendant also claimed under a deed from Mrs. D. 22d October, '99, the negroes mentioned in deed to complainant, and took possession of them on Mrs. D.'s. death. Complainant brought an action against him, obtained a verdict, and has thereby established his claim at law to the negroes. The only question now is, whether that deed or the release and receipt are to prevail. On the part of defendant, it was argued that he was a purchaser for valuable considerations, without notice, and to prove it, a lease for life from him to Mrs. D. of a house which he swears was purchased by him purposely for her accommodation, and her letters approving the house were produced. It is to be observed that this house was purchased in November, 1799, two or three months before her death, when she was extremely sick, and most probably with some of the money to which she was entitled from her husband's estate. She however never occupied it, for she died before it was in a situation for her to go into. As a strong proof that he was not a purchaser for valuable consideration of Mrs. Dickinson's rights, and of the release and receipt, the lease specifies that it was made in consideration of £250.: it does not say by whom paid, but it could be by no other person than the lessee Mrs. D. The release states what has not been proved, that he had settled his account; and it is in evidence that no money was paid by him when the receipt was given. If the defendant had proved himself a bona fide

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purchaser without notice, he must have *succeeded in his claim against complainant, whose deed was only a voluntary one, which though for a good consideration, such as natural love and affection, would not have prevailed. But defendant not having paid any consideration for his release or receipt, or if he had paid or promised to pay any money, it being only out of what Mrs. D. was legally entitled to from her husband's estate, he cannot be considered as a bona fide purchaser, nor can the release and the receipt be viewed in any other light than as voluntary acts; by no means however under as favorable circumstances as the deed to complainant's wife, which was made when Mrs. D. was in sound health, for a favorite niece, and in the cool moment of reflection. Whereas the release and receipt to defendant were obtained from her when she was extremely debilitated—almost at her last gasp, and not perfectly recollecting at the time, (as may reasonably be supposed) the deed she had formerly executed in favor of her niece, because the very day before her death (it is in evidence) she desired complainant Maine to have another deed drawn, if the former one was not sufficient. Upon a mature consideration of this case, the court are of opinion that defendant cannot in any point of view be considered as a purchaser for valuable consideration: but the release must stand purely on the footing of a voluntary deed. No money being paid when the receipt was signed, that must be laid aside.

Deed to complainant's wife, and the release being considered as altogether voluntary, the established rule both at law and in equity must prevail, which is that where there are several voluntary deeds, the first is to take place.

Complainants deed has already been established at law, and it was absolutely necessary for them to come here to obtain a discovery and account. It must therefore be referred to the master to state and settle the defendant's accounts and ascertain the balance remaining in his hands, which was unpaid at Mrs. D.'s death. With respect to the Georgia Lands, by the law of that state, if a person dies intestate, his widow is entitled

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to one third of his *whole real and personal estate. She, however, has a right to elect her dower if she thinks fit, and is nevertheless entitled to one third of his personal estate; as Mrs. D. did not make any election, complainants can only be entitled to one third of the money the land sold for.

2 Desaus. 194

Case XXII.

[Present, Chancellors Rutledge, Marshall and James.]

WILLIAM SKIRVING v. EDWARD NEUFVILLE.

(May, 1803.)

[*Estoppel* ⟸94.]

A mortgagee agrees that the mortgagor should sell to a third person part of the mortgaged negroes at an advanced price, and receives the purchase money, for which receipts were given, as of payments made on the debt due by the mortgagor. This is such a privity of contract between the mortgagee and the new purchaser, as releases the negroes so purchased and paid for, from the operation of the mortgage, though the remaining negroes are insufficient to satisfy the balance of the debt due by the first purchaser on the mortgage.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 247; Dec. Dig. ⟸94.]

This was a bill filed to obtain a perpetual injunction against a mortgage of negroes from George Tunno, to Edward Neufville, part of whom W. Skirving purchased with the consent of defendant, and paid him nearly all the purchase money. But the defendant insisted the negroes were liable under the original purchase, and mortgage by G. Tunno, for a deficiency, due by G. Tunno, which the other negroes included in the mortgage could not satisfy, as appeared by a sale made of them.

It appeared that when George Tunno was found to be incapable of paying the purchase money, Mr. Edward Neufville, the mortgagor, was anxious to obtain a safe purchaser for them, and opened a communication with Col. W. Skirving, which terminated in his agreeing to purchase part of the negroes, and to pay a larger price for them than Tunno had agreed to give; and the defendant consented to the purchase. Col. Skirving paid the purchase money through his factor to the defendant Neufville. But the receipts

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were expressed to be on account of Tun*no's debt to Neufville. The only question was whether there was such a privity of contract between complainant and defendant, as released the negroes from the mortgage of Tunno, on Col. Skirving's paying the defendant the amount of his purchase, there being a deficiency on the sale of the rest of the negroes.

After the argument, Chancellor JAMES delivered the decree of the Court.

George Tunno bought 62 negro slaves of the defendant and gave him a bond and mortgage for them.

The debt being unpaid, defendant threatened to enforce his mortgage. George Tunno became anxious to make sale of some of the negroes, to raise money to pay the debt, and made application to the complainant to become the purchaser of some of them. That complainant called on defendant for the purpose of communicating with him on the subject. But defendant was not at home. Defendant afterwards wrote to complainant on the subject. And in two days after, defendant wrote to complainant, requesting him to commit to paper, the number and value of the negroes, the terms of payment, and reasonable manner in which complainant expected to accomplish the latter. And the defendant also expressed the most unlimited confidence in complainant's compleating the promises made. Complainant returned an answer in the manner requested by defendant, and conceiving the matter sanctioned by defendant, he concluded the bargain, by which he bound himself to pay £2775 for 37 of the negroes, most of whom were delivered to complainant by G. Tunno, with the assent of the defendant, and part of them by defendant himself. Afterwards the remainder of the negroes were sold below their value (defendant not attending the sale) under the mortgage, so that a large sum remains due on G. Tunno's original purchase and mortgage. Complainant has paid almost the whole of the amount of his purchase to defendant. But defendant insists that the negroes sold to complainant are liable to

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make good the deficiency *due by Tunno, on the mortgage; and he threatens to enforce the mortgage against them. The bill prays that the negroes purchased by complainant may be discharged from the lien, and that he may have a complete title.

The defendant admits that G. Tunno was indebted to him as stated, but swears that he told complainant previous to the purchase of the negroes, that he would not relinquish his lien on the negroes, until the whole debt was paid; and thinks that complainant has secured himself from the effects of the mortgage, by an indemnity from George Tunno's brothers. That defendant did not deliver any of the negroes to the complainant, and submits that on a fair construction of the letters produced, he (defendant) cannot be considered as a party to the contract; but that the same was made by complainant with George Tunno.

Mr. Price proved that the first mover towards the contract was the defendant, who was anxious to conclude it. That complainant is particular in his bargains, and would not have concluded this if he had thought the property would remain subject to the lien, after he had paid his purchase. That the price of the negroes was £15. per head higher that the mortgagor had given for them. That complainant has paid the whole of the purchase money except £47. The letters were produced, as above stated, also a letter of 21st April, 1796, from defendant to complainant, wherein he makes some ar-

rangements relative to the specified negroes which complainant was to receive. Complainant did receive the negroes and made payments on his purchase.

The court considered the bargain compleat at this stage, and would not consider the subsequent letters of defendant to T. Tunno, nor the receipts expressing the payments to be on account of George Tunno, to bear upon the question, as this would be allowing defendant to new model and colour the transaction so as to suit his own interests. The court upon the whole of the evidence, was satisfied that the application first came from

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the defendant to com*plainant. That defendant was anxious for the sale to the complainant, whom he considered a purchaser in whom he could place unlimited confidence. What then is to be presumed by this unlimited confidence? Certainly one without restriction, or any other pledge to secure the property than that required by the letter above stated, (to wit: that complainant would commit to paper the number and value of the negroes, the terms of payment, &c.) the object of defendant seems to have been to get the contract reduced to writing, so as to make it binding on the parties. Complainant did so write, and defendant was satisfied. Here then the contract was complete; and the privity of contract between complainant and defendant is established. It is acknowledged by defendants counsel, that this privity is the principal criterion by which to judge whether this contract was a separate and independant one of that made with George Tunno.

The court thinks the privity is complete in all its parts. As soon as G. Tunno assented to deliver up the negroes, it appears that he was no more consulted, and every step taken was between complainant and defendant.

Complainant thinks himself released from the operation of the mortgage, and Mr. Price proves that complainant acted on that principle. Defendant swears he never meant to release the negroes till the whole debt (from Tunno) was paid. The letters must decide this point in this contradiction; and the court is of opinion that whether defendant meant to release the negroes purchased by complainant from the mortgage or not, he has used expressions which the court must consider a release. It is said that the defendant's intent never to release the negroes till the whole amount of George Tunno's purchase was paid, came to complainant's knowledge. This would have been very important if it had come to complainant's knowledge before the completion of the contract: but it seems to have been after the contract was completed. Another circumstance of weight is, that defendant might have got more for the remainder of the negroes, (in Tunno's

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hands) and receiv*ed full payment of the balance by more equitable means than a rigid adherence to the enforcement of the mortgage by the sheriff for cash; at which sale he did not attend, but allowed them to go off low. Mr. A. Tunno offered his note for the balance of debt, with an endorser at 90 days, if he would release the negroes—this was refused.

The conclusive consideration with the court is, that the complainant bought the negroes with the consent of the defendant for a full price, (higher than the first sale) and complainant has paid it all except £47.

It is common for sellers to warrant the property on sales for full value. Here where defendant was the real seller for full price, (which he has received) there is no good reason why the seller should be allowed to disturb the property.

Decreed, that on complainant's paying the balance due by him on his purchase, (and it is referred to the master to ascertain it) the defendant be perpetually enjoined from disturbing the complainant under the mortgage.

Defendant to pay costs of suit.

Mr. Pringle for complainant.

Messrs. Ward, Drayton and Simons for defendant.

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2 Desaus. 198

Case XXIII.

[Present, Chancellors Rutledge, Marshall and James.]

ANONYMOUS.

(May, 1803.)

[*Husband and Wife* ⊂283.]

The Court of Chancery will decree alimony in proper cases: but a widow is not entitled to recover alimony or maintenance from the estate of her deceased husband, after living many years separate from him, without suing in his life time. The demand does not survive, though the separation was at the desire of the husband, and against her inclination, and there was no fault in her conduct alleged against her: and he never maintained his wife or child during his life, and made no adequate provision for them by his will: and though she forbore to institute suit for alimony in her husband's life time, to prevent violence between him and her relations.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1073; Dec. Dig. ⊂283.]

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*The bill was filed on the 5th of Dec. 1800, by a widow against the executor of her deceased husband to obtain arrears of maintenance from her husband's estate during many years that he had lived apart from her, and furnished no means of support to her, or to his daughter.

The bill states that the complainant married the defendant's testator in May, 1772, at London, and arrived in this state in August following. That on the 28th of Feb.

following, complainant was delivered of a daughter at the house of her husband's mother. That from their marriage until the birth of said daughter, they lived together as man and wife, though not happily. That in May, after the birth of her daughter, she visited her friends in another part of the country at the desire of her husband. That afterwards she was desirous to return to her husband, but he refused to receive her, and continued so to do until his death in February, 1796. That her friends perceiving he intended to live separate from her, they insisted he should allow her a separate maintenance; and accordingly some negotiations were begun, and eminent counsel employed to enforce the claim, who made some progress in the business; and her husband offered to hire a house for her in Charleston, and to maintain her as his wife; and he assented that she might fix her own annuity. That some altercation taking place, a quarrel ensued between her said husband and her counsel, which ended in blows, and a duel between her said husband, and a nephew of her counsel. And the complainant being alarmed at these violences, and fearing that the death of her said husband, or some of her relations who took a warm part in her cause, might be the consequence of pursuing her claim, she on this account alone desisted from pursuing the same.

That from the time she visited her friends, until the marriage of her daughter, neither herself nor her daughter were maintained by her husband; but by her relations until the death of her father, who bequeathed to her brother property amounting to £1600 in value, in trust for the sole use of complainant

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and the heirs of her body, with which *she has maintained herself and her daughter, until her daughter's marriage. That notwithstanding the long separation, complainant being conscious she had acted like an affectionate wife, hoped he would finally compensate her for the distress she had sustained by his conduct; but he died (sometime early in Feb'ry. 1796) without compensating his wife and daughter for the neglect hitherto shown as to their maintenance. That at the death of her husband he had by him a will dated in Oct. 1791, in which, among other devises, he gives as follows: "First, after all my just debts are paid, I give and bequeath unto my wife (naming her) the sum of fifty pounds sterling, in lieu of her dower, and every other of her demands against my estate real or personal." And then after giving £50 to his daughter, he devised the residue of his estate to distant relations, and appoints the defendant his executor. That his estate was estimated at £15,000 sterling, and complainant knowing her right to dower out of the real estate to be incontrovertible, and that her claim to maintenance during separation, and the infancy of her daughter, was just, instituted her suit at law for the first, and demanded payment of the latter from the executor, hoping her demand would have been complied with: but although the legality of complainants claim was admitted, and a recovery had as to her dower; yet said executor has refused her demand for alimony, alleging at one time that she eloped from her husband, whereas complainant charges that she quitted her husband's house on the visit appointed by his express direction; at other times the defendant pretends that if complainant ever had any right to alimony, she relinquished it by desisting from her pursuit of it for so many years; and that if she did not, her right expired with her husband.

Whereas complainant contends that desisting for a time under imperious circumstances, by no means implies a relinquishment; and that such claim cannot expire with her husband, seeing that maintenance is an obligation imposed by law upon a husband, which

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therefore will survive, whe*ther created by act of parties or provision of law. All which doings are contrary to equity and good conscience.

Bill concludes in usual manner, and prays for relief.

To this bill the defendant pleaded the statute of limitations.

On argument, the plea of the statute of limitations was overruled. But the court having some doubts whether the demand was not altogether of a personal nature, and whether by the wife's not making her application during the life of her husband, she had not slept so long on her rights as to have lost her title to relief, the court directed that point to be argued and precedents sought for, before they would order the defendant to answer.†

This question came on to a hearing, and was argued by Messrs. Parker, Holmes and Desaussure and Ford for complainant, and by Messrs. Drayton and Simons for the defendant.

For the complainant, it was contended that the doctrine of alimony is derived from that of divorce a mensa et thoro, by the ecclesiastical court. There is no such court in this country; but a voluntary separation by mutual consent, or a separation by the wife, ex justa causa, must draw after it the same doctrine and relief. This arises ex necessitate, else the greatest injustice would be done, without any remedy for it. And even in England where there are competent Ecclesiastical Courts, the Court of Equity has concurrent jurisdiction. See 1 Fonbl. 96, 7. 2 Vern. 752. Williams v. Callow. The suit for alimony is given to the wife in case of sepa-

†This was equivalent, as insisted by her counsel, to putting the cause on the footing of a bill demurred to: or a motion to dismiss a bill for want of equity apparent on the face of the bill, admitting it to be true.

ration, if the husband refuses to make her an allowance suitable to their station in life, and his fortune. It is called an injury to the wife, which the court christian will redress. See 3 Bla. Com. 93, 4.—Alimony is a vested right, on a proper case being made out. It arises out of the marriage contract

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to maintain *the wife; together if they live happily; separate, if unhappy circumstances should separate them without criminality on the part of the wife. It is an allowance out of the husband's estate for the wife's support, on consideration of all the circumstances, 1 Bla. Com. 441, 2.

Maintenance is a vested right in the wife, founded on the marriage contract; on the weakness of the sex; on the confidence implicitly reposed in the husband; on the great advantages given to the husband in and over the property of his wife. It is a duty to allow it. Godolphin, 509. 1 Levinz. p. 6. See 2 Blac. 302.

There is no good reason why this right should not survive to the wife. The claim being founded in contract, the most sacred of all others, the marriage contract, may survive as well as any other contract, unless satisfied in the life time of the parties:—and it is more peculiarly so, as the law relying on the husband's faithfully performing his contract, and his duty to maintain his wife, gives him an absolute right in all her personal estate, reduced to possession, and other rights in her other property; from which alone she could be maintained, if he refuses to do so.

It cannot be reasonably contended that this right to sue for and recover alimony, arises ex delicto; no more than any other case, where a man by breach or non performance of a contract, makes himself liable to suit. And there is no more reason for the uncertainty of the amount preventing the claim surviving in this case than in any other. And there are numerous cases of claims of uncertain amount surviving. Nor can it be said that the wife in this case hath waived her right. The husband refused to receive his wife home; and when it was ascertained that he was resolved she should never return home to him, she set up her claim to maintenance for herself and infant daughter. This was apparently acquiesced in. But some disputes arising, and blows and a duel following between her husband and her counsel and his friend, this unhappy lady became terrified at the evils and bloodshed which might result from the prosecution of her

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claim; and she *dropped the pursuit at that time. Her feelings and her forbearance prevented the renewal of her claim during her husband's life, lest it should provoke a renewal of these scenes. She subsisted with difficulty, and maintained his daughter on small means derived from her friends, and contracted debts which now straiten her, rather than produce mischief and blood by pursuing her claim in his life time. It would be hard indeed if this forbearance, founded on such motives, should be construed into a waiver or abandonment of her claims. It surely was not intended by her as a waiver, and the circumstances will fully justify the court for not presuming a waiver against the facts of the case.

All presumptions of waiver or satisfaction are on the ground that there has been a culpable omission in the prosecution of the claim. But it would be a perversion of words, and a forgetfulness of all correct feelings, to call such forbearance on the part of this lady a culpable omission. Her conduct has been correct throughout, and there is no shadow of blame on her.

Alimony and dower are distinct rights; where alimony terminated, dower began—and both are recoverable.

The ground of doubt whether a wife who has been obliged to live separate from her husband, without any maintenance, is entitled to recover alimony after his death, has arisen from the misapplication of another principle—to wit: That a wife having a right to the settlement of her estate, this court would compel him to make it. But it is a personal equity, and if she dies, her children cannot compel it. 1 Fonbl. 89. And so though the wife may be entitled to the income of a separate estate, yet if she do not demand the produce in the husband's life time, and he maintains her, an account of such separate estate shall not be carried back beyond the last year—and this is upon an implied waiver. 1 Fonbl. 95.

For the defendant it was argued that the claim to alimony will not survive.

The husband is not liable except for neces-

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saries, and *that only during the marriage and cohabitation. 1 Bla. 442. The case of Corbet and Poelnitz which attempted to extend the liability of the husband for the contracts of the wife has been overruled in 8 Term Rep. Marshall v. Rutkin.

The ecclesiastical court decrees alimony only in cases of divorce, a mensa et thoro. And though from necessity the Court of Equity has assumed the jurisdiction in this country, to prevent a total failure of justice, yet it will not decree alimony except in cases where the ecclesiastical courts, would have granted a divorce a mensa et thoro. This court is still governed by the same principles. The substance of the claim has undergone no change. See 2 Vesey, jr. 191.

All the cases shew that alimony is granted only on the misconduct of the husband and on the correct conduct of the wife. His ill conduct is a tort. It is therefore a personal claim, and dies with the parties. 2 Atk. 97. The decrees for the relief of the wife are

always prospective. 2 P. Wms. 82. Hankey v. Cox.

The Court of Equity allows alimony only during the separation, and if the husband shews that she is obstinate, and will not return, though he is willing to receive her, the alimony will be revoked. See 3 Atk. 517, 550. Head and Head. 2 Atk. 96. Watkins v. Watkins. 2 Vern. 752, Williams v. Callow.

This is a claim which cannot survive and be prosecuted after the death of the husband. The claim is founded on the violation of his marital duties; and is ex delicto, not ex contractu. The acquiescence too, has been for many years. It was 23 years from the separation to the death of the husband, and in all that time but one claim was made, and that soon dropped. Then the husband died in 1796, and no claim made till the bill filed in 1800. This is a waiver of the demand; for whatever were the motives, the waiver and the abandonment were complete and decisive. 3 Bro. C. C. 639, Smith v. Lane. 2 Vesey, jr. 87. Ibid. 585, and 3 Atk. 225.

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*Besides it would be dangerous to allow such demands after a husbands death. The subject of the differences between husband and wife are of a delicate kind; and the reasons of his conduct are probably locked up in his own breast. To allow such charges and demands to be made after his death, would be to expose his memory to misrepresentation and reproach, without his executors having the means of defense. The demand of the wife is refused on several grounds; and if the husband were living, he might shew that some of those grounds existed.

The widow has dower allowed her after her husbands death. It has been claimed and allowed in this case. Now dower is allowed after the husband's death in lieu of alimony, which he no longer lives to furnish.

The Court took time to advise, and afterwards Chancellor RUTLEDGE delivered the decree of the Court.

The complainants bill states that she married the late A. B. defendant's testator, in London, in May, 1772; that they arrived here in August following:—that in the February ensuing, she was delivered of a daughter. That from the time of her marriage to the birth of her daughter, they lived together as man and wife, though not so happily as could have been wished. That in May, 1773, she went to visit some of her friends at Beaufort, at the express desire of her husband, and was afterwards desirous of returning to him; but that he refused to receive her, and continued so to do till his death in March, 1796.—That some negotiations were set on foot for allowing her a separate maintenance, but a quarrel ensuing they were broken off, and never afterwards renewed. The reasons why nothing further was done are particularly detailed in the bill. Complainant therefore prays a suitable allowance, during the time she lived separate from her husband. To this bill defendant pleaded the limitation act, which upon argument was overruled. A strong doubt arising whether the demand of complainant was not altogether of a personal nature, and by

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her not making appli*cation during the life of her husband, she had not slept so long on her rights as to lose her title to relief, the court desired to have that point argued and precedents sought for before they would order defendant to answer.

The question has been very fully discussed by counsel on both sides. For the complainant it was contended that the husband was bound to maintain and provide for his wife, as well during his life as after his death. That he was under a moral obligation to do so; that it was a part of the marriage contract, and the court would compel him to it. That this suit was not ex delicto as for a tort; but ex contractu for a breach of that contract; and therefore that a suit for alimony would survive against executors as well as for any other contract; but even admitting it did not generally survive, it ought under the peculiar circumstances of this case. For the defendant it was insisted, that suits for alimony or separate maintenance do not survive. It was admitted that the court may allow separate maintenance during the life of the husband. Nevertheless he was only liable where there was a divorce, a mensa et thoro; and as incidental to a decree for that purpose. That the causes of divorce were purely personal, and cannot be decreed after the death of one of the parties; that complainant forfeited or lost her claim by not pursuing it in the life of her husband; and that where a party with a full knowledge of his rights, sleeps over them, the court will consider it as an abandonment or relinquishment of them. With respect to the power of this court to allow a separate maintenance, where a proper case is made out, that is not to be questioned. It has been exercised and must continue to be exercised, because a wife would be otherwise without redress, there being no other court in this country competent to it.

This question must be decided on general principles and not on the particular circumstances of this case. It is plainly and simply whether a wife who applies for alimony or a separate maintenance ought not to bring suit against her husband in his life

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time? The very idea of ali*mony or a separate maintenance, admits that the husband is alive, and refuses to perform the contract which the law imposes on him of maintaining and supporting his wife. A suit must therefore be instituted against him personally, charging him with a violation of his contract.

and stating particularly ill usage on his part as a ground for the application for a separate maintennce. He is then called upon by the process of the court, in which the suit is commenced, to answer the charge. Upon his answer and the proof adduced, depends the decree that is to be pronounced. Hence it is evident, that the suit must be brought against him personally, because in the Ecclesiastical Court, there must be a divorce a mensa et thoro, previous to the allowance of alimony, and a sentence of divorce cannot be given in any case where either husband or wife is dead. A decree cannot be made in this court against a defendant where his misconduct is the charge for the foundation of such decree, unless he is brought into court, to answer the charge, except indeed he absconds, in which case, the court will make some provision for the wife, till he returns. That the suit for alimony is for a tort and altogether personal, is further illustrated by its being brought against the husband for ill usage, for depriving the wife of her conjugal rights, such as driving her from bed and board, and refusing to support her. What acts can be more tortious than those? None; not even beating her. Such conduct of the husband, being proved, terminates in a decree in the Ecclesiastical Court, for a divorce a mensa et thoro, and an allowance of alimony; or in this court a separate maintenance, during their separation only; for this court has no right to decree a perpetual separation. A very strong ground for the court not sustaining this suit is, that no precedent has been produced of a similar case: whence it may be very fairly and justly inferred, that no suit of this kind has ever been brought from a thorough conviction that it could not be maintained; for if such a suit had been instituted, some determination on it would certainly have been found in

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*the books. The singularity of such a case would unquestionably have attracted the attention of all the writers on this subject, and the diligent researches of complainants counsel would undoubtedly have brought it to light.—It was therefore with that view that the court desired to have the question fully discussed. When differences arise between husband and wife, when their mutual resentments must be considered of so serious a nature as to induce a separation, it is reasonable to suppose that she would institute her suit with promptness, and prosecute it with vigor; but if she remains wholly passive during his life, and makes no application for a separate maintenance till several years after his death, the court will consider such conduct as an abandonment or relinquishment of her rights. In almost all cases the law has fixed the period within which suits of various kinds shall be brought, and where the law is silent, the courts reasoning from analogy, have limited the time for prosecuting suits of a similar nature. In cases of tort, the law has fixed twelve months for bringing an action at law. In a case like the present, which is also a tort, if the wife does not commence her suit during her husbands life, the court would not interpose its aid for the best of reasons, because the offender, (if he was one) is no more. He is in his grave; he is incapable of answering to the charge which is made against him. The violation of contract in the case under consideration, is of thirty years standing. Both the parties have lived in the state within a few miles of each other, during the whole of that period, until his death, and no steps taken by complainant to obtain redress for the injury, except at the commencement of these differences; some conversations were then had on the subject, and proposals made, which were broken off; the whole business was then relinquished, and nearly five years after her husband's death this suit was instituted against his executor to be allowed a separate maintenance for upwards of 20 years back: That complainant has not been without a maintenance, although not

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from her husband, appears from *her own bill; for within two years after their separation, her father died and left 1600*l.* in the hands of trustees, to be applied to her sole use, which it is to be presumed she has uniformly received the profits of; and since her husband's death she has received a very liberal allowance for dower out of his estate. To allow of such stale demands as the present, after so great a length of time has elapsed since the original cause of suit, and so many years after the death of a party, might be attended with the greatest inconvenience and most dangerous consequences. It would be putting it in the power of the living to accuse the dead of the grossest misconduct, and it is more than probable that an executor might be wholly unacquainted with circumstances, and therefore incompetent to repel the charges or make a proper defence; whereas if the husband was alive, it is possible he might be able to assign good and substantial reasons for his conduct, and rebut the accusation by the testimony of witnesses. No one ought to be condemned unheard. Audi alteram partem is the language of reason, of common sense, and of the law: but how can the person accused be now brought into this court to make his defence. Expedit Reipublicæ ut sit finis litium, is a maxim that has prevailed in this court in all times. Laches and neglect are always discountenanced, and a Court of Equity which is never active in giving relief against conscience or public convenience, always refuses its aid to stale demands, where the party has slept upon his rights, and acquiesced for a great length of time. Upon the whole of the case, the court are unanimously of opinion that no precedent being shown wherein the court

has given relief in a case similar to the present, they will not make one. That the demand made by complainant for an allowance is altogether of a personal nature; that it did not rise ex contractu, but wholly ex delicto; and therefore does not survive against the executor.

The bill must be dismissed.

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2 Desaus. *210

*Case XXIV.

[Present, Chancellors Rutledge, Marshall and James.]

THOMAS KARWON, Administrator of Catharine Ashby, v. THOMAS LOWNDES and Wife and Others, FRANCIS and FLORIDE PEYRE, and the GAILLARDS and ASHBYS.

(May, 1803.)

[*Descent and Distribution* ⟸41.]

An intestate dies, leaving a real and personal estate. His nearest relations were an uncle and aunt, of the half blood, and three first cousins of the whole blood; and he left several more distant relations. The uncle and aunt of the half blood are entitled, under our statute of February, 1791, for abolishing the rights of primogeniture, and for other purposes, to take the whole real and personal estate in exclusion of the first cousins of the whole blood.

[Ed. Note.—Cited in Edwards v. Barksdale, 2 Hill, Eq. 420.

For other cases, see Descent and Distribution, Cent. Dig. § 116; Dec. Dig. ⟸41.]

[This case is also cited in Peyre v. Karwon, 2 Desaus. 420, as to facts.]

Bill of Interpleader.

Catharine Ashby being possessed of a real and personal estate, died in Sept. 1802, intestate, unmarried and without issue, leaving alive many relations, to wit: Mrs. Lowndes and her brother and sister, who were cousins of the whole blood, by the paternal line, to the intestate. The Ashbys and the Gaillards, who were cousins of the half blood, by the maternal line, to the intestate; and Francis Peyre and Floride Peyre, who were uncle and aunt of the half blood, by the maternal line to the intestate.

The claims set up by these various relations to the estate of the intestate, induced the administrator to file a bill of interpleader, calling upon all these relations as defendants to set forth their claims, and to obtain and abide by the decree of the court, on their respective pretensions.

The defendants answered and admitted the relationship in which they severally stood to the intestate, and submitted to the judgment of the court on their claims.

The cause came to a hearing, and it was argued by Mr. Parker and Mr. Desaussure for the first cousins of the whole blood, that

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none of the relations of the intestate *were entitled to any part of the estate, except themselves and the uncle and aunt of the half blood.

That the cousins of the half blood are not entitled, because the uncle and aunt of the half blood are nearer in degree of kin, according to the mode established by the act of 1791, for ascertaining the degrees of kindred. That as between the cousins of the whole blood, and the uncle and aunt of the half blood, they are equally entitled per capita; for by the 4th, 6th and 7th sections of the act for abolishing the rights of primogeniture and for giving a more equitable distribution of the estates of intestates, a preference is given to the relations of the whole blood, over relations of the half blood, when standing in the same degree, which is substantially removing relations of the half blood one degree; which in this case would put the first cousins of the whole blood and the uncle and aunt of the half blood on the same footing; and they would be equally entitled.

The clauses of the statute of February, 1791, applicable to this case, are the following: The 4th clause gives a preference to brothers and sisters of the whole blood; and provides that the children of a deceased brother or sister shall take among them respectively the share which their respective ancestors would have been entitled to had they survived the intestate.

The 5th section provides, that if there be no issue, nor father or mother, nor brother or sister of the whole blood of the intestate living, the brother or sister of the half blood, and the children of a brother or sister of the whole blood, shall take the estate; the children of every deceased brother or sister of the whole blood taking among them a share equal to the share of a brother or sister of the half blood. But if there be no brother or sister of the half blood, then the children of a deceased brother or sister of the whole blood are to take the estate, without any provision for the children of deceased brothers or sisters of the half blood.

By the ninth section it is provided that in

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reckoning the *degrees of kindred the computation shall begin with the intestate and be continued up to the common ancestor, and thence down to the person claiming kindred inclusively, each step inclusively being reckoned as one degree.

By the express provisions of the English statutes of distribution of personal estates, no representatives are admitted among collaterals, further than the children of the intestate's brothers and sisters. But in our statute of February, 1791, which regulates the descent of real as well as the distribution of personal estate, and puts them both on the same footing, there is no such provision, restricting representation; and by the law for the descent of real estate, prior to

our statute of 1791, representation was allowed ad infinitum, as well among collaterals as among lineal descendants.

A considerable change has been made by our statute respecting the rights of the half blood. By the common law of descents, the half blood could not inherit real estate at all. But by the construction put upon the statute of distributions, the half blood might take personal estate equally with the whole blood. By our statute of February, 1791, the half blood are let in to take real estate by descent, but both with respect to real and personal estate, brothers and sisters of the half blood are postponed one degree—that is, they cannot take at all whilst there is any brother or sister of the whole blood alive. But if none such be alive, then brothers and sisters of the half blood are let in equally with the children of brothers and sisters of the whole blood. And doubtless it was the intention of the law to extend this postponement of the half blood one degree (in the reckoning the degrees of kindred) in all the remoter degrees. If this be correct, then the defendants Mr. Peyre and Miss Peyre being uncle and aunt of the half blood to the intestate, are in the third degree of relationship, and being postponed one degree, they are to be reckoned in the 4th degree. Mrs. Lowndes and her brother and sister are also in the 4th degree; and these are equally entitled to

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the estate of the intestate. All the *other relations being more remote, cannot take any share.

Mr. Gaillard and Mr. Pringle for the other relations, argued, that the case which has occurred is not provided for specifically by our statute of February, 1791. The last part of the 4th section of the statute does provide that the children of brothers and sisters of the intestate shall take by representation the shares to which their respective ancestors would have been entitled had they survived the intestate. But this representation extends no further. And the priority given by the act to brothers and sisters of the whole blood, is not carried any further. Now the statute of distributions is not repealed. Of course it is abrogated only so far as the provisions of the new act contravene it. The case under consideration does not come within the express provisions of the new law; consequently the old act of distributions applies, and the uncle and aunt of the half blood being one degree nearer of kin, are entitled exclusively. The words of the act are not to be extended by analogy.

In the case of Poaug, the doctrine was recognized that there shall be no representation among collaterals beyond brothers and sisters children.

In the case of Carson and Stuart, it was contended that the act intended to put real and personal estate on the same footing. But the court thought differently. See 4 Burns' Ecclesiastical Law, 355, 6, 357, 8. Also 1 P. Wms. 26, 53, 594. 2 Vern. 124. 2 Ves. 213, 215.

Chancellor MARSHALL afterwards delivered the decree of the court.

This case is not provided for in any of the specially enumerated cases of the act for the abolition of the rights of primogeniture, &c. passed the 19th day of February, 1791, but comes within the provision of the 7th clause of the 1st section of that act. It is in these words: "If the intestate shall have no lineal descendants, father, mother, brother or sister of the whole blood, or their children, or brother or sister of the half blood, or lineal

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ancestor, then the *widow shall take two thirds of the estate; and the remainder shall descend to the next of kin.

The single question in this case is, who are the next of kin to Catharine Ashby the intestate? Whether Miss Floride Peyre the aunt of the half blood, and Francis Peyre, the uncle of the half blood? Or Mrs. Lowndes, Mrs. Wragg, and Jacob Bond I'on, the first cousins of the whole blood?

In computing the degrees of kindred, the act above quoted directs in the 9th clause of the 1st section, that "in reckoning the degrees of kindred, the computation shall begin with the intestate, and be continued up to the common ancestor, and thence down to the person claiming kindred inclusively, each step being reckoned as one degree." By this mode of computation, Miss Floride Peyre, the aunt, and Francis Peyre, the uncle of the half blood, stand in the third degree.

The children of Mary Ashby, (Mrs. I'On) viz. Mrs. Lowndes, Mrs. Wragg and Jacob B. I'On, stand in the fourth degree. It is evident therefore, that Miss Floride Peyre and Francis Peyre, the aunt and uncle of the half blood of the intestate Catharine Ashby, are the next of kin, as being in the third degree; and that they are entitled equally to the estate of the said Catharine Ashby in exclusion of the others.

Costs to be paid out of the estate.

2 Desaus. 214

Case XXV.

[Present, Chancellors Rutledge, Marshall and James.]

The Administrators of SOMERS, v. JOHN SMYTH, Administrator with the Will Annexed of Samuel Adams, and REBECCA KELLY.

(May, 1803.)

[*Fraudulent Conveyances* ⟸108.]

Deeds conveying the whole property of the person making them, to a woman with whom he cohabited, without any proof of valuable consideration paid by her, she not having means to make such purchases, will be presumed to be void, as against creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 333, 334; Dec. Dig. ⟸108.]

[*Fraudulent Conveyances* ⟸278.]

The statute of limitations does not run in such cases.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 801, 802; Dec. Dig. ⟸278.]

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*This was a bill filed by creditors for an account and discovery of the estate of Samuel Adams, deceased; and to set aside certain deeds from said Adams to Rebecca Kelly, on the ground of their being voluntary and fraudulent, to the prejudice of creditors.

There were three bills of sale, bearing date the 18th of August, 1794, by which the said Samuel Adams conveyed away nearly all his property to Rebecca Kelly. His will was also executed on the same day. His executor Duffy proved the will, qualified, and included in the inventory all the slaves included in the bills of sale, and most of the other property.

Robert Caldwell proved that he knew Samuel Adams from 1791 to 1794, when he died. He knew several of his slaves. They were included in the bills of sale, but some of them remained in his possession till his death.

Rebecca Kelly cohabited with him. Witness lived on plantation of Adams in 1797. He leased it; at first he applied to R. Kelly, and she referred him to John Smyth. He paid them both in work for the rent. Smyth sold some of the negroes of the estate to Mr. Clarkson. Some were sent off to the Havannah. When Rebecca Kelly lived with Adams, he maintained her.

Mr. Clarkson proved that he bought several negro slaves from Smyth, some of them had belonged to Samuel Adams.

Mr. Sherwood proved that he rented the plantation from Smyth in 1798, and paid him the rent. Smyth afterwards told him to give up the possession to Rebecca Kelly on her application for it.

Mr. Mazyck proved that his father had emancipated Rebecca Kelly, and had given her two slaves, and an annuity of £60. for 10 years. She afterwards lived with Adams. She was not industrious, and was extravagant. She might have made £60. or £70. per annum; but her earnings and savings could not be considerable.

Mr. Squib proved that Rebecca Kelly carried on the business of making mattresses ex-

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tensively. She some*times sent down 10 or 12 in a week to Charleston for sale. Adams derived more assistance from her than she did from him. Adams told witness he was under great obligations to R. Kelly. He would have gone to pieces without her.

Mr. Lemon proved that Smyth had sold some negroes to Adams. But they were not paid for; and Smyth took them in 1797.

Mr. Denoon proved that he sold the mattresses for Adams for a long time. They did not amount in value during the whole time, to any such sum as £200. or £300.

Mr. Cheves and Mr. Pringle for the complainants argued, that the bills of sale were fraudulent and void—that even if they had been fairer, the complainants were judgment creditors at the date of the bill of sale. It is a strong circumstance of fraud that the deeds convey Adam's whole property. The deeds too were executed in August, on a sick bed, and Adams died in October of the same year. The courts will be suspicious of persons living as R. Kelly did with Adams, and gaining an ascendency over him, and obtaining such deeds at such a time. 1 Fonbl. 272. Her circumstances did not enable her to make such purchases; nor has any consideration been proved to have been paid. Adams kept possession of the property till his death; and his executor Duffy included the property in the inventory; and no claim was made whilst they remained in Duffy's possession.

The evidence contradicts the defendants answers.

Mr. Gaillard for defendants, argued that the real question was, whether there was any fraud in obtaining the deeds. The answer of R. Kelly denies the allegation of fraud. The executor at first inventoried the negroes as part of Adams estate—but afterwards gave them up. The considerations expressed on the face of the deeds are considerable, if not amply sufficient. The encreased value of the property since cannot affect the question. If there be fraud in the transaction, it is true the statute of limitations cannot

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be used as a defence. But if there be *not fraud, then possession and the statute of limitations will protect the purchaser of the slaves, even against prior judgments. Cowp. 434, 713.

Chancellor JAMES afterwards delivered the decree of the court.

The object of the bill is for an account and discovery, and to set aside deeds from Sam'l. Adams to Mrs. Kelly. Adams made his will

on 18th August, 1794, and on same day executed a bill of sale to Rebecca Kelly, of his stock of cattle, furniture, &c. also of eleven negroes, and deeds of lease and release of his lands and lots. He died in 1794, possessed of a considerable real and personal estate.

The bill prays that the bills of sale & deeds may be set aside, as fraudulent, and that Smyth should be decreed to account with complainants as creditors of Samuel Adams. The answer and the evidence are detailed in decree.

The defendant Rebecca Kelly states in her answer, that her freedom was given to her in the early part of her life by her master, Mr. Mazyck; that she lived with him in the capacity of house-keeper afterwards; and received from him £60. per year for her services; and during the time she lived with him, that she purchased two negroes from him.

That she afterwards lived with Samuel Adams, and carried on for him the business of upholsterer for several years. That for the said services rendered to the said Samuel Adams, and for certain monies lent and advanced by her to him, he became indebted to her for the sums mentioned, as the consideration money in the said bills of sale and the said deeds. That the said bills of sale and the said deeds were executed by him to her, about two months before his death, when he was of sound mind, and that she knows he did also make a will. That A. Duffy took forcible possession of the negroes of the said Samuel Adams after his death, as executor; but that he again delivered up the same to her in consequence of her producing the bills of sale aforesaid.

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*That she lived on the plantation at the four mile house long before the death of Samuel Adams, and hath always kept possession of the same by herself or tenants. That she never had possession of the lot of land in Charleston, but that the same through some defect of title hath been lost to her. That she does not know what property the said Samuel Adams died possessed of, but understands that besides the property mentioned in the said bills of sale and deeds, he died possessed of many hundreds of acres of land in the upper country; the titles for which were in the hands of a Mr. Geddes in Charleston.

That the said bills of sale and deeds are fair and bona fide.

The defendant John Smyth in his separate answer, admits that he did qualify as administrator on the estate of Samuel Adams as in bill set forth, and gave security to the Ordinary for £100. the same being the full value of all the property of Samuel Adams.

That judgment was renewed against him as administrator upon the debt of complainants, but on what ground he knows not. That he has heard S. Adams say he could not live without the assistance of R. Kelly, and that he was greatly indebted to her for monies and property she had advanced to him. That he never reduced into his possession any of the property in the bills of sale or deeds mentioned, nor did he return the same to the ordinary, because he was convinced that the said bills of sale and deeds were fair and bona fide. Were it not for that belief, that he would have endeavoured to obtain possession of said property, as being the greatest creditor of said S. Adams. That he never had any dealings with R. Kelly on account of the estate of said Samuel Adams, and that he never assisted in sending away any negroes of said estate. That he never was but once in the last seven years on the plantation at the four mile house, and that he never received any of the negroes of said estate, or any part of the proceeds of their labor.

Upon the trial, it was proved on the part of complainants by the testimony of Mr. Cald-

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well, that the property *contained in the bills of sale and deeds was all the property which he knew Samuel Adams to be possessed of in his lifetime. Mr. Geddes also proves that if the papers in his possession be grants and title deeds for lands in the upper country, that they were always ready to be delivered to the administrator. From the testimony of Mr. Mazyck, it further appears that R. Kelly was not very industrious, was extravagant; and both he and Mr. Denoon agree, that she never could have been possessed of more than £200. or £300. at any one time. It also appears from the evidence of several of the witnesses that S. Adams cohabited with the said R. Kelly, and was very much under her influence; that she did indeed carry on the upholsterers business on his plantation; but that she was chiefly assisted by his negroes. From the bills of sale and deeds, it is further evident that they and the will are all dated on the same day, and that the will directs payment to be made of the debts of testator by a sale of his property, while the bills of sale and deeds dispose of the whole property to R. Kelly. That one of the witnesses (Caldwell) leased the plantation at the four mile house from R. Kelly and John Smyth in 1797, and paid them both in carpenters work. that another witness (Sherewood) leased it from Lemon, Smyth's nephew, as his agent, in 1798, and paid the rent to Smyth.

On the part of the defendant, R. Kelly, it was proved by one witness (Mr. Squib) that Samuel Adams spoke in warm terms of R. Kelly's industry and good conduct. That she carried on the business of making mattresses extensively, and sometimes sent to town 10 or 12 in a week. That she also sent poultry and pigs to Adams on her own account. That Adams derived more assistance from her than she did from him; that he would, in the witnesses words, have gone to pieces without her. The same witness also gave in

much more testimony in favor of Kelly, which it is needless to recapitulate, as it is not corroborated by the testimony of any other witness, and is indeed contradicted by

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Mr. Denoon, one of defendants own wit*nesses. The evidence of Mr. Lemon for the defendants goes only to exculpate Smyth the administrator from some of the charges in the bill, but proves nothing in favor of R. Kelly. The court said that the complainants had contended:

1st. That the bills of sale and deeds, containing a general conveyance of all S. Adam's property, real and personal, were fraudulent and void.

2d. That the circumstances of the purchaser were entirely inadequate to such a purchase.

3d. That the complainants were judgment creditors of S. Adams, at the time of the date of the bills of sale and deeds, which were voluntary conveyances and void.

4th. That the will of S. Adams, bearing date the same day, and containing clauses repugnant to bills of sale, &c. he must have been noncompos or imposed on.

The defendants contended 1st, that though the consideration was now inadequate, it may have been at the time a full consideration.

2d. That the deeds were dated 18th of Aug. 1794, recorded 27th of Sept. 1794, which was notice to all the world.

3d. That Duffy, the executor of Adams, and the ordinary, had recognized the claim of Mrs. Kelly, and given up the negroes to her.

The court upon full consideration, is in favor of complainants.

1st. These deeds appear to contain all S. Adam's property: all the evidence shews that his whole property was conveyed. Therefore according to the rule quoted from Twyne's case, "quod dolosus versatur in generalibus," these deeds have the signs and marks of fraud. See 3 Rep. page 81.

2d. Upon this ground the preponderance of the evidence shews that the circumstances of Rebecca Kelly were at all times inadequate to the making of such a purchase. This being clearly proved, and no money having been shewn to be paid by her, the

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court may safely presume that this was *a voluntary gift without sufficient consideration, and therefore void as to creditors.

3d. The complainants were judgment creditors at the very date of the deeds and will. None of the witnesses have been produced to prove the payment of any money. There are violent presumptions of fraud growing out of all the circumstances. No money applied to pay off Adam's debts by himself or his executor.

4th. The court is obliged under the circumstances to believe that S. Adams was either non compos, or that unfair dealings were used towards him to induce him to sign the deeds, &c. The will making dispositions different from the deed is dated the same day. The defendants grounds were not supported by any evidence, or was overpowered by the opposite evidence shewing fraud.

Decreed that the bills of sale and deeds be set aside as voluntary and fraudulent; that the administrator J. Smyth do account before the master for the rent of the plantation at the seven mile house for the years 1797 and 8, (during which he leased it out) and that complainants be permitted to enforce their judgments and executions.

Costs to be paid by defendant Kelly.

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2 Desaus. 221

Case XXVI.

[Present, Chancellors Rutledge, Marshall and James.]

FRANCIS PEYRE and FLORIDE PEYRE v. THOMAS H. JERVEY.

(October, 1803.)

[*Husband and Wife* ⊂=10.]

A husband is exclusively entitled to the personal estate of his deceased wife, though not reduced to possession during the coverture.—His right of administration will protect it, notwithstanding the provisions of the act of February, 1791.

[Ed. Note.—Cited in Peyre v. Karwon, 2 Desaus. 420; Baskins v. Giles, Rice, Eq. 326.

For other cases, see Husband and Wife, Cent. Dig. § 42; Dec. Dig. ⊂=10.]

The bill for discovery and distribution, sets forth that Magdalene Ashby in bill mentioned, being entitled to one third of the estate real and personal of John Ashby, her deceased husband, who departed this life some time

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in the year 1793, the said Mag*dalene did make her last will and testament in the year 1801; by which, amongst other things, she gave and bequeathed unto her sister Floride Peyre, and unto her niece Floride Taylor, all her part or proportion of the bonds, debts, &c. that she might be entitled unto, to be equally divided between them, share and share alike, as soon as possible. All the residue of the property, or her proportion of the said undivided estate of her deceased husband, whether in lands, negroes or whatsoever the same might be; and all such other property as she might be possessed of, or entitled unto in any manner whatever, she gave to her daughter Mary Catharine Ashby, to her and the heirs of her body; but in case her said daughter should die, leaving no child, then and in that case, she gave and bequeathed the same unto her niece, the said

Floride Taylor, and to her nephew Thomas Ashby, to be equally divided between them, share and share alike, to them and their heirs for ever: and she appointed executors of her said will. That the said Magdalene Ashby soon after making the said will, died, and some months after her death, to wit: on the 6th May, 1802, Floride Taylor, mentioned in the said will, intermarried with Capt. Thomas Jervey, the defendant. That Mary Catharine Ashby, the daughter of the testatrix, died on the 21st Sept. 1802, an infant unmarried, and without issue.

That soon afterwards, to wit, on the 3d Nov. 1802, the said Floride Jervey died intestate, and without issue, leaving complainants the next of kin. That the estate of the said John Ashby was not divided in the life time of the said Magdaline. That since the death of Mary Catharine Ashby, the said Thomas Jervey, as administrator of his wife, has been put into possession of that part or share of the estate of the said John Ashby, which on the death of Catharine Ashby, without leaving a child or children, was given by the said Magdalene Ashby to the said Floride Jervey, the wife of the said Thomas, including a proportion of the proceeds of a tract of land belonging to the estate of the said John

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Ashby, lately sold for the purpose *of making a division between those interested therein.—And complainants insist that they are entitled to a distributive share of the real and personal estate of the said Floride Jervey, as next of kin, she having died intestate, and without issue; the act entitled an act for the abolition of the rights of primogeniture, saying expressly that in all cases of intestacy, the personal estate of the intestate shall be distributed in the same manner as real estates are disposed of by this act.

That with respect to real estates, that part of the said act applicable to this case, is in these words:

On the death of any married woman, the husband shall be entitled to the same share of her real estate, as is herein given to the widow out of the estate of the husband, and the remainder of her real estate shall be distributed among her descendants and relations as is heretofore directed, in case of the intestacy of a married man. Complainants therefore conceive themselves entitled to one third of the estate real and personal of the said Floride Taylor; and further state, that they have applied to the said Thomas Jervey, administrator of his said wife, for one third of the estate real and personal, which she died possessed of, interested in or entitled to, that he has refused and still refuses so to distribute the said estate of his said wife; contending that such distribution is not agreeable to law. Complainants pray that a full discovery may be made by the said Thomas Jervey of the assets of the aforesaid Floride, wife of the said Thomas; and that after payment of debts, the surplus of her estate may be divided according to law, and complainants put in possession of their proportion or share thereof, and such other relief as the nature of their case may admit.

The answer of Thomas Jervey the defendant, admits that Magdalene Ashby, in bill mentioned, did depart this life at the time therein mentioned, and that she was entitled to one third of her deceased husband's estate as stated.

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*That the said estate was not divided in her life time, and that she made and executed her last will and testament as is set forth. Defendant admits his marriage with Floride Taylor, and that she died at the time stated in said bill; and that Mary Catharine Ashby, in bill mentioned, died an infant and unmarried, and without issue: and also that he administered on the estate of his wife, and received sums of money due thereto, including a proportion of the proceeds of lands sold lately, and other property left by Magdalene Ashby to his said wife Floride Jervey.

Admits that the said Francis and Floride, the complainants, are the next of kin of the said Floride Jervey, his deceased wife, but denies that they are entitled to one third of the estate real and personal, which she died seized, possessed of, or entitled to. Submits to the court that complainants are not entitled to any part or share of the personal property bequeathed to his deceased wife by Mrs. Ashby, or which she otherwise possessed at the time of her death, considering the said legacy as vested in his said wife during her life time, and that as soon as it vested, in virtue of his marital rights, he became entitled thereto, and therefore it cannot be considered as the estate of his wife, or distributable by the act entitled an act to abolish the rights of primogeniture, although there is a clause in the said act saying, that in all cases of intestacy, the personal estate of the intestate shall be distributed in the same manner as real estates are disposed of by the said act; yet defendant apprehends that the said clause does not, and was not intended to relate to married women who are not capable of making wills, since such construction would make it operate in the nature of a marriage settlement in every case where the wife had property at the time of her marriage, or acquired it afterwards.

If the court should be of opinion that the complainants are entitled to any of the proceeds of the tract of land belonging to the estate of John Ashby, deceased, sold for the purpose of a division as is set forth, or to any part or share of sums he may receive

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due on the bonds left by the *said John Ashby, and not yet paid, although they were payable long before the death of the said Mag-

dalene Ashby, the testatrix, or to any proportion of the negroes left to his said wife by the said Magdalene Ashby, defendant will immediately come to a fair and full account with them as administrator aforesaid, and abide any decree this honorable court may think fit to make in the premises.

The case was heard, and one of the chancellors afterwards delivered the decree of the court.

The husband is by law entitled to the personal estate of his wife on their marriage, or which may come to her afterwards, unless secured to her by settlement or otherwise, although not reduced into actual possession; for there might be time spent, and delays occasioned before he could recover her personal estate, especially if it consisted in choses in action, and such delay ought not to turn to his prejudice.

Indeed the statute of frauds presuming on the circumstance of his not having reduced any part of the personal estate into possession, gives to him the right of administration, and provides that no part of it shall be distributable amongst her relations after her death, by declaring that he shall recover and enjoy the same: The act for the abolition of the rights of primogeniture, has not intrenched in any manner on the rights of the husband respecting his title to his wife's personal estate; but has placed his claim to her real estate on the same footing as it places the wife in relation to the husband's estate, if he was to die intestate in her life time.

In this case the legacies to defendant's wife were vested: the first of them before marriage, and the second after.—On the death of Mrs. C. Ashby, under age, and without issue, of course they belong to her husband, and are not liable to distribution. He must however account for what money he has received, or may receive, on account of lands that were sold, for the purpose of mak-

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ing a division *of Mrs. Ashby's estate between him and her nephew T. Ashby.

It is therefore ordered and decreed that he account for the money so received by him; one third part whereof is to be paid by him to complainants, according to their respective rights thereto.

Costs to be paid out of the estate.

Mr. Croft for complainants.
Mr. Gaillard for defendant.

This subject has since come more fully into discussion, and the court of appeals has decided repeatedly, that the personal estate of the wife, not actually reduced to possession during the coverture, does not belong exclusively to the husband, but is distributable under our statute of Feb'ry. 1791. Vide 3d vol. of Reports in Chancery, p. 135, 147, 8. 155 to 164. See also 12 Ves. 497.

2 Desaus. 226

Case XXVII.

[Present, Chancellors Rutledge, Marshall and James.]

PIERCE BUTLER v. PAUL HAMILTON, Comptroller General.

(June, 1804.)

[*Principal and Surety* ⊂⊃89.]

A security to certain bonds is not released from his liability, merely on the creditors not urging the demand. There must be an express extension of credit to the principal. If one of the bonds has been pursued diligently, and an execution has been returned nulla bona, there is less necessity to sue the others.

[Ed. Note.—Cited in Rutledge v. Greenwood, 2 Desaus. 405.

For other cases, see Principal and Surety, Cent. Dig. § 139; Dec. Dig. ⊂⊃89.]

[*Principal and Surety* ⊂⊃123.]

[Cited in Rutledge v. Greenwood, 2 Desaus, 415, to the point that it is incumbent on the security, before he can expect relief, to apply to the obligee and require him to sue the principal.]

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 304–311; Dec. Dig. ⊂⊃123.]

The bill was filed to obtain relief against the liability of the complainant, on three bonds, executed by him, together with Daniel Bourdeaux and as his security to the commissioners of the treasury.

The bill states, that on the 5th day of ——— 1787, complainant entered into three bonds as surety to Daniel Bourdeaux, now deceased, payable to P. Bocquet and J. Mitchell, the treasurers and their successors in office. Each bond conditioned for the sum of £781 11s. 8d. with interest from the date. That the said three bonds were payable in three annual instalments, to wit: on the 12th

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March 1788, 1789 *and 1790. That the said bonds were not signed by Joseph Atkinson, as they were to have been, as will appear by reference to exhibit A. and insists that it was incumbent on Mr. Boquet and Mr. Mitchell to have procured the same, as the name of Mr. Atkinson was inserted in said bonds, and it was intended and meant at that time that the signature of Mr. Atkinson should have been to the said bonds.

Bill states that judgment was obtained on the first bond against said Bordeaux, and your orator, in the year 1789. That no proceedings were ever had on said judgment or on the other bonds against said Bordeaux, or your orator. That your orator conceived that all the said three bonds were paid by the above mentioned D. Bordeaux, the principal, until Mr. Hamilton the comptroller applied to your orator for payment of them.

The bill further states, that after the said bonds were due and payable, your orator applied to know if they were paid at the treasury by Mr. Bordeaux. That he was informed that on search the said three bonds could

not be found, and that they must have been paid; and that from the nature of the debt, he conceived that due diligence would be used; and that if your orator had known that the said bonds had not been paid, he could have had an indemnity from Mr. Bordeaux. That the application to the treasury was made expressly to see if the bonds were paid, he then having in his hands, bonds and other assurances of Mr. Bordeaux, as will appear by exhibit B. That the said bonds and assurances of Mr. Bordeaux were well secured by a mortgage of real property, and were given up to Mr. Bordeaux under the idea that his bonds to the treasury were paid. That under all the circumstances, the lapse of time, the gross laches in the officers of the state, and the not inserting the name of Mr. Atkinson, as was originally meant and intended, that he should be a party to the said three bonds, it would now be unreasonable to compel your orator to pay the said three bonds.

The bill further states, that complainant

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holds by as*signment certain lands of Mr. Bordeaux, as security against any securityship he might have entered into for Mr. Bordeaux; and that the proceeds of these lands when recovered, he is willing to pay on account of those bonds preferably to indemnifying himself. Bill prays that complainants name may be struck out of said bonds, and that he may be fully relieved in the premises, &c.

The answer of the defendant admitted the execution of the bonds, but stated the ignorance of the comptroller-general of the other facts charged by the complainant.

The cause came to a hearing, and Mr. Gaillard and Mr. Parker argued for the complainant. That it was manifestly intended that Mr. Atkinson should have been joined in the bonds, his name being inserted as a co-obligor; yet he never executed them; that the state treasurers were bound to have procured the execution by him, and complainant would not have signed them unless he had understood that Atkinson was to have signed also.—1 Powel, 316, 395. 2 Pow. 196, Loft's Rep. 113. That the complainant called at the treasury, and was told his bonds were paid; and he in consequence gave up a counter security which he had received from Bordeaux, the principal. That the treasurers were in the habit of giving indulgence on bonds due to the state, as was proved by Col. Moultrie, the former attorney-general. That in fact the principal had not been pressed for ten years, which was an indulgence that the creditor had no right to give the debtor at the risk of the security. 2 Bro. C. C. 579. 2 Vesey, jun. 540. 4 Vesey, jun. 824. 3 Atk. 80. That the treasurers were bound to have collected the debts summarily.

That the letter of complainant acknowledging his liability, was written when not advised of his rights, and ought not to bind him. That the confirmation of an obligation not existing, is inoperative. 3 P. Wms. 306. 1 Fonb. 115. 1 T. Rep. 112, 285.

That the case of Nesbit and Smith, in 2

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Bro. C. C. has *settled the law, and shews that this court will give relief to the security, where the creditor extends the time of payment to the principal.

On behalf of the state, Mr. Pringle, the attorney-general, argued that with regard to one of the bonds there could be no doubt, for it was sued when due, and judgment obtained in 1789, and due diligence used to recover the money. That it would have been useless to pursue the principal on the other bonds, as he was insolvent, and nulla bona returned on the execution on the first bond.

That the leaving out Atkinson was not a misrepresentation to affect the complainant. To obtain additional security, was merely intended to strengthen the security of the state.

That any application should have been made to the attorney general, in whose hands the papers were, and not to the treasurers. That the cases in which the Court of Equity has given relief to securities are unlike this; for they are cases where the creditor varied the contract, or gave further time expressly, and these are not applicable to this case, for there was no express extension of credit.

If complainant had wished the principal pressed for the debt, he should have required it to be done. The letter of complainant was written deliberately, and bound him.

After the hearing, Chancellor RUTLEDGE delivered the decree of the court.

This is a case of the first impression, and of considerable magnitude, as it relates to the monied interest of this country. It has never before been fully discussed, therefore the court took time to deliberate on it. It has been heretofore a generally received opinion, that the principal and security in a bond, were at all times equally liable for the payment of the debt, as long as the bond existed; and under that impression, payment has never till lately been resisted by the security, when called upon. Some modern adjudications in the Court of Chancery in England, have however shaken former

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opinions; and it is now set*tled, that the security is not liable to the extent it was believed; and that a Court of Equity under peculiar circumstances would give relief, and has actually given it in several cases. It was never doubted, that a security had a right to call upon the obligee to sue the principal and obtain payment of the debt from him, and if he refused to do so, by an application to this court, the obligee would be compelled to bring suit for that purpose. The grounds for relief in equity, in the case

of sureties, are various. That the obligee has not used due diligence to recover his debt from the principal in the first instance, and has refused or neglected to comply with the sureties request, to use that diligence: Also, that the creditor has extended the credit longer than the parties contracted for, against the sureties consent. The second ground is the strongest; it is on that, and that only, that the court has uniformly determined in favor of the surety. All the cases are bottomed on that principle, that the surety is only responsible for a limited time; and if the obligee will extend the credit to a longer period, against the will of the surety, he shall be discharged; for it is both unreasonable and inequitable, that a man should always have such a cloud hanging over him. No one could say what estate he had left for his family, if he was to be liable beyond the time he contracted for. His estate might continue to be so, in the hands of his heirs or legatees to the most distant period. The plain simple question then is, whether the complainant, from the peculiar circumstances of this case, is entitled to relief, on the principles of the adjudged cases? With respect to the first bond, there is not the smallest ground whatever for relief; because it was put in suit, and judgment and execution obtained against him, and Bordeaux, the principal, as soon as it could possibly be done. What availed the due diligence? Was any part of the debt received in consequence of it, from Bordeaux? Not a penny. Was he in a situation to pay? We presume he was not. For what purpose then sue the other bonds? Did the complainant ever apply to the treasurers

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*to do it? It does not appear that he ever did; and for the best of reasons, because it would not have advanced his interest, and would have been attended with additional expence. When he made the application to the treasurers, to know if the bonds were taken up, is not stated, nor is it a material circumstance, because he could have got the information from Bordeaux himself; and from the complainants own confession, as stated in his bill, he had ample means in his own possession, to secure himself completely. He knew judgment had been obtained against him on one bond. It was therefore his interest to see that that was satisfied in the first instance; and also the other bonds afterwards, and before he parted with the funds he was possessed of. If he gave up some of them to Bordeaux without being ascertained whether the bonds in question were or were not taken up, and has made a bad bargain in the disposition of the rest, he has only himself to blame. The negligence of the public officers ought not to be used as a shield, to protect him against his own supineness. Upon the whole, the court are unanimously of opinion, that the complainant is not entitled to relief on the ground of negligence, with regard to the first bond, because due but unavailing diligence was used to recover the money on that. Nor is he entitled to relief on the other bonds, upon the ground of extending the credit beyond the time contracted for, because he has not made it appear that such credit was given either expressly or impliedly against his consent or inclination. This case therefore is not similarly circumstanced, nor does it come within the reason or equity of the lately adjudged cases. And lastly, because from complainants own confession, it appears he was fully indemnified for his suretyship by the funds deposited with him, for that purpose, if he had made due and proper application of them.

Bill must be dismissed with costs.

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*Case XXVIII.

[Present, Chancellors Rutledge and Marshall.]

JOHN LLOYD, Jun., and Wife, v. the Executrix of DANIEL CANNON and Others.

(January, 1804.)

[*Executors and Administrators* ⇨488.]

A person possessing himself of the estate of a female orphan relation during the war, when there was no American government or civil authority to grant letters of administration, will not be considered as a trespasser, or executor de son tort, but as a trustee acting for the best: and will be allowed commissions on his accounts.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2072; Dec. Dig. ⇨488.]

This was a bill filed by the complainant John Lloyd, for an account and settlement of his wife's estate. It involved many matters of fact, but no point necessary to report but one.

Mr. Cannon, the connection of Mrs. Lloyd, on the death of her father, took charge of her person and property, and took out such authority as was then to be obtained from the British board of police, which was the only semblance of civil authority in Charleston, a garrison town held by the enemy. After the restoration of the American government, Mr. Cannon did not deem it material, or was not advised that it was proper to take out regular letters of administration; but he proceeded to act upon and manage the affairs of his young relation who lived in his family till her marriage with Mr. Lloyd. Mr. Lloyd afterwards bro't suit for an account and settlement of his wife's estate, which some complicated circumstances prevented the parties settling without the aid of the court.

A question was made whether a person situated as Mr. Cannon was, could be allowed

commissions on his pecuniary transactions. On that point the court said that Mr. Cannon ought not to be considered as a trespasser or executor in his own wrong. He was rather to be commended then censured for getting possession of the estate as he did; for there was no other way of securing it but by application to the ruling powers.

But he should afterwards have applied

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to the Court of *Ordinary for letters of administration. Yet as the court cannot consider him in the light of a wrong doer, but of a trustee, he was justly and equitably entitled to his commissions. The report of the commissioner on that point was therefore confirmed.

Bailey for complainant.
Desaussure and Ward for defendant.

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Case XXIX.

[Present, Chancellors Rutledge, Marshall and James.]

JOHN RAMSAY and Maria, his Wife, v. WILLIAM ALLEN DEAS, Executor of John Deas, Jun.

(June, 1804.)

[*Descent and Distribution* ⇐6.]

The act abolishing the rights of primogeniture, having a precise day fixed by law for the commencement of its operation, must operate on all cases coming within its scope, on that day.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 30; Dec. Dig. ⇐6.]

[*Adverse Possession* ⇐61.]

An executor entering on lands of the estate of his testator, and occupying them, is to be considered, as holding them in trust for the heirs or devisees, unless he proves that he held adversely with notice to the heirs or devisees; in which case, the proof lies on him to establish the claim at law, on an issue directed.

[Ed. Note.—Cited in Carr v. Green, 2 McCord, 82.

For other cases, see Adverse Possession, Cent. Dig. § 316; Dec. Dig. ⇐61.]

[This case is also cited in Fowke v. Woodward, Speers, Eq. 246, on the doctrine of notice.]

John Deas, jun. died on the 20th October, 1790, possessed of a considerable real and personal estate, leaving alive his wife Maria Deas, and an infant son, John Seaman Deas, and his wife pregnant of a child, who was born soon after, and proved to be a son. A little before his death, to wit, on the 20th October, 1790, he executed his last will and testament, which he left in full force, wherein and whereby he devised, (amongst other things) all his real and personal estate, not otherwise disposed of, to his son John Seaman Deas, and such child as might be born after his decease; if a son, to be equally divided between them, share and share alike, as tenants in common, and their heirs. But should such child prove to be a daughter, in that case he devised and bequeathed one third of his estate to such child and her heirs. and the remaining two thirds to the said

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John S. Deas. He bequeathed his *house servants, furniture, &c., to his wife for life, with the remainder to his son J. S. Deas. He desires the plantation called Thorowgood, which he had contracted to purchase, should be actually purchased; and he gives a life estate in it to his mother, and the use of it after her death, to his wife, during the minority of the children. He also devised as follows: That if he, the testator, should die without male issue, or if said John S. Deas, or such other male issue should die under the age of 21 years, he gave and devised the whole of his real estate to such posthumous daughter, her heirs and assigns; and in like manner, he gave and bequeathed to her a moiety of his personal estate; the other moiety of his personal estate, he in such case, gave and bequeathed to his wife forever.—And on said J. S. Deas coming of age, he directed a house to be built on Mount Holly, for the accommodation of his wife. And if he should die without male issue, or should such after born child prove a daughter, in that case, he gave and devised Thorowgood and Mount Holly estates to his brother W. A. Deas, his heirs and assigns.

And he appointed his wife, Mr. Archibald Brown, and his eldest brother (Mr. W. A. Deas) executors of his will. They all three qualified as executors on the will.

That on the 23d October, 1790, the widow was delivered of a child, who proved to be a son. The eldest son John Seaman Deas, died in November, 1790, an infant, unmarried and intestate; and some time in the year 1792, the posthumous child died, an infant, unmarried and intestate.

After the death of the testator, Mr. A. Brown and the said W. A. Deas possessed themselves of the real estate, and received the rents and profits thereof; and after the death of the posthumous son, the widow and the two executors sold all the personal estate, (except what was specifically bequeathed to Mrs. Deas for life) and part of the real estate of testator, and the two executors received the money and specialties.

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*Mr. Brown, the executor, died in the year 1797, and the said Wm. A. Deas possessed himself of the real estate unsold, and received the rents and profits, and possessed himself of all the monies and specialties.

Mrs. Deas afterwards intermarried with Dr. John Ramsay.

Upon this state of facts, Dr. John Ramsay and wife filed their bill of complaint, claiming the whole real and personal estate de-

vised by the said John Deas to his two sons, both of whom Mrs. Deas survived, and requiring an account from Mr. W. A. Deas. The complainants insisted that by the operation of the statute of Feb. 1791, abolishing the rights of primogeniture, and for other purposes, the whole estate vested in her, on the death of her two sons, the devisees of their father Mr. John Deas.

The answer of Mr. W. A. Deas admitted all the facts charged, but denied the conclusions drawn from them by the complainants. He denied the complainants right to the estate, and insisted that ever since the death of his nephew, the posthumous child of testator, he had been in the peaceable possession in his own right of all such parts of the real estate of said John Deas, as was not sold, and submits to the court whether the residue of the specialties arising from the sale of the lands, made by the executors, should not, (after payment of debts) be considered as real estate. And that if the complainants ever had any right or title to any of the real estate of said John Deas, (which however, he denies,) he contended they were barred thereof; and he prays the benefit of the statute of limitations.

At the hearing, it was insisted for the complainants, that on the death of John Seaman Deas, the eldest son of the testator, in November, 1790, the estate he was entitled to went to his brother, the posthumous son, either by the devises in the will, or by descent, according to the common law; the statute altering the law, not then having been enacted. And that on the death of the posthumous son, an infant unmarried and intes-

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tate, in July, 1792, af*ter the passage of the act abolishing the rights of primogeniture, and of the time fixed for the commencement of its operation, (1st May, 1791) his mother, the complainant Maria, became entitled by the provisions of that statute to the whole estate. That the devise to W. A. Deas, was upon contingencies which had not occurred; for the testator did not die without issue male, his son John S. Deas being living at his death: and the child with which his wife was pregnant, did not prove to be a daughter, but a son. And that the executor W. A. Deas, having entered on the real estate, and possessed himself of the personal, as executor, he could not set up his possession after the death of the posthumous child (in 1792) as an adverse possession, so as to entitle himself to the benefit of the statute of limitations. That executors do in this country constantly enter upon the lands of the estates of their testators, ex necessitate, from the blended nature of the real and personal estate; lands, which are real, with negroes, which are personal, placed on them for cultivation; and this entry and occupation must be considered, not as a trespass or adverse, but confidential, and in trust for the heirs.

For the defendant, it was insisted that upon the true construction and intention of the will, if the two children of the testator died under 21 years of age, the defendant was to take the real estates of Thorowgood and Mount Holly. But that if the defendant did not take under the devise, he was entitled as heir at law to the posthumous child. That the law abolishing the rights of primogeniture did not operate upon cases of this kind, where the wills of testators were executed prior to the passage of the law; and upon failure of the provisions of the will, a descent took place, and the estate should rightfully go according to the ancient law.

That on the death of the posthumous son, in July or August, 1792, the defendant considered the estates as his own, and treated them as such; occupying them in his own right, renting them out, receiving and ap-

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propriating *the profits to his own use, until the filing of the complainants bill in Sept. 1801.

That however his original entry on the land might be, on account of the children, yet after their death he claimed it as his own, and held adversely to all other persons; and his acts manifested this to the world, and particularly to the widow, and those acquainted with these transactions. This entitled him to the benefit of the statute of limitations.

The court took time to deliberate, and Chancellor RUTLEDGE delivered the decree of the court.

Upon a fair construction of the will of J. Deas, nothing can be more clear and manifest than that the testator never intended his wife should possess any part of his real estate, except a life estate in Mount Holly, on which he directed a house to be built for her accommodation on a certain contingency. It is also as clear that had not the law for abolishing the right of primogeniture interfered, the defendant, upon the death of testator's children, during minority, would have been entitled to his real estate. The act abolishing the right of primogeniture, passed since the testators death, and also the amendatory act, have made a total alteration in the law, both as to real and personal estates, by making the father or mother of an intestate child capable of taking the real estate, particularly in exclusion of those who were formerly entitled to it. We wished to have restricted the operation of the law to such wills as had been made after it passed, because it was impossible for persons who had made wills previous thereto, to guard against the inconveniences of such alterations as might be made in the general law, on the subject, and to have excluded its operation in cases of intestate infants who are by law incapable of disposing of their estates; but the time for the

commencement of the operation of the law being fixed to a day, the court have no discretion; and however hard, we may think the defendants case to be, such is the law; by it must our decisions be governed. In the sixth clause of the will, testator says, if I should

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*die without male issue, or should such after born child prove a daughter, in that case I give, devise, &c. Thorogood and Mount Holly estates unto my brother, W. A. Deas, his heirs, &c. Neither of these contingencies happened, for he did not die without male issue, which according to legal construction must be confined to a dying without leaving male issue at his death; and the posthumous child did not prove to be a daughter. The consequence then is clear that the devise to defendant could not take effect, and the mother under the law before mentioned (as it then stood) became entitled to the whole estate devised to her children who died infants and intestate: No person being designated by the amendatory law to take the part which is therein directed to go to the brothers and sisters.

In opposition to complainant's demand respecting the lands, defendant has pleaded the limitation act in bar thereof. If he had proved an adverse possession in Mount Holly, the court would have directed in issue for defendant to establish his title at law by the verdict of a jury; but as it is evident that the defendant being an executor, got possession of the estate in that character, the court cannot view him in any other light than as a trustee for the devisees, which circumstance alone would give this court a jurisdiction in the case of claims to land, for otherwise the question being merely as to the validity of a title by possession, it is properly determinable in a court of law. Considering defendant therefore as a trustee, in which case the limitation act will not avail him, his plea must be overruled. Defendant must therefore account for the estate of his testator before the master, namely, the rents and profits of Mount Holly, the bonds which were taken for lands sold, and also the personal estate. Also that he deliver up to complainant all the deeds, evidences and writings relative to Mount Holly tract.

Afterwards in October, 1804, a motion was made for a bill of review, before Chancellors

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RUTLEDGE and MAR*SHALL—which was argued, and the court finally directed an issue at law, wherein W. A. Deas should be plaintiff, and Dr. John Ramsay and his wife, defendants, to ascertain whether the plaintiff has had quiet, peaceable, and uninterrupted possession of the Mount Holly lands, or any, and which part thereof, for five years before the filing of the complainant's bill, with notice to the said complainants, (defendants in the issue directed at law) of such possession.

On the trial of this issue at law, the plaintiff in the issue, W. A. Deas, went into proof of his adverse possession of the Mount Holly lands, and the jury found a verdict for the plaintiff, establishing his title; which verdict was afterwards supported by the court—(ex relatione.)

Messrs. Parker, Gaillard, Pringle, for complainants.

Messrs. D. Deas, Ward, Smith, for defendant.

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2 Desaus. 239

Case XXX.

[Present, Chancellors Rutledge, Marshall and James.]

M'CAULY and Others, Executors of Edgar Wells, v. M'FARLANE and PLAYER, and Their Assignees.

(June, 1804.)

[*Assignments for Benefit of Creditors* ⟸310.]

A copartner taking money out of the funds of the copartnership, and carrying it into a new concern or trading house, and that becoming bankrupt, the fund cannot be followed specifically, so as to give the former copartnership a priority over the other creditors of the bankrupt house.

[Ed. Note.—Cited in Mason's Ex'rs v. Mason's Ex'rs, 3 Desaus. 122; Woddrop v. Ward, Id., 209.

For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 908; Dec. Dig. ⟸ 310.]

This was a bill filed to recover certain sums of money from the defendants which M'Farlane, when a copartner in the house of M'Farlane & Wells, but trading under the firm of Alexander M'Farlane, had taken out of the funds of that concern, and carried with him into a new concern in trade, formed by him with Mr. Player, under the firm of M'Farlane & Player. The latter had since become bankrupt, and had assigned all their estate and effects to assignees, who are made defendants. The complainants claim a pri-

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ority of payment out of the bankrupt *estate, which claim was resisted by the defendants.

At the hearing the evidence was as follows: That when M'Farlane entered into copartnership with Wells, the former was active and industrious, but had no funds. The latter had funds. By the articles of copartnership, the business of the concern was to be confined to shop keeping. It was a prosperous concern and made money.

It was acknowledged by Mr. Player that some of the copartnership funds of A. M'Farlane and E. Wells, were brought by M'Farlane, into the stock of the new concern of

M'Farlane and Player. But it was in money, not in goods. Certain sums were ascertained also by evidence.

It was contended by Mr. Bailey, for the complainant, that the funds taken by M'Farlane out of those of M'Farlane and Wells, and carried into those of M'F. & Player, could be pursued and made liable specifically. That the new concern held as a trustee for Wells, and are accountable even for the profits made from that fund. He cited 1 Ves. 240, 2. 2 Cowp. 445. Coopers Bank Law, p. 129.

It was argued for the defendants by Mr. Pringle, that admit it to be proved that M'F. had carried the funds of M'F. & Wells into the house of M'F. & Player, it was not stock in trade, which could be specified and traced, but money which has no ear mark. That stock must be capable of specification. That a lien cannot attach but on specific goods of the first stock. 1 Ves. jun. 166. That even if goods be taken out of the company stock by one of the partners, his separate estate only is liable. 3 Ves. jun. 240.

There is no evidence that an atom of stock was carried into the new concern by M'F.

Chancellor MARSHALL delivered the decree of the court.

The object of the bill in this case is, that complainants should be permitted to follow certain funds which were taken by Alexan-

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der M'F. from the copartnership of *M'Farlane & Wells, trading under the firm of Alexander M'F. and carried by him into a partnership, subsequently entered into, of M'F. & Player, and since that, transferred by their bankruptcy under the law, to their assignees.

It has been contended for the complainants, that they, as the representatives of E. Wells, the copartner of A. M'F. have a right to follow these funds so taken; that they have a lien on them, and can claim them in the hands of the assignees, preferably to their other creditors. It has been also contended, that the taking of these funds by M'F. (being an act done as a partner) was to all purposes a trust which attached to them, throughout their whole subsequent progress, and protected them from the effect of M'F. & P's. bankruptcy. The only evidence which clearly and distinctly proved the taking or appropriation of any of the funds of M'Farlane and Wells, by Alexander M'F. and carried into the copartnership of M'F. & P. related to three sums, viz: one of £693. 4s. 10d. proved by the answer of Player, one of the defendants, and the books of Alexander M'F. to have been brought by Alexander M'F. into the partnership of M'F. & P. also the sum of £482 received by one Peitring, from J. Tunno of London, in consequence of a letter of credit from Alexander M'F. (M'F. & Wells,) on J. Tunno, which sum he received, and afterwards paid the amount to M'F. & P. who never remitted the same to J. Tunno, but appropriated it to their own use, leaving the estate of the copartner Wells, answerable to Tunno. The last sum is that of £186 received by M'F. & P. of Carpenter and Smith, of Camden. This debt was due to the partnership of Alexander M'F. (and Wells,) but was appropriated by M'F. & P. to their own use. The single question then is, have complainants under the circumstances of this case, the right contended for, or must they, as is insisted on by defendants, come in as other creditors for a dividend of the estate of M'F. & P. It was proved at the hearing of this case, that what was taken from the partnership of M'F. & W. & carried by him into that of M'F. & Player, was in money.

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*This has no ear mark, by which it can be traced or designated. No lien can specifically attach upon it. It is not tangible as goods or the like. It has not been proved, that M'F. ever took the copartnership goods of M'F. & Wells, and carried them into the stock of M'F. & P. The sums appropriated by M'F. were in money, ready cash, which it is impossible to identify in the funds of M'F. & P. M'F. & P. have become bankrupts, and their estate has passed into the hands of assignees, and as the case stands, we cannot say that complainants have a higher equity than their other creditors. They can only come in on the footing of general creditors of M'F. & Player.

Bailey and Desaussure and Ford for complainant.

Pringle for defendant.

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2 Desaus. 242

Case XXXI.

[Present, Chancellors Rutledge, Marshall and James.]

JOHN IZARD WRIGHT, Administrator of Catharine Wright, v. CAROLINE M. WRIGHT and JOHN SIMMONS, Executrix and Executor of James Alexander Wright, Deceased.

(June, 1804.)

[*Contracts* ⇐247; *Executors and Administrators* ⇐460.]

Administrator and heir may compel his co-administrator and co-heir to account; and the court will not on slight grounds presume that settlements have been made; or that parties have abandoned their rights. Some partial settlements not conclusive, that all transactions have been settled.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1139; Dec. Dig. ⇐247; Executors and Administrators, Cent. Dig. § 1983; Dec. Dig. ⇐460.]

[*Husband and Wife* ⇐8.]

[A husband, being banished, is civiliter mortuus; and such rights as he would have

been entitled to on the death of his wife are extinct.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 28; Dec. Dig. ⟸8.]

John Izard Wright, as one of the administrators of his mother, the late Mrs. Catharine Wright, filed this bill against Mrs. Caroline M. Wright and John Simmons, executrix and executor of James Alexander Wright, deceased, for an account of his mother's estate, sometime in the hands of James Alexander Wright, as co-administrator.

The defendants denied that they were under any obligation to account, for the following reasons, viz.

1st. That Alexander Wright the father of complainant, and of defendant's testator,

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was entitled to a life estate in *the property, (having survived his wife) by virtue of a marriage settlement; and that James A. Wright had settled the account of his administration previous to the 28th August, 1796, with his father.

2d. That when a division of their mother's estate was made in May, 1797, complainant gave two bonds to their testator, for a sum of money, being the difference between the value of the property allotted to him, and that to his brother, and did not then make the claim now insisted on.

3d. That when their testator in the year 1800, contracted with complainant for his share of their father's estate in Jamaica, the account now demanded was left entirely out of view, and therefore must have been settled.

The cause came to a hearing, and afterwards Chancellor RUTLEDGE pronounced the following decree of the court:

Complainants bill is brought as one of the administrators of the late Mrs. Wright, against defendants, executors of James A. Wright, who was the other administrator on the said estate, for an account of his administration, and to restrain defendants from compelling payment of a sum of money received by him from their testator, until the accounts before mentioned are liquidated. Defendants by their answer oppose an investigation and settlement of the account on three grounds. 1st. That Alexander Wright, the father of complainant, and of defendant's testator, was entitled to a life estate in the property, (having survived his wife,) in virtue of a marriage settlement, and that he never relinquished his right thereto; and to shew that he did not, they relied on a paper which they gave in evidence, dated 28th August, 1796, entitled regulations made by Alexander Wright with J. A. W. and J. J. W. drawn by the father, and signed by complainant and his brother; inferring from thence, that James A. Wright must have settled the account of his administration previous thereto with his father. Another ground set up is, that when a division of their mother's estate was made in May, 1797, complainant gave two bonds to their testator for a

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sum of *money, being the difference between the value of the property allotted to him, and that to his brother, and did not then make the claim now insisted on. A third ground was, that when their testator, in the year 1800, contracted with complainant for his share of their father's estate, in Jamaica, the account now demanded was left entirely out of view, whence they infer that all accounts between the parties were mutually relinquished.

Two questions were agitated in this case, which occupied a great deal of the time of the court unnecessarily.—1st, with respect to the light in which a woman is to be considered, whose husband is banished, and estate confiscated; and 2d, as to the husband's right to claim a life estate in property settled on marriage, he having survived his wife, but is still in banishment. Both these points are extremely clear: the first, that she is considered as a feme sole, in every point of view; may contract debts, and acquire property, which she may again dispose of by deed or will. 2d, that the husband being banished, is considered as civiliter mortuus, and such rights as would have survived to him on the death of his wife, are extinct and gone with him; and the estate must consequently go to those to whom it is limited over. The case is reduced to these plain simple questions—whether an administrator and co-heir has a right to call his co-administrator and co-heir to an account for his administration of the estate they are respectively entitled to? And whether complainant has done any thing to testify his relinquishment of that right? The first question cannot be controverted, that an administrator and co-heir may compel his co-administrator and co-heir to account. The second question then only remains to be considered, whether complainant has done any thing to shew a relinquishment of his right? Upon this question, the paper entitled regulations, &c. is strongly relied on by defendant. But upon a careful perusal of that paper, it does not appear that a settlement of accounts relative to the estate in question, previous to that period, was at all contemplated:

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nothing is said on the subject, *and an arrangement or mode of conducting the affairs of the estate in future, of a temporary nature, and settled by the father, is the sole object of those regulations; which complainant and his brother subscribed, not from an acknowledgement of his right to make them, but from motives of policy: knowing that he possessed a large estate in Jamaica, and if they opposed his inclinations, he would most probably dispose of that estate to some other

person. That paper therefore, we think, ought not to have any weight in the determination of the question.

With respect to the bonds given by complainant, when the division of the estate was made, they were given, it is to be presumed, in conformity to the mode prescribed by that deed, so that no inference can fairly be drawn from that act of an acquiscence on the part of complainant, respecting the account of his co-administrator being thereby settled. Indeed his subsequent conduct plainly evinces the contrary, for we find defendant's testator by letters in the months of April, June and October, 1798, several months subsequent to the division of the estate, written to complainant, informing him that he had drawn out his account, had mislaid it, but would draw it out again, and send it to him. It is impossible for us to ascertain whether he meant a private account between them, or those of his administration. The latter is as probable as the former; especially as it has not been attempted to be proved that he ever settled his account with his father. It is to be lamented that executors and administrators in general, are so remiss in their duty as not to conform to the directions of the law, by rendering accounts of their administration to the ordinary annually. Had that been done in this case, no difficulties could have occurred. There would have been no occasion for the present suit, and a public discussion of family discord, (at all times unpleasant, but which must be peculiarly so to the relatives of the deceased) would have been avoided. The court are of opinion, and decree, that the defendants account for their

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testators administration of the *monies belonging to the estate which he received, and that the injunction be continued till further order of the court.

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2 Desaus. 246

Case XXXII.

[Present, Chancellors Rutledge, Marshall and James.]

JAMES SHOOLBRED v. CHARLES and THOS. DRAYTON.

(June, 1804.)

[*Partition* ⇐111.]

Three executors who were residuary devisees, had sold the real estate for a division upon credit, and divided the bonds equally amongst themselves; and one of them had pledged the bond that fell to him to his private creditor. Afterwards, the court at the instance of another heir, set aside the sale, decreeing that the estate was divisible into four shares instead of three, and that the sale was unauthorized. Upon a re-sale, the creditor to whom the above pledge was made, shall come in for the one fourth that would belong to the devisee who made the pledge, although it may leave an unequal pressure of debts on the other executors who assented to the sale and division.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 401; Dec. Dig. ⇐111.]

The case made by the bill was this—that the defendants, together with their brother Glen Drayton, were the sons and executors of John Drayton, deceased. That in the year 1779, they divided the estate of their testator amongst themselves, each taking one third part. That one part of the property so divided, was a house in Broad-street, which they sold for the purpose of division. That Dr. Chanler became the purchaser, and gave his three bonds for the purchase money, secured by a mortgage of the property; and each executor took one bond to himself as his portion or share of that property. That Glen Drayton was indebted to William Smith & Co. on a bond dated 7th March, 1788, for £720. 7s. on which, judgment was entered up 17th Oct. 1791—execution issued in May, 1792, and levied by sheriff Postell on a large gang of negroes held by G. Drayton. That complainant became administrator of William Smith, to whom G. Drayton owed sundry monies on accounts—these were liquidated with complainant, and G. Drayton gave his bond, dated 17th May, 1792, for the fur-

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ther sum of £684. 11s. 4d. and *confessed judgment thereon 27th May, 1792, on which execution was issued and levied in like manner as above. On the faith of these levies, and at the strong solicitations of G. Drayton, and repeated promises of payment, a series of indulgences were granted him. As a further security, he deposited with complainant one of the above bonds, made payable to the three executors, being the one that had fallen to G. D. on the division, which bond was for the sum of £1305. 4s. which bond the said G. Drayton then alleged was exclusively his own, and on which it appeared he had received sundry payments from Dr. Chanler. That complainant gave notice to Dr. Chanler, and believes the transfer was known to the defendants; that no objection was ever made. That G. Drayton had for many years held a large real and personal estate as his own, which was never questioned by his brothers, on the faith of which, creditors had extensively trusted him.—That in the year 1792, the defendants filed a bill against the judgment creditors of G. Drayton, stating that the brothers had divided the estate, on the mutual principle that each one was to pay his own share of the debts. That G. Drayton had involved himself extensively, and his creditors were about to take the property obtained from his father's estate under their executions: and this court, at their instance, granted an injunction to restrain the private creditors: that defendants then let the business rest for years, and suffered their brother, G. Drayton, to make crops and use

them. That complainant employed counsel to urge his particular claims, but was told at a late stage of the cause, that not being named a party, he could not be heard except on an original bill; and the court proceeded to decree in that case, that all the lands that had been bequeathed by the testator to his son John, and which were directed to be sold in the event of his death, and which had been sold by the executors, should be re-sold by the executors under the directions of the master; which decree comprehends the aforesaid house, and the bonds taken from Dr. Chanler for the purchase of it, and operates

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to *cancel the bond, so as aforesaid transferred to complainant. That the said decree goes to defeat the creditors of G. Drayton, and the legal liens they had obtained: and although the court did not consider such claims as sufficient to bar the remedy of the creditors of John Drayton the testator, and the minor heirs of his son John, yet that those objects are duly provided for: and therefore the court ought to hold the defendants shares of the estate answerable for the reimbursement of G. Drayton's creditors, who ought not to be sacrificed for defendants safety; as they being executors, fully assented to the division, and to G. Drayton's holding his own share, absolutely, and freely incumbering it. And especially, that they ought to be decreed to indemnify complainant for the rescision of the sale to Dr. Chanler at their instance, so as to make good the amount of the bond that had been transferred by G. Drayton by their sanction. That this was the security for indulgence, and complainants might have sold the negroes levied upon as other creditors had done, and the property would have been out of the reach of the defendants, and the debts have remained upon them.

The defendants in their answer, admit that the debts stated to be due from G. Drayton to complainant, may be truly due. Also that indulgence might have been given, but not at the request of defendants. They admit that the bond of Chanler was allotted at the division of the estate to Glen Drayton, being his share of the sale of the house in Broad street. Also that G. Drayton received payments thereon, and that he deposited the bond with complainant, tho' defendants do not know for what purpose; but believe it may have been about the time and for the purpose in bill stated. But they own that at the time they divided and allotted the bonds, they did believe that each was entitled to one third of the house. But this court in March, 1793, in the case of the heirs of John Drayton the younger, against those defendants, determined that each was entitled to only one fourth, and defendants did not then know of the transfer of the bond to

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*the complainant, nor for a long time after, but it was kept a profound secret from both. That their bill was filed for an injunction, 3d. July, 1792, and the time of depositing the bond in November, 1792. That defendant Charles Drayton found it out by applying for it to secure himself when G. Drayton informed him he had parted with the bond. That he was his surety for 3000 guineas, which he has been obliged to pay, and was as ignorant of his circumstances as the rest of his creditors.

That the debts due to complainants were contracted in 1780, 1781 and 1782, long before the bond was in existence, and could not be contracted on the faith of it, and that the execution could not bind it. As for not restraining G. Drayton from taking the crops during the long pendency of the suit, it was not advised by counsel, probably from not deeming the crops liable to his proportion of testators debts. That the bill and answer were lost for several years, and the creditors might equally have taken measures to urge the suit. That complainants case is not stronger than those of the other creditors of G. Drayton, concerning whom the court have already decreed; and as to the bond, complainant could have no more than an equitable claim, nor stand in a better light than G. Drayton himself, who could have no right until his proportion of his fathers debts was paid. That at all events his proportion of the house was only one fourth instead of one third, and he has probably received that amount in the payments that have been made to him on the bond. That this court having determined that the sale of the real estae including this house, was void, the bond and mortgage must be so too.†

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*This case was argued by Mr. Ford and Mr. Wm. L. Smith for the complainant, and by

†This determination of the court will be found in the decree delivered Sept. 25, 1794, decree book, vol. 1, p. 177, which is accidentally omitted to be inserted in this work. It was the sequel of the suit of John Drayton, for self and minor sister, v. Charles Drayton and others, executors of John Drayton, reported ante, vol. 1, p. 324; and the decree should have been inserted in the 1st. volume. It is now inserted, and was as follows:

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*JOHN DRAYTON et al. v. CHARLES, GLENN AND THOMAS DRAYTON.

[*Powers* ⊜36.]

[Cited in Carroll v. Stewart, 4 Rich. 202; Mallet v. Smith, 6 Rich. Eq. 22, 60 Am. Dec. 107, to the point that a will authorized a sale of the testator's real estate, but did not authorize the executors to sell. The executors, in good faith, supposing themselves authorized, sold the land for the purpose of a division, and became the purchasers of a large portion of it. *Held*, that the sale was void, and that the executors would not be compelled to abide by their purchase.]

[Ed. Note.—For other cases, see Powers, Cent. Dig. § 141; Dec. Dig. ⊜36.]

Decree.

The point principally litigated in this case is, whether the defendants shall be held to their respective purchases of land belonging to their father's estate, which they advertised and set up

Mr. Parker for the defendant. But as the

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grounds of argument were similar *to those used on either side in the case of the executors of J. Drayton v. G. Drayton and others, (ante, vol. 1, p. 557, 562 &c.) it is deemed unnecessary to detail them here.

Chancellor JAMES delivered the decree of the court as follows:

This case differs from that heretofore de-

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creed between *the executor of J. Drayton, and the creditors of Glen Drayton, in one circumstance only, and that is, with respect to the bond in question of Dr. Chanler, for complainant had obtained judgment and execution, and the execution was levied on the property in Glen Drayton's possession, in May, '92, prior to the delivery of the bond to him. It is to be observed that Chanler's bond formed no part of the security for the debt in the first instance, and was considered in no other light than merely as a collateral security when received, according to complainants own statement; because though it amounted to nearly as much as Glen Drayton's debt, it was not taken in payment or satisfaction, for the judgment and execution still subsisted to be enforced at the pleasure of the complainant. The conduct of the defendants has been arraigned for delivering up this bond to Glen Drayton as his property, thereby giving it a currency, whereby complainant was induced to forbear enforcing his execution, and recovering his debt. If there appeared the smallest tincture of fraud in the defendants conduct, the court would lay hold of it to make them personally responsible for this debt: but when it is considered that the division of their testators estate was first made during the invasion of this country by the British, when no man could call his property his own one moment; that it

to sale in February, 1786, or whether the lands shall be re-sold. Upon a review of the testators will, it does not appear that he has given any authority to these executors to sell any part of his estate, not even the lands in question, although he has directed them to be sold in the event of his son John's death during his minority, and without issue; nor has he authorized his executors to make a division of the real and personal estate bequeathed to John, or of his the testators residuary estate, although he has directed that such division shall take place: so that in these respects, the will is very defective. It has never been questioned that where a testator directs his estate to be sold, but gives no power to his executors to sell, that in such cases, a sale by the executors is illegal, and there have been various instances where executors in those cases have applied to this court to sanction their sale, which has always been done.

In the present case, the defendants conceiving that upon John's death, they were exclusively entitled to the estate bequeathed to him, proceeded to a sale of the lands directed to be sold, in order as they expressly swear, (and their answer stands uncontradicted by any evidence) to make a division of the money, but no other person bidding except in one instance but the person authorized by defendants; they were bought in by defendants in such parcels as best suited them. Impressed with these ideas, it was not very material whether the lands sold at a higher or a lower rate, if their depreciation purchases were nearly for the same price; as in such case, either would have but a small sum to pay the others. It was contended that as complainants were minors at the time of sale, and there are creditors also interested, their rights should be particularly attended to by the court, and defendants ought therefore to be held to their bargain.—Though the claims of minors and creditors should be protected, it must not be done to the injury or oppression of the adverse party, who may have acted incautiously, but without any intention of fraud. If there was any evidence whatever before the court, which shewed that the defendants were apprized of complainants right, and yet persisted in the sale, not being authorized by will to make it, the court would be strongly inclined to hold them to their purchase.—But defendants have positively sworn that the sale was made from a misconception of their right, and for the ex-

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press purpose of a divi*sion.—That no titles have ever been made, nor indeed could they have been properly or legally made. But it was said complainant J. D. who is the heir at law, is willing to make them titles. We ask, would he have been willing to make titles, had the defendants bought in the lands for a trifle? On the other hand, would he not then have requested the court to protect him in his right? As the court would not have confirmed the sales if the lands had been sold at a low price, purely on the principle that the executors had done an act which they were not authorized to do either by the will or the law; so neither ought the court to oblige the defendants to abide by their purchase, made under a sale which they were not warranted in, and under a misconception of their right, without any intention of fraud or deceit. The court are therefore of opinion and decree, that all the lands devised by testator to his son John, (which he directed to be sold on the event of his death) shall be forthwith re-sold by the executors under the direction of the master, on a credit of one, two and three years, taking bond from the purchasers, with a mortgage of the premises. Also that the personal estate, and such other parts of the real estate as John was entitled to under his father's will, and not directed to be sold, to be divided by three persons chosen for that purpose, into four equal parts or shares, and that one of such fourth part or shares, shall be delivered over to the complainant John Drayton for the benefit of the estate of William H. Drayton, deceased, he to be accountable for a proportionate share of testator's debts as were chargeable on his residuary estate. Also, that it be referred to the master to ascertain and report, what shall be a fair and reasonable sum of money to be paid by defendants for the use of the lands which they purchased, from the time of their purchase respectively; and also what may be a reasonable allowance for the work and labor of the negroes complainant may be entitled to; to be computed from the death of testator's son John to the time when the division shall be made, deducting thereout the expences of taxes and clothing; that the master shall examine and ascertain what sum of money was allowed or paid by defendants to Mrs. D. for her dower in John's lands, and the residuary real estate of their testator, and debit complainants with one-fourth part thereof in his settlement of accounts. And lastly, that the defendants do pay the costs of this suit out of the sales of the estate.

was then made evidently for the benefit of all concerned: That every thing continued in a state of confusion for several years afterwards—when it is considered that defendants looked on the property as their own when they made the division, but had misconceived their rights; and it was not until some years after when their mistake was corrected by a decree of this court: When all these circumstances combined together are considered, they weigh strongly with the court not to make the defendants personally responsible; The first part of their conduct being justifiable, and the second in a great measure excusable. Besides a custom had too commonly prevailed, and in some instances had been sanctioned by the court, of dividing estates among the heirs and devisees before the debts

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*were satisfied. The inconvenience of such a practice has been seen by the court, and severely felt by creditors, and we trust will never occur again. Complainant states that he forbore to enforce his execution on the appeal of Glen Drayton's friends, and in consideration of this bond being deposited with him. Defendants in their answer positively deny they ever made the appeal set forth, and complainant has not proved they did; and so far from countenancing his parting with the bond, they wished and endeavoured to get it back again to secure themselves. As to complainants enforcing his execution, he would have been prevented from selling as well as the other creditors of Glen Drayton, who were restrained by injunction.

It has been urged that the court in the former decree had favored the defendants, by setting aside the sale they had made of testators lands, which would prejudice their individual creditors; and it may eventually prove so. The reasons however, which are given by the court in their decree, evidently shew that the interest of defendants was not at all the object of that decree, but to make a legal distribution of testators estate, and set aside a sale not authorized by his will. If in so doing, a prejudice has arisen to the creditors of one of the legatees, it cannot be avoided: the will of the testator from whom the estate was derived must be complied with. The court are disposed to do all they can consistently with the principles of justice and equity for complainant's relief; but they are of opinion that they would violate those principles, in making defendants personally responsible for Glen Drayton's debt, seeing that they have already suffered considerably by his misconduct. As the house however still remains the property of the estate, and G. Drayton was entitled to a fourth part of the reversion in it, the court will order that the reversion in the house be sold, and the one fourth part of the amount sales thereof be paid over to the complainant.

2 Desaus. *254

*Case XXXIII.

[Present, Chancellors Rutledge, Marshall and James.]

CHARITY FORREST, by Thomas Karwon, Her Trustee, v. JAMES WARRINGTON.

(June, 1804.)

[*Husband and Wife* ⇨29.]

A marriage settlement not recorded in the time prescribed by the acts of the legislature, is void as to a bona fide purchaser of the settled property from the husband. The wife's choses in action are equally included in those acts with other personal estate; and a transfer by delivery, by the husband, to a bona fide purchaser, is good against the wife, as well as other assignees.

[Ed. Note.—Cited in Matheney v. Guess, 2 Hill, Eq. 69; Phillips v. Rivers, 1 S. C. 449.

For other cases, see Husband and Wife, Cent. Dig. § 167; Dec. Dig. ⇨29.]

[*Assignments* ⇨22.]

[A chose in action is assignable at law as well as in equity.]

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 36; Dec. Dig. ⇨22.]

[*Husband and Wife* ⇨11.]

[The receipt of dividends on bank stock belonging to the wife, and the assignment of the stock by the husband, are a sufficient reduction into possession to vest the property in the assignee.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 55; Dec. Dig. ⇨11.]

The bill states, that in May, 1794, the complainant Charity Forrest, (then widow of R. Lushington) being about to intermarry with George Forrest, had a deed of settlement made, dated 8th of May, whereby her real and personal estate were conveyed to William Mason, (since deceased) and Thomas Karwon, as trustees, the particulars of which personal property were stated in a schedule annexed to the marriage deed, to which her said husband was a party, and in which the full power of holding and disposing was reserved to complainant as will appear by the deed itself. That the marriage took place 14th May, 1794. Among the articles of personal property settled, there were forty eight shares of bank stock, in the South-Carolina Bank, standing in the name of complainant, Charity Lushington. On these shares her brother-in-law, Daniel Lathan, drew the dividends for the year 1793, by virtue of a power of attorney from complainant. That the said George Forrest went to the bank, and without any power from her, drew the dividends for 1794, 1795 and 1796. That from the marriage and during part of the year 1797, the said George Forrest was in good credit, and supposed to be affluent. That in the month of May, 1797, he suddenly left this state, and no certain accounts of him have been since had. Numerous attachments have been issued by his creditors, and all his property has been seiz-

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ed and sold. That complainant was *igno-

rant of his circumstances, and being abandoned in a distressful condition, she claimed against the attaching creditors, the said bank shares, supposing them to be amongst the papers and property taken possession of. That she afterwards heard that Isaac Peace, one of the first attaching creditors, had laid claim to the same, as being included in 100 shares in the said bank, which George Forrest had transferred to him by an assignment, dated 27th November, 1796, in payment of some debt, but that they had not been delivered, the said G. F. having previously lodged them with other certificates in the office of the Charleston Insurance Company, of which he was a member, as a pledge, agreeably to their rules. That the deposit, as well as the assignment, were without the authority of complainant, or her trustee. That complainant learnt afterwards that James Warrington laid claim to 45 of the said bank shares as assigned to him by a deed subsequent to that to Isaac Peace: and complainant hath understood that the said 45 bank shares, with other stock, hath been delivered by the president or some other officer of the Insurance Company to the said James Warrington, in consequence of the claim by him so made. That the assignment made to the said J. Warrington by the said G. Forrest, was without the authority or assent of complainant or her trustee. That application hath been made to the said James Warrington, while in this state, and to his agent James Bulgin, since his departure, to deliver up the said bank shares, which they have refused, claiming property therein. The bill proceeds with divers charges, that defendant Warrington knew that G. Forrest was under the pressure of great difficulties, and availed himself of his necessities to get from him the stock he possessed at a great under value. That the consideration consisted of advances of money at an usurious rate of interest—that he knew the stock belonged to complainant as it stood in her name, and that the transaction was not fair and bona fide, and prayed that he or his agent, or the In-

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surance *Company, might be compelled to restore the said Bank Shares.

The defendant, James Warrington, filed a plea and answer. To the relief sought by the bill, he pleaded, that after the marriage between the complainant and George Forrest, and when he was in high credit, and reputed to be wealthy, viz: Sept. 1797, he pretending to be possessed in his own right, of and in the bank stock in bill mentioned, and sundry other stock in the same bank, and public stock of the United States (in plea set forth) all of which was deposited in the Charleston Insurance Company, subject to its controul, according to its rules and regulations, in consequence of G. Forrest being a proprietor of one half share of stock in that company, and pretending to have good right and full power to sell and transfer all the said stock, together with his share in the company, applied by his agent David Denoon to this defendant, and proffered to sell and transfer all his said stock and interest to the defendant for $6250, the defendant to come into the Insurance Company in his lieu and stead. That defendant inspected the rules of the company, and found that every stock holder must deposit money, or stock to be estimated at the lowest market price, to the amount of his capital share, and execute and deposit with such stock, ample powers of attorney, to sell and transfer the same, when by the rules and exigencies of the company it should become requisite. That on the 14th Sept. 1797, defendant applied at the Insurance Office for information, and was there informed by the clerk that the said G. Forrest held a half share, and shewed a specification of his deposit, amongst which were the bank shares in question, standing in the name of his wife before marriage, with several powers of attorney from G. Forrest, to sell and transfer the various stock, agreeably to the rules of the company; and defendant concluded that the said G. Forrest was the lawful proprietor with full power to dispose thereof, as a member of the company, and the said company having agreeably to their rules assented to receive defendant as a

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member in *lieu of G. Forrest, the defendant, on or about the 7th October, 1797, did actually purchase from the said G. Forrest, for valuable consideration, (viz. $2650,) all and singular the stock so deposited, including the shares in bill mentioned, whereupon by indenture made the 7th October, 1797, (ready to be produced) the said G. Forrest reciting that he was possessed of all the stock (as specified in the deed, and the shares in question amongst the rest) and other funds deposited in the insurance company according to its rules and regulations, for the consideration of $6250, paid, did bargain, sell and assign all the said stock and shares to the said J. Warrington, together with his half share in the company, &c. That by force of the assignment, and of an election had in the company, the said J. W. was admitted and accepted a member for a half share, and afterwards as such paid $2125, on a loss in the company; and the said J. Warrington doth aver that at the time of executing the assignment, and at and before the time when he paid the consideration money, and at and before the time of purchasing from the said G. Forrest, as aforesaid, he was without knowledge or notice of the marriage deed or settlement mentioned in the bill, and was an innocent and bona fide purchaser for valuable consideration, and without notice of the settlement or trusts in bill stated, and pleads the same in bar, of the relief prayed. And defendant answers (not waiving his said plea) that he does not know whether

there was any power given to the husband to pledge the stock in said company, but submits that it was inferrible from the fact, that the said G. Forrest after the marriage always drew the dividends, and from his having possession of the original certificates. That the settlement all along lay concealed and not published on record as the law requires, until long after the stock was sold, viz. 4th November, 1797. The defendant denies that the said G. Forrest was apparently in embarrassed circumstances, but was in good credit; or that the certificates or stock were bought for inadequate consideration or

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for money advanced upon usurious in*terest, and avers that the contract was in manner and substance fair and bona fide.

This cause was argued by Mr. Pringle and Mr. Gaillard for the complainants, and by Messrs. Parker, Smith, Desaussure and Ford for the defendants.

For the complainant were cited, 1 Eq. Cas. ab. 68. 1 Vern. 161. 3 Ves. jr. 469. 5 Ves. jr. 515. 3 Atk. 20. 4 Bro. 139. 1 P. W. 459. 1 Atk. 280. 2 Ves. jr. 680. 4 Bro. 339. 1 Fonb. 96. 3 P. W. 197. 2 Fonb. 155, Solee v. Bezier, decided in this court. Also 2 Fonb. 155. 2 Ves. jr. 437, 440. 3 Atk. 654, 1 Fonb. 314. 3 Ves. jr. 469. 1 P. Wm. 199.

For the defendants were cited, Mitf. 215. 2 T. R. 70. 1 Fonb. 164. 3 P. W. 280, 1. Act of Assembly of March, 1785, and Dec. 1792. 1 Wils. 26. 3 Atk. 156. 2 Ves. 666. 2 Atk. 275. 2 P. W. 237, 532, 607. 3 P. W. 196. 1 Vern. 18. Ca. Temp. Lord T. 186. 2 Atk. 207.

The opinion of the court was delivered by Chancellor JAMES, as follows:

Complainant among other matters, states in her bill, that a marriage settlement was duly made and executed on the 8th May, 1794, by which forty-five shares in the South-Carolina Bank (among other property) were conveyed to trustees for the use of complainant Charity Lushington, (now Charity Forrest) the intended wife of George Forrest, which bank shares are the property claimed by the bill. That the marriage was shortly after solemnized, and the said George Forrest, soon after the marriage, received the dividends of said shares from the said bank, for the years 1794, 1795, 1796, without any power of attorney from complainant. That from the time of said intermarriage, until the close of the year 1797, the credit of the said George Forrest stood high as a merchant, but in the year last mentioned, he suddenly absconded from his creditors. That after the said George Forrest had left complainant in distressed circumstances, she

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found that the *said bank shares had been twice assigned by the said George Forrest—first, to Isaac Peace, without giving him possession of the certificates for the same; and secondly, to the defendant James Warrington, who had obtained possession of the said certificates from the president, or some other officer of the Charleston Insurance Company. That the said assignments were both made without any authority from complainant or her trustees.

The defendant James Warrington, among other matters, sets forth in his answer:

That after the marriage of the said George and Charity Forrest, while the said George Forrest was apparently in affluent circumstances, viz: in the month of Sept. 1797, the said George Forrest pretending to have a right to sell the forty-five bank shares in dispute, together with other stock in the answer mentioned, this defendant did agree with him to purchase the same.

That in consequence of said agreement, the said bank shares were assigned to the defendant on the 7th October, 1797, under the hand and seal of the said George Forrest. That defendant gave a good consideration for the said bank shares, without notice of the marriage settlement, and was an innocent bona fide purchaser. That the said marriage settlement was never recorded in the manner prescribed by law. That therefore defendant pleads the matters of fact above stated in bar to so much of complainants bill as seeks to compel him to deliver up the said bank shares to the complainant.

A great many grounds have been occupied in this case, and the questions arising in it have been argued with great ability by the counsel on both sides. Upon consideration however, it appears to the court that the case may properly be confined to two grounds.

1st. Whether the marriage settlement of Charity Forrest, not being recorded, shall prevail against a bona fide purchaser.

2nd. Whether George Forrest, the husband, did make a legal assignment of the bank shares to the defendant.

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*Upon the first point, we observe that the act of the legislature to oblige persons interested in marriage deeds to record the same, passed on the 18th March, 1785, directs that every marriage contract, deed or settlement that shall hereafter be entered into for securing any part of the estate, real or personal in this state, of any person or persons whomsoever, shall within three months after the execution thereof be duly proved and recorded. That again, an act of the legislature to alter and amend the one above mentioned, which passed on the 21st of December, 1792, directs, that all marriage settlements shall particularise the real and personal estate thereby intended to be passed, or have a schedule annexed, particularising the same; and in default of such schedule, and recording the said settlements, are declared to be fraudulent and void against creditors and bona fide purchasers.

We have been the more particular in re-

citing these acts to shew the abundant caution of the legislature to provide against the mischiefs arising from the former practice of not recording marriage settlements. The preambles to both the acts also shew how anxious they were that persons interested in marriage deeds should not have it in their power to keep the same secretly by them, and by the shew of an estate liable for their debts, to induce creditors to trust them. If it were necessary by any other proof to shew the solicitude of the legislature to guard against these and such like mischiefs, it might be done by referring to the statute book, and pointing out that the spirit of every law upon the subject of recording deeds is directly opposed to the holding out of false lights to creditors, and bona fide purchasers.

The first act we have quoted, directs that marriage settlements shall be recorded within three months after the executing of the same; and the second enacts, that in default thereof, they shall be void against creditors and bona fide purchasers. Now in the case before us, the deed never was recorded until three years and seven months after the same was executed.

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*The acts of assembly have therefore pronounced it void, and how can this court say that it shall prevail against a bona fide purchaser. The abundant caution of the legislature has left no room for the interference of this court; and although it may be urged that this is a hard case, yet we must reply, as in a case decided to-day, that such is the law. Upon the question of assignment, it will be proper to enquire, 1st. Whether George Forrest had the power to assign. 2d. Whether the assignment was properly made. As to the power, we are of opinion, that although the marriage settlement was properly executed, as between the parties thereto; yet as to bona fide purchasers, from its not being recorded, that it remained inchoate, and inoperative.

To bring it into operation, the law required a certain act to be performed in a certain time; that act was not performed within the time fixed; therefore as between George Forrest and an innocent purchaser, the property remained as if no marriage settlement had ever been made, and all the marital rights over it, attached in the husband.

He would not indeed be allowed in equity to defeat his own agreement, if the same had been complete; but the trustees having left it incomplete, he was left at liberty to act as he pleased.

After the marital rights attached, it only remained for the husband to reduce the property into possession, to be able in law to assign the same; and this, it appears, he did by exercising acts of ownership over it; first, by receiving the dividends for three years; second, by depositing the certificates for the same in the Charleston Insurance Company; and third, by assigning over the same to the defendant. Now these acts certainly shew an intention to make use of the property—but to shew an intention to make use of property "is said in 2d Atk. 207, to be a sufficient reducing into possession. It therefore is plain that to a purchaser without notice, George Forrest had the power to assign.

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*The question then remains whether the assignment was properly made. It was contended by complainants counsel that a chose in action is not assignable at law, and that such assignment can only be made in this court. This may have been the case formerly, but in the case of Carteret & Paschal, 1st Peere Wm. 199, it is held that where Baron is entitled to a chose in action as he may release or forfeit it so if he should assign it for a valuable consideration, it would be good.

This case is fully in point, and the assignment stated to be made therein by Dr. Herbert, is similar in every principle to the one made by George Forrest, in the present case. We therefore hold this a sufficient authority for us to decide that the assignment by Forrest was properly made. It was strongly urged by complainant's counsel, that defendant had sufficient notice to put him upon inquiry, and therefore that this notice was good in law. We agree with the counsel, in the law, so far as it applies; but we apprehend that in all such cases, the purchaser ought to be put upon such an enquiry as might lead him to the truth. The only fact in the present case that could put the purchaser upon inquiring was that the stock at the time of the assignment, still stood in the name of Charity Lushington. But this fact would mislead him—seeing the stock still in the name of complainant before marriage, he would naturally conclude that by virtue of the marital rights it became her husband's after marriage.

But further if his researches carried him to the secretaries office, he would be led still further from the truth. Since there he would find that no marriage settlement had been recorded. So that the only information he had which could put him upon inquiry, would tend to lead him wide of the truth; we apprehend that the law quoted (from 1st. Fonb. 151) will not apply in the present case.

It was also contended that a chose in action was not such an interest as it was necessary to record; seeing from its nature it could hold out no false lights, could give no false credit, and therefore it could not come

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with*in the spirit of the acts. But as we cannot at this distance of time know all the views of the legislature in passing these acts it will be sufficient for us, if it can upon

a fair construction be brought within the general words of the acts. It is clear from the books cited that choses in action constitute a part of personal estate. Now both acts of the legislature which we have cited, in directing settlements to be recorded, make use of the generic term personal estate, and therefore choses in action being as we have observed a part of the personal estate must come within the general words of the law, and ought like any other personal property contained in a marriage settlement, to be recorded.

Before the court dismiss the subject, it may be proper to observe that during the argument, attempts were made to interest their feelings in favour of the complainant, as a woman left in destitute circumstances.

Had this been really the case, the court do not know what relief they could have afforded her under the law. But they find that the fact is otherwise, and that there is other property of considerable value contained in the marriage settlement, which does not appear to be claimed by the creditors of George Forrest.

Therefore as it appears that the marriage settlement was void, under the acts of assembly, from its not being recorded; and being so void, that the defendant, as a bona fide purchaser, became capable thereby to receive a legal assignment of the property in dispute,

It is therefore decreed upon the matters of fact set forth by defendant, that his plea in bar be sustained; and that the costs be paid by complainant.

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2 Desaus. *264

*Case XXXIV.

[Present, Chancellors Rutledge, Marshall and James.]

ADAM TUNNO and Others, Assignees of M'Farlane & Player, Bankrupts, v. LEWIS TREZEVANT, GEORGE CROSS, Jun., and Others, Trustees to the Marriage Settlement of Joshua Player and Charlotte, His Wife.

(June, 1804.)

[*Fraudulent Conveyances* ⟸94.]

A. makes a settlement before marriage, including his wifes fortune, and all his private property. The settlement was dictated by her uncle and guardian, who would not otherwise consent to the marriage, and who was ignorant of the insolvency of A. at the time. The creditors of the copartnership filed a bill to set aside the settlement as it respected his property as fraudulent and void against prior creditors. There was clearly no actual fraud, and the court refused to set aside the settlement.

[Ed. Note.—Cited in Davidson & Simpson v. Graves, Riley, Eq. 236; McGowan v. Hitt, 16 S. C. 610, 42 Am. Rep. 650.

For other cases, see Fraudulent Conveyances, Cent. Dig. § 241; Dec. Dig. ⟸94.]

[This case is also cited in Sniffer & Paxton v. Sass's Adm'r, 14 Rich. 22, note; Hutzler Bros. v. Phillips, 26 S. C. 148, 1 S. E. 502, 4 Am. St. Rep. 687, on relative rights of creditors of firm and of individual partners.]

The bill states that M'Farlane & Player, at the time they were declared bankrupts, were indebted to complainants and others in large sums of money. That the property of M'Farlane & Player will not pay two and six pence in the pound, they having surrendered respectively, very inconsiderable funds. That the said Joshua Player was possessed of a large estate derived from his father; and being so indebted and so possessed, he intermarried with Miss Charlotte E. Thomson; and previous to his intermarriage, executed a certain deed of settlement, on the 31st Dec. 1801, in consideration of his intended marriage, and in consideration of a certain settlement of his wife's property then in possession, and such as might afterwards come to her, whereby he conveyed to the defendants in trust, all his lands and negroes for the use of himself and wife for life, and if she died first, without issue living at her death, then to his sole use; but if she left issue alive, then to him for life, and remainder to the children. If the children died in his life time, then to his sole use for ever.—In the event of his dying before her, the same limitations are made in her favor; except that if she should die, leaving no issue alive, the

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property is to revert to his heirs.—*And the said Joshua Player further covenanted in and by the said settlement, that as soon as the said Charlotte E. Thomson's share of her father's estate was ascertained, he would convey the same to the said defendants, in trust for her separate use during their joint lives, not subject to his debts; and in the event of her dying first, without issue living, then in trust for the use of the said Joshua, his heirs, executors and assigns; but if she left issue, then to him for life, remainder to such issue. And in case the said Joshua should die before the said Charlotte, then to her for life, and remainder to her issue; in default of such issue to his right heirs.

The bill prays that the said marriage settlement be postponed to the prior claims of the creditors, as far as regards the property of the said Player, thereby conveyed.

The answer of the defendants admits the settlement; that it was made on the 31st December, 1801, and that M'Farlane & Player were declared bankrupts on the 24th July, 1802; and the defendant Lewis Trezevant states the following facts in regard to the said settlement; that in May, 1801, the said Player applied to this defendant as guardian and uncle of the said Charlotte E. Thomson, (whose father was dead) to obtain his consent to the marriage of the said Player, with his niece; that this defendant consented thereto, but required that a proper settlement of her property should be made on her; and further, as mercantile men were liable to sudden misfortunes and failures, which often stripped them of their whole property; he

required that the said Player should settle so much of his own property on her, and the issue of the marriage, as together with her own property, would secure her a competence in case he should meet with accidents, and become embarrassed. The said Player replied that a settlement was unnecessary, as his father's will devising to him his property, settled it upon him, and any family he might have. That this defendant expressing a doubt, whether the will might not be incorrectly worded, and not sufficient to effect this

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object, asked for a copy thereof, which *the said Player promised to give; at the same time saying, that if upon examination, the will should turn out to be insufficiently expressed to effect this object, he was willing to make the settlement required, as he knew his father's intention to be that the property should be so settled. That this defendant soon after examined the said will, and being of opinion that it would not secure with certainty this property to the family of the said Player, communicated to him that opinion, and required the settlement to be made. That the said Player then agreed to settle the said property upon such terms and trusts as this defendant might think proper and liberal. That this defendant then consented to his marriage with his niece, between whom and the said Player, an engagement immediately took place, although the marriage was not solemnized until some time after. And this defendant verily believes that the said marriage never would have taken place without his consent, which he certainly would not have given, unless this settlement had been made. This defendant solemnly avers, that neither at the time of the engagement, nor at the time of the marriage, had he any reason to suspect the solvency of M'Farlane and Player. That being but little acquainted with the circumstances of mercantile men in Charleston, he made some enquiries respecting the situation of M'Farlane & Player, at the time the latter was paying his addresses to his niece, and learnt that their credit was good at the custom house, and at the banks. Defendant therefore trusts that he will be acquitted of having had any improper design to procure the said settlement to be made for the purpose of placing the said property out of the reach of the creditors of M'Farlane & Player.

This defendant avers that the settlement, and the terms and limitations therein contained, were proposed by himself, and not by the said Player. That the settlement was made in consideration of marriage, and to provide for the issue thereof, and also in consideration of the property and estate to which the said Charlotte was entitled.

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*These defendants contend, that as to the solvency of M'Farlane & Player, at the time of the agreement above named, the debts due in May, 1801, and not the amount due in December following, ought to be the sum taken into the calculation, because the verbal contract to make the said settlement, was made in May, at which time M'Farlane & Player were worth more than they owed by several thousand pounds sterling; but that even in December, they might reasonably have considered themselves solvent.

These defendants deny that M'Farlane & Player were indebted in the sum of $137,636.34 cents, in the month of December as stated; and they aver that a large part of the debts due in December, were paid before the bankrupty took place.

That the amount of debts proved against M'Farlane & Player, before the commissioners of bankruptcy, is only $74,318, 5cts. and in that amount, several creditors have proved their debts without giving credit for the proper discounts; which if done, would reduce the amount to $64,780, 30 cts.; and that from this sum ought to be deducted, the debt due by G. K. White & Co. which reduces the amount to $46,050, 25cts. That the debts and effects assigned by M'Farlane & Co. as bankrupts, is $91,281, 82 cts.

These defendants cannot admit that M'Farlane & Player are guarantees for Cummings & Co. as stated, and pray to be dismissed with costs.

The cause came to a hearing, and after argument, Chancellor RUTLEDGE delivered the decree of the court as follows:

This bill is brought by the assignees of M'Farlane & Player, against the defendants, trustees in a settlement made by Player, previous to his marriage, to set aside the settlement (so far as it respects his own private estate) in favor of the prior claims and rights of complainant and other creditors of M'Farlane & Player, the funds of the copartnership being wholly inadequate to the

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payment of *their debts, and because the said M'Farlane & Player were insolvent at the time of the settlement. The defendant Mr. Trezevant, who was the principal agent in the transaction, by his answer, among other matters, states that his niece referred Mr. Player to him, for his approbation, before she would give him an answer. That having no personal objection to Mr. Player, defendant proposed the settlement, which was afterwards made for the reasons set forth in his answer. That having inquired respecting the situation of M'F. & Player, he understood their credit was good at the banks and custom house; that neither at the time of his engagement, nor even at the time of the marriage, had he any reason to suspect the solvency of M'F. & Player; that he verily believes the marriage would not have taken place without his consent, and he would not have consented to it, if the settlement had not been made. That it was not only in considera-

tion of marriage, and to provide for the maintenance and support of his neice, and for the issue of the marriage, but also in consideration of the property to which she was entitled. That her property is settled upon terms much more favourable for Mr. Player than his is in her favour. That it was the intention of Player's father, as expressed in his will, to secure the property he devised to his son, (and which is settled) in such a manner as to place it out of the reach of creditors; and therefore no more is done by the settlement than was intended by the father; and further that the lands settled are charged by the will with legacies to the amount of £600. It was admitted that this transaction was conducted with the utmost fairness and was totally free from the smallest imputation of fraud. It was nevertheless contended by complainants counsel that although there was no intention of fraud, yet if the deed was supported, it would operate as a legal fraud with respect to the creditors of M'F. & P. the copartnership being largely indebted at the time, and if not then really insolvent, has since proved to be so; that therefore Player had no right to make the settlement,

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in as much as it *breaks in upon the legal rights of creditors. For defendant it was insisted that M'F. & P. were solvent at the time of the contract, and no subsequent misfortunes ought to operate so as to invalidate it; that even if they were insolvent, and Player knew it, that would not affect the case, defendant not having notice of it, and they being purchasers for a bona fide and valuable consideration without notice. That the creditors trusted to the fund of M'F. & P. and must be paid out of them. Defendants were in nature of private creditors, and their claim was preferable to the copartnership creditors, and must be first satisfied out of the private estate. This case is confessedly stripped of every symptom of fraud: it does not therefore come within the statute of 13 Eliz. As the marriage would never probably have taken place, if it had been contemplated that the legality or validity of the settlement would have been at all controverted, the only question in the case is whether the settlement under all the circumstances of it, is made upon such a consideration as to prevail against creditors. Marriage is not only a bona fide and valuable consideration, but the very highest consideration in law; this court will therefore always support marriage settlements, if there is no particular evidence of fraud made out, shewing an intention to deceive or defraud creditors. In the case before us, referring to the answer of the defendant, M. Trezevant, he positively swears that M'F. & P. appeared to be in good circumstances; their credit was good, he was induced to give his consent to the marriage, (without which it would not have taken place) under the strongest conviction of the solvency of P. and that he was competent to make the settlement which was made.

Whether the house of M'F. & P. were or were not solvent, was a question defendant could not decide, he could only judge from circumstances, and he had no reason, as he has sworn, to suspect that they were insolvent. Besides the property proposed by Player, to be settled, was his own private

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estate, devised to him by his father, sub*sequent to his engaging in trade, and therefore could not have been counted upon by the copartnership creditors to satisfy their demands. Independent of that, defendant on referring to the fathers will, saw that his intention was to secure the property from his sons creditors, for the benefit of his grand children; and defendant therefore very naturally concluded that such intention would be carried into effect by this court, if applied to for that purpose. The doctrine of setting aside voluntary conveyances and settlements made by persons indebted at the time, is laid down we think on too broad a scale; for if that was held to be the law, scarce any settlements could be supported in this country, there being few or no persons who are not more or less in debt; and if it was to be extended to the actual solvency of the party making the settlement, it might be attended with great difficulty; for at that rate a man previous to making a settlement must know to a cent what he owed, and have his estate appraised to ascertain the precise value of it. The situation of mercantile men would be still harder, for they might be worth thousands to day beyond what they were indebted, and a few days hence by unforeseen losses in trade and bankruptcies of their debtors, they might be reduced to beggary. In the application of funds for payment of debts, the partnership effects are always appropriated to paying partnership debts, and the private estate to pay the private debts of the respective partners; the partnership creditors have no specific lien on the private estate of the individual partners. This is a private contract entered into by Player with the trustees, when he was generally believed to be in good circumstances, the consideration of which is of the highest nature, and not a scintilla of fraud in it. The private fortunes of Player and his intended wife, are mutually pledged as well for the purpose of securing a suitable maintenance and support for them, as for the providing for the issue of the marriage; and from the evidence offered, it appears the income is not, or is but barely sufficient for

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that purpose; and when the legacies *which are charged on the land are paid, which they must be, the income will be still less.

Upon the whole, the settlement seems to be both fair and just; we will not weigh it

too nicely; it is a bona fide discharge of a moral duty, and ought to be supported.

Bill must be dismissed with costs.

Pringle for complainants.

Parker and Lightwood for defendants.

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2 Desaus. 271

Case XXXV.

[Present, Chancellors Rutledge, Marshall and James.]

WILLIAM TELFAIR v. EDWARD TELFAIR.

(November, 1804.)

[*Courts* ⇐489; *Specific Performance* ⇐58.]

The court will decree specific execution of a contract for the conveyance of land situate in this state, though the contract is in the form of a penal bond, and though the defendant resides out of the state.

[Ed. Note.—Cited in Bowden v. Schatzell, Bailey, Eq. 366, 23 Am. Dec. 170.

For other cases, see Courts, Cent. Dig. § 1326; Dec. Dig. ⇐489; Specific Performance, Cent. Dig. § 179; Dec. Dig. ⇐58.]

The bill was filed to obtain specific execution of a contract, for the purchase of a tract of land in South-Carolina, the contracting parties being partners. The defendant had given his bond to make titles to the land.

The bill stated that in 1772, complainant and defendant were connected in trade; complainant resided in London, defendant, then and still in Georgia. Defendant in May, 1794, bought of J. Smith and Elizabeth his wife, of Savannah, the plantation called Smithfield, containing 1,050 acres on Savannah river, in the State of South-Carolina, and took titles to him and his heirs for ever. That said purchase being made with the funds of complainant as well as defendant, he the defendant, on the day after the date of said titles, viz: on the 17th May, 1774, bound himself in a bond to complainant in the sum of £3,300. with a condition that in case defendant (upon complainants paying him the sum of £11,550. currency on or before the 31st August 1778, with interest from the date of bond to be paid annually, and upon the further payment of a moiety of all charges, &c. in repairs and buildings) would make him

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(said complain*ant) titles to one half of said plantation; then said obligation to be void, or otherwise to be of force.

That said bond taken altogether was intended as an agreement to convey one half of said plantation to complainant, and ought to be carried into execution by this honorable court. That notwithstanding such purchase from Smith, the land belonged to Basil Cooper, of London, as is proved by said defendants letters, stating that on the 14th May, 1774, said Edward Telfair purchased of Mr. Cooper his half of Smithfield, for £1650 sterling and advising of his having executed a bond to make titles to half of said land to complainant upon his paying defendant's bond with interest, improvements, &c. That upon complainants being thus advised, he entered into bond with Basil Cooper, conditioned to pay £1650 with interest from 17th May, (time of purchase) at the interest of South-Carolina, eight per cent, being for the purchase of Smithfield. That said bond was accepted by said Cooper, as a performance by complainant of the stipulation made by defendant, touching said land, and was also an exoneration of defendant, and a performance of the stipulations entered into by complainant, to wit: the payment of £11,550 old currency, with interest at 7 per cent., making £1650 sterling, and complainant has taken up said bond, and is entitled to have half of said land conveyed to him and his heirs, according to the meaning of said bond, entered into by defendant, but settled by complainant. That in consequence of the revolution and the troubles incident thereto, complainant was a resident beyond sea until lately. That he has waited patiently for defendant to make him titles to said lands, hoping not to be compelled to resort to legal coercion against so near a relation; but defendant refuses to make titles, (although complainant has always been and still is ready, if there remains any thing on his part, to fulfil the same, and to come to a general account with defendant) & although complainant has paid said bond, which was for the consideration money for said land, and although said defendant has it in his power,

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if any other charges have ac*crued, to repay the same from the funds of complainant, which he retains in his hands, and upon which an account and general settlement will be found to exceed any charges which could possibly exist against complainant relative to said purchase. That the rents and profits of said plantation would themselves have defrayed the same.

Bill prays for a specific execution of said bond, and that titles be made by defendant for one half of said land.

To this bill, the defendant demurred for want of equity, but the demurrer was overruled, and the defendant ordered to answer.

On the part of the defendant, the following paper was filed:

The answer of defendant contests the jurisdiction of the court, and denies all and every the matters alleged in the bill of complainant, except only that a bond with such special condition as is set forth in the bill, was signed and sealed by the said Edward, deposited with the late Basil Cooper, deceased, who was to have transmitted the same to the said William Telfair, and the said Edward does not admit that the said

William Telfair hath performed or complied with the conditions and covenants on his part to be performed. That on the contrary, the joint bond of Basil Cooper, and the said Edward Telfair, of which the original purchase of Smithfield, composes a part of the condition, is now in suit in the federal court of the district of Georgia. And the bond executed by the said Edward to Basil Cooper for one thousand six hundred and fifty pounds for the said Cooper's moiety, which the said William pretends to have satisfied, is now in suit in the same Circuit Court, to which suit, the said Edward among other pleas, has pleaded payment.

And the said Edward further saith, that Samuel Stiles obtained a judgment against him on the 21st February, 1793, in Beaufort district, in South-Carolina, for £1739 4s. 5d. which is in full force and unsatisfied, and for the payment of which, the said Edward conceives the said tract of land to be bound.

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And the said Edward saith that he *is a citizen of the state of Georgia, openly and notoriously residing there, and that he was not in the state of South Carolina at the time of filing the said bill, so as to be served with process, and that he has always been and still is ready to answer any suit, either at law or in equity brought against him in the courts of the United States for the district of Georgia. He therefore doth not admit, but insists against the power of the said Court of Equity, to call him in to answer as to matters contained in the said suit, he not residing in that state, nor being found there to be served with process. Wherefore for the several matters above stated, the said Edward requires that the said bill be dismissed.

The cause came to a hearing, and after argument, Chancellor RUTLEDGE delivered the following decree of the court:

The bill and answer being read, the only evidence adduced was, on the part of the complainant: 1st. A letter from defendant to complainant, dated the 29th of May, 1774, advising him of his having purchased B. Cooper's moiety of the tract of land called Smithfield, for complainant. 2d. A bond from defendant to complainant, to make him titles, on complainant's giving his bond for the purchase money to B. Cooper, and paying his proportion of expenses for improvement, &c. 3d. Complainants bond to B. Cooper for the purchase money, which bond was cancelled, the complainants name and seal being torn off, from which circumstance it was argued for complainant, that the purchase money due thereon must have been paid. There was no evidence offered on the part of defendant; but the defence urged by his counsel, was principally against decreeing a specific execution of the contract, after the length of time which had elapsed since it had been entered into; and that the court should leave the party to his remedy at law on defendants bond; especially as it did not appear that complainant had ever paid any part of the expenses, &c., which was part of the condition of the bond.—On the first blush of the case, the court were strongly in-

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*clined to send the complainant to seek his remedy in the state of Georgia; but as he could at law only recover the penalty, and should he file his bill in the Circuit Court of the United States, and obtain a decree for a specific performance, that court could only enforce its decree by the process of attachment against his person, the land lying in this state, whereas this court could enforce its decree by putting the complainant in possession of the land, if defendant should prove contumaceous, the court have therefore thought fit, on maturely weighing all circumstances of the case, to retain the suit, and to order and decree, that the defendant do forthwith make good and sufficient conveyances in fee simple to complainant of the land in bill mentioned; that defendant be at liberty to file any discount which he may have against complainant for expenses incurred in improvements, &c. and that the land shall be considered as liable for the payment thereof: complainant being equally at liberty to make his charge against defendant for rent or hire of the said land.

Costs to be paid by the defendant.

Desaussure and Ford for complainant.
Gaillard for defendant.

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2 Desaus. 275

Case XXXVI.

[Present, Chancellors Rutledge and Marshall.]

WILLIAM LOUGHTON SMITH, v. J. FISHER.

(November, 1804.)

[*Discovery* ⇐8.]

The court will not compel a defendant to answer whether his transactions with a third person were, or were not of an usurious nature, at the instance of a creditor of that third person; he not seeking the discovery, and there being no charge of fraud on the complainant.

[Ed. Note. Cited in Pickett v. Pickett, 2 Hill, Eq. 479.

For other cases, see Discovery, Cent. Dig. § 9; Dec. Dig. ⇐8.]

The case made in the bill, was shortly this; that prior to 1792, D. Campbell, owed complainant sundry sums of money, and on the 12th July, 1792, Mr. Campbell executed a mortgage to complainant of a considerable number of slaves and complainant going

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*abroad, left Mr. Campbell his agent, and left in his hands said mortgage with his oth-

er papers. The mortgage was to have been recorded, but was not recorded, until the 28th February, 1804, when complainant returned to this state. Complainant found that in the mean time, viz. 21st Oct. 1796, Mr. Campbell had executed a mortgage of sundry negroes and property to the defendant, J. Fisher, to secure payment of certain bonds given by Mr. Campbell to him. The said mortgage comprehended the negroes before mortgaged to complainant, and was duly recorded, and so took a preference at law. The bill alleges that after complainant's departure, D. Campbell became greatly embarrassed in his circumstances, and was compelled to resort to the expedient of taking up monies from divers persons at usurious interest, and of using the complainant's funds that came into his hands, to relieve his embarrassments. Being pressed and embarrassed with debts of this nature in the banks, some of the usurious notes alleged to have been held by defendant himself, he applied to the defendant to lend him a sum of money sufficient to pay off or take up all these notes, proffering good security. That defendant took an unfair advantage of him, and in lieu of money, compelled him to take stock at an enormous price, far above its price in the market, which Mr. Campbell was obliged to accept, in order to raise money by a sale of the stock at a sacrifice, and part of the money was applied to take up notes due the defendant, which were charged to be usurious, as will appear by discovery of defendant if compelled to answer. That complainant is a great sufferer by Mr. Campbell; the defendant threatens to inforce his mortgage and absorb the whole estate of said Campbell, thereby leaving complainant without any remedy, either by virtue of his mortgage or otherwise. And complainant prays that the defendant's incumbrances may either be cancelled, or postponed to the debt of complainant, on the grounds of the alleged usury and the oppressive manner in which the contract was made between the

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said *defendant and the said D. Campbell—and the bill seeks discovery and relief.

The defendant demurred to that part of the bill that sought for a discovery, whether the dealings between defendant and D. Campbell, antecedently to the sale of the stock, when these incumbrances were created, were not usurious. And as to the relief sought against these incumbrances, the defendant answered, that he knew nothing of the transactions between the complainant and D. Campbell, the origin or amount, or nature of the debt, nor of the mortgage stated to have been made in 1792. That as to the communication alleged to have been had for a loan, prior to the selling of the stock, he denies it. That he did not seek Campbell, but the latter applied to the defendant, having heard that he possessed a quantity of stock. That he offered defendant 20s. in the pound if he would sell him the stock on a credit of 1, 2 and 3 years. Defendant believes, but does not know positively, that it might have been sold for 18s. cash. That Campbell offered him security by mortgage of his real and personal estate. Defendant employed a professional gentleman to investigate his titles, and search the records, who reported the same to be good and unincumbered. Denies that the debt or any part of it was created for notes due the defendant, but solely for the sale of stock which was a commodity in the market like all other articles of fluctuating value, and always commanded a higher price on an extensive credit, as is usual with every thing else. That he took no advantage of his necessities, but fairly sold the stock at the same rate at which he had sold stock before. That to him the stock was at par, and he determined to keep it rather than sell it under par—and was not anxious to sell.

That instead of rigor, he had exhibited great lenity to the said D. Campbell, as the statement of the debt would shew, and denied any right in the complainant to interfere wtih his contract, which was fair and bona fide.

The demurrer was argued by Mr. Smith himself, and Mr. Gaillard for complainant,

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and by Mr. Parker and *Mr. Ford for the defendant. Many grounds were taken and many authorities cited on both sides, but it would swell this case to an unreasonable extent, to give the arguments of the counsel.

The opinion of the court on the demurrer was delivered by Chancellor RUTLEDGE, as follows:

The complainant is a creditor of D. Campbell, and his bill seeks a discovery from defendant, respecting certain usurious transactions which he alleges have taken place between Campbell and defendant, and also with several other persons; likewise a discovery whether the bonds and mortgages in bill referred to, were not found on usurious considerations, and obtained from complainant by coercion, and when in such necessitous circumstances, that he was obliged to make the contract to relieve himself from his embarrassments. Defendant has demurred to such parts of the bill as call upon him to discover whether complainant had not at various times borrowed considerable sums of money from him and other persons, on usury or at exorbitant interest. To the other parts of the bill which relate to the bonds and mortgages, he has answered partly. The demurrer is now the only subject for determination.

If a bill had been filed by D. Campbell himself, containing the charges set forth in this, the case would have worn a different aspect, and defendant might perhaps have been compelled to answer. But the complainant being a creditor, and the defendant

standing in the same situation, and Campbell himself not appearing to be dissatisfied with his contract, and not seeking to set it aside—if the court, upon the bare suggestion of one creditor, were to allow of an investigation of transactions between debtor and creditor, without any charge of fraud, it would be productive of infinite litigation. No fraud being charged in this transaction, and defendant having answered that part of the bill which relates to the consideration for which the bond and mortgages were given him by D. Campbell, the court are of opinion that it

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is by no means *necessary or material for him to answer that part of the bill respecting any prior usurious transactions between him and D. Campbell, if there were any, but more especially such as may have taken place between him and other persons. Cases cited are good law when applicable, but not so on the subject of the demurrer. How far they may apply on a discussion of the general question, will be determined when that is argued.

Demurrer must be sustained.

NOTE.—In a subsequent term the court decreed on the merits which depended on matters of fact, and much evidence was adduced.

For the decree itself, vide Decree book, No. 2, p. 326, delivered in April, 1806.

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2 Desaus. 279

Case XXXVII.

[Present, Chancellors Rutledge and Marshall.]

ANDREW KERR and Wife, Administratrix of Elizabeth Hill, and Guardian of Henry D. Hill, v. CHARLES P. BUTLER, Surviving Executor of Duncan Hill.

(October, 1804.)

[*Executors and Administrators* ⟸109.]

An executrix not allowed credit in her accounts for payments made by her, merely on the verbal request of the testator on his death bed; no measures having been taken to reduce the request to writing as a nuncupative will.

[Ed. Note.—Cited in Turnipseed v. Sirrine, 60 S. C. 287, 38 S. E. 423.

For other cases, see Executors and Administrators, Cent. Dig. § 435; Dec. Dig. ⟸109.]

[*Wills* ⟸730.]

A testator giving the profits of his whole estate to his wife for life, and to his son afterwards, the wife is bound to maintain the son in minority, and till her death; and she cannot charge the son with board and maintenance.

[Ed. Note.—Cited in Rhode v. Tuten, 34 S. C. 501, 13 S. E. 676.

For other cases, see Wills, Cent. Dig. § 1785; Dec. Dig. ⟸730.]

[*Husband and Wife* ⟸110.]

[A wife advanced to her husband several sums of money, for the purposes of his business, out of her separate property. On the death of the husband, he devised to his wife, for her life, after payment of several legacies, his whole estate. *Held*, that the representatives of the wife might recover, against the devisee in remainder, the sum so advanced.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 404; Dec. Dig. ⟸110.]

The complainants set forth in their bill, that the said Elizabeth Hill, formerly Elizabeth Butler, was possessed of a considerable real and personal estate, and contemplating a marriage between herself and Duncan Hill, did, on or about the 3d December, 1785, by indenture tripartite, the said Duncan Hill consenting thereto, and joining therein, for the considerations therein mentioned, settle, convey, and assure all her estate to Angus M'Cleod and James Hamilton, in trust for

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the sole and separate use of *the said Elizabeth Butler. That the said intended marriage took effect, and the said Elizabeth Hill, out of the profits and increase of her said separate estate, loaned to the said Duncan Hill for the necessary expenses of his trade, and for other purposes, the sum of £326. 15s. as appears by exhibit A. filed with the bill. That the said Duncan Hill being also seized of a considerable property, did made and execute his last will and testament, bearing date the 5th December, 1797, and by the same, he bequeathed all the residue and remainder of his estate, after payment of a few legacies, to his wife Elizabeth Hill, for the term of her natural life, and after her death, to his son Henry D. Hill; and in case of the death of the said Henry D. Hill, before he attained the age of 21 years, the testator directed that the whole of his estate should be divided in five equal portions among certain legatees; and of this will, appointed James Hamilton and Charles P. Butler executors, and shortly thereafter departed this life, leaving the same in full force. That shortly after the death of the said Duncan Hill, his widow took possession of his estate, and finding it would be impossible for her to pay the debts due by the said Duncan Hill, and support his son Henry D. Hill out of the profits of his estate, and knowing it would be more beneficial for those interested in the said estate, that the same should be kept together, the said Elizabeth Hill, out of the profits and income of her separate estate, paid the sum of £ . agreeably to exhibit C. filed with the bill, whereby the said Elizabeth Hill, by her payments to the several creditors of the said Duncan Hill, and other disbursements out of her separate estate, became entitled to the same lien on the property of the said Duncan Hill, as the creditors had thereon. That the said Elizabeth Hill departed this life, having first made and executed her last will and testament, and by the same appointed Thomas Bass and the said Charles P. Butler executors thereof, who refused to qualify upon the same, or to take upon themselves the burthen of the execution thereof; whereupon the complainant

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Margaret Kerr ap*plied to Charles Lining, Esq. ordinary for Charleston district, and obtained letters of administration, with the will

of the said Elizabeth Hill annexed. That shortly after the death of the said Elizabeth Hill, the said Charles P. Butler qualified upon the will of the said Duncan Hill, and by virtue thereof possessed himself of all the estate of the said Duncan Hill left by him at the time of his death, and hath received the rents of houses, and the earnings and gains of the negro slaves, and of the monies due, and owing to the said Duncan Hill. That about the 11th May, 1804, said Henry D. Hill applied to this honorable court by petition therein, praying letters of guardianship of his person and estate might be granted to the complainant Margaret Kerr, and duly obtained an order for the same. That the complainants frequently applied to the said Charles P. Butler, and requested him to come to a fair and just account and settlement, & to pay to the complainant Margaret Kerr, as administratrix aforesaid, the sum so advanced by the said Elizabeth Hill in her life time to the said Duncan Hill in his life time; and also the aforesaid sum paid by the said Elizabeth Hill after his death, for the boarding, educating and clothing of the said Henry D. Hill; and for the payment of the debts due by the said Duncan Hill at the time of his death, with interest on those sums respectively. That the said Charles P. Butler hath refused to come to an account and settlement; but withholds from the complainants a large proportion of the said estate, on the pretence that he cannot as the executor of the said Duncan Hill, deliver over the estate and property, or pay the rents, issues and profits of the said estate without the sanction of this honorable court; more especially as he is uncertain whether the vouchers offered in support of the said demands are legally sufficient, & therefore he refuses to pay the same. The bill prays relief.

To this bill the defendant put in an answer. The defendant, in his answer, admitted that the said Elizabeth Hill being pos-

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sessed of a considerable real es*tate, intermarried with Duncan Hill, having previously made and executed such marriage settlement as in bill of complaint set forth. The defendant neither admits or denies that the said Elizabeth Hill did from the increase and profits of her separate estate, loan and advance to her husband said D. Hill, as stated in complainants exhibit, filed with the bill marked A; but if the same should be proved to have been actually advanced, the defendant submits to this honorable court, whether such advances are chargeable and demandable against the estate of the said D. Hill, more especially as the defendant presumes she lived with, and was supported by him, and the same was never by her demanded in her life time: and whether if the said estate had been chargeable therewith, such charge was not deemed satisfied by his leaving her all his estate during her life. The defendant admits that Duncan Hill was seized and possessed of a considerable real and personal estate, and did make the bequests as in bill mentioned; and that he, the defendant, with James Hamilton, and said Elizabeth Hill, were named executors and executrix thereof; and that said D. Hill about the time in bill mentioned, departed this life without revoking his said will. Defendant admits that Elizabeth Hill took possession of the estate and property left by said D. Hill, at the time of his death. Defendant can neither admit or deny, it not being within his knowledge, and therefore requires proof, that the said E. Hill, finding it impossible for her to pay the debts, and support his infant son out of the profits and income of the testators estate, and she supposing it would be more beneficial for those interested in said estate, that the same should be kept together, paid from the profits of her own estate, the sums stated in the exhibit filed with the complainants bill marked C. The defendant submits to the court that if it shall appear that the said E. Hill supported the said minor Henry D. Hill, in the manner and to the amount stated, whether it ought not to be deemed to be done by her gratuitously, as his father the testator had left to her all his estate during her

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life, as the said son *had no estate or means whereby he could support himself. The defendant also says he cannot admit that the said E. Hill paid the debts aforesaid of the said D. Hill out of her separate estate, but that the said debts were paid partly by cash of the said D. Hill, found in the house at his decease, and partly by a debt due said D. Hill from J. Hamilton, & the amount of the debts so paid hath been since overpaid by the defendant to the complainants, they not knowing of, & omitting some credits contained in the said exhibit, which ought to have been given to the estate; and the said Elizabeth Hill having unadvisedly paid more than was due on account of the legacies left by the said D. Hill. Defendant admits that E. Hill died about the time in bill mentioned, having first made and executed her will and testament, and by the same, appointed the defendant and Thomas Bass executors, who refused to qualify, and that the complainant Margaret Kerr, in consequence thereof, took administration, with the will of the said E. Hill annexed. Defendant admits that shortly after the death of the said Elizabeth Hill, he qualified upon the will of the said D. Hill, and paid on account of the said estate, the sum mentioned in an exhibit filed with the answer. The defendant admits that H. D. Hill applied to this court by petition, therein praying that letters of guardianship of his person and estate might be granted to the complainant Margaret Kerr, and obtained an order for that purpose.—He admits that he delivered over to the complainant Margaret

Kerr such part of the estate of the said D. Hill as is set forth in the exhibit filed with the bill, and refused to deliver over the residue, conceiving himself not legally authorized to do so, having qualified and taken upon himself the burthen of the execution of the will of the said D. Hill, more especially as in case of the death of the said H. D. Hill before 21 years of age, the estate is limited over to certain persons in the said will mentioned: but the defendant is willing that the court should direct the whole or any part thereof to be paid to the complainants for the support and education of the said H. D.

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Hill. He *denies all unlawful combination, and prays to be dismissed with his costs and charges.

Chancellor MARSHALL afterwards delivered the decree of the court.

In considering the points of this case submitted to the court by the report of the master, the first is that of three several sums of money paid by Elizabeth Hill at the request of her husband on his death bed, after the making of his will: although it has been clearly proved such request was made by the testator, and the monies accordingly paid by his executrix, yet as the payments were not authorized by the will, the court cannot allow the same in the accounts of administration. If the court were to do so, it would as to those sums be a repeal or alteration of the will, directly contrary to the act of assembly on that subject, passed in the year of our Lord, 1789; indeed the precaution has not been taken to prove according to the directions of that act, the said request of Duncan Hill as a nuncupative will. The legatees under the will, when of full age may from a sense of justice reimburse the sums paid by Elizabeth Hill, but this court cannot order it. Neither will the court allow the complainants the sum of one hundred and eighty-five pounds charged for the board of Henry Duncan Hill, provided by his mother Elizabeth Hill. True it is, that by the will, the testator gave the whole income and profits of his estate to his wife during her life; but the court will not suppose on the part of the testator an intention so extraordinary as leaving his infant son for a series of years without the means of maintenance or education, or that an account for these purposes was to be kept until the son came into the possession of his fortune, and then to be paid out of the capital thereof; but the court will rather suppose the testator intended his wife to take the profits of his estate as well for the support of his son, as for her own use. The several other sums of money mentioned in the report, are duly proved; it is therefore decreed that the complainant do

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*recover the amount thereof with interest, to be paid out of the estate of Duncan Hill, subject nevertheless to a deduction of one thousand eighty nine dollars and twenty-nine cents, for monies due Duncan Hill, and received by the said Elizabeth Hill from James Hamilton, but omitted to be brought into her account of administration. It is further decreed that the report of the master with the foregoing modifications be confirmed, that the defendant Charles Paxton Butler, out of the profits of the estate of Duncan Hill, do pay to the complainant Margaret Kerr for the maintenance and support of Henry Duncan Hill, the sum of one hundred and fifty pounds annually, to be computed from the time he chose her for his guardian, and that the costs of this suit be also paid out of the estate of Duncan Hill.

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CASE XXXVIII.

[Present, Chancellors Rutledge and Marshall.]

ADAM TUNNO and Others, Assignees of Joseph Hargreaves, a Bankrupt, v. ANGUS BETHUNE.

(November, 1804.)

[*Bankruptcy* ⇐188.]

A joint owner in a vessel and cargo, accidentally in possession of the papers, the insurance, &c. or in whose hands they were left, for the joint benefit shall not be deemed to have a lien on them, so as to give him a preference over other creditors of the other owners of the vessel and cargo, who have become bankrupts, for certain endorsements on notes not connected with the transactions relative to the vessel, & cargo.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 295; Dec. Dig. ⇐188.]

[*Bankruptcy* ⇐316.]

[Where an indorser was compelled to pay money for a bankrupt, after the bankruptcy, upon an indorsement prior to the bankruptcy, he was allowed to prove his debt under the commission.]

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 475; Dec. Dig. ⇐316.]

This was a bill to compell defendant to account for the proportion of a certain vessel and cargo, in which the bankrupt was concerned, together with the defendant, into whose hands the whole had come.

The bill stated that in December 1802, Joshua Hargreaves and Joseph Hargreaves, copartners under the firm of Joshua and Joseph Hargreaves, and Angus Bethune, all of Charleston, merchants, purchased the schooner Samuel Treadwell, Barney master, and shipped on board a cargo of merchandize,

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and sent her on a *voyage to the coast of Africa; that they were equally interested in the said vessel and cargo, and the profits of her voyage. That the said vessel proceeded on her voyage, and arrived at her destination in safety, and traded according to the objects of the party aforesaid with great suc-

cess and gain; and that she arrived in the port of Charleston returning from the coast of Africa, in July 1803, laden with a valuable cargo.

That for the more convenient management of the concern of said adventure, the immediate government thereof was placed in the hands of the said Angus Bethune, and in order thereto, all the invoices, bills of lading, policies of insurance and other papers and documents relative thereto, were also left in his hands, and committed to his care, none of them remaining with the said Joshua and Joseph Hargreaves. That some time after the said vessel departed for her voyage, the said Joshua Hargreaves died, to wit, on or about the of 1803, and that the said Joseph became bankrupt on or about the 15th of March, 1803, some time before said vessel's arrival in Charleston, as aforesaid, with her said cargo. That your orators were duly appointed assignees of the estate and effects of said bankrupt. That on the arrival of said vessel, the said Angus Bethune took possession of her and her cargo, and disposed thereof, but without consulting with your orators, though they were equally interested as assignees of said bankrupt; and he hath ever since retained to himself the proceeds of both vessel and cargo, refusing to account with your orators, and declining to pay over to them that portion thereof to which they are entitled as aforesaid. And your orators shew unto your honors that they have repeatedly applied to the said Angus for said account, and to have the share of the said bankrupt paid over to them, well hoping that they would have complied with such their reasonable requests. The bill charges combination, and states that the said Angus still refuses to give such account, or to pay over to them such part of said proceeds of the said vessel and cargo as they are entitled

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*to, alleging that the estate of said bankrupt being indebted to him, he is entitled to discount his claims on the estate against the monies which he has received as the proceeds of said vessel and cargo. Whereas your orators aver that the demands of the said Angus have become due to him long since the bankruptcy of the said Joseph; whereon by the assignment to your orators, the whole estate was vested in your orators to be distributed according to law: In the first place, to such claims as have preference, and in the second, in average and proportion among the creditors generally of said bankrupt—among the latter of which, the said Angus must claim without any preference whatever; and your orators further shew unto your honors, that though the debt had been due the said Angus by the said bankrupt, before the bankruptcy—yet in as much as the property came into his possession long after the bankruptcy, and it can in no wise be considered as a mutual debt at the time of the Bankruptcy, the said Angus cannot detain, but must prove his debt, and come in under the commission with the other unpreferred creditors; and further, that the said Angus, so far from considering himself as having any claim on the said vessel and cargo, that after the bankruptcy, he advised with one of your orators, to wit: Adam Tunno aforesaid, about effecting insurance on said vessel, and actually did effect insurance, both on the estate's and on his own account, not denying, but admitting that your orators were equally interested in the said vessel and cargo—all which doings tend to the injury of your orators. The bill therefore prays a subpœna, and that said Angus may be compelled to discover and submit to the inspection of complainant the papers and documents relative to the said vessel and cargo, and pay over to them their proportion of the proceeds and profits thereof.

To this the defendant put in the following answer: The answer states that it admits all and singular, the several matters contain-

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ed in bill, relative to the joint concern *of said Joshua and Joseph Hargreaves, with this defendant in the schooner aforesaid, and of the purchase and shipping on board her, a cargo of merchandize (being jointly concerned) and sending her to Africa, and that the said vessel traded on the coast of Africa, and returned with a cargo. It also admits that the said Angus Bethune had the immediate government and controul of the said adventure, and that the invoices and other papers so purported him to have: and that in order to the due fulfilment of the said trust on his part for their benefit and use, the said R. Barney executed and delivered a certain bond bearing date 27th Nov. 1802, for $600, to be paid to the said Joshua and Joseph Hargreaves, and the said Angus, on or before 1st Aug. 1803, which bond was also in possession of said Angus. The answer further admits that the said Joshua died, and that the said Joseph became bankrupt, at the times mentioned in the bill; and that complainants were appointed assignees of said bankrupt. Admits also, that on said vessel's arrival, the said Richard Barney finding the bond aforesaid in the hands of said Angus, delivered up to him said vessel and cargo, in consideration of the said Angus, cancelling the bond of said Richard Barney; and that the defendant disposed of the same—and saith further that in the interim, between the departure and return of said vessel, and before said bankruptcy, in order to accommodate said Joseph, and to enable them to borrow money from the banks, the said Angus was induced to become the indorser of two promissory notes of said Joshua and Joseph Hargreaves, and of one promissory note signed by Stephen Brown, and indorsed by said Joshua and Joseph Hargreaves, the former of which were afterwards renewed,

and to which two notes so renewed said Angus, continued endorser as aforesaid; and said three notes are dated respectively the 2d and 9th March, and the day of 1803; two of which signed by said Joshua and Joseph Hargreaves for $1000 each, and that signed by Stephen Brown for $2000; but on which at present there is only a balance unpaid of $507.37, all payable in 60 days

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after their *respective dates. That the said notes being of the proper debt of said Joshua and Joseph, the said Angus, upon their failing to pay the same, was obliged to pay the whole amount at the banks which had discounted them; but has been since paid by the said Stephen Brown, so much of the note signed by him as leaves only a balance of $507.37. Admits also that proceeds of sales of both vessel and cargo remain in his hands: but denies that defendant refused to account with complainant, or to submit to them the invoices of the original cargo, or of the return cargo and sales thereof, and of the vessel. But on the contrary that he hath ever been willing to render an account, provided said assignees would allow him to retain the amount paid by him on the notes aforesaid; and the same account is contained in the exhibit B. filed with the answer: admits that defendants declined to pay over to complainants the whole amount of proceeds of said adventure, because he insisted on his right of being reimbursed thereout the amount of said notes of which he was endorser as abovementioned; and defendant submits to this honorable court, that out of the said proceeds, he had for so much, a lien and right of equitable set off, which he hopes this court will support: that he now is and ever hath been ready to pay said complainants the balance if any of said proceeds after such discount and prays to be dismissed with costs.

Chancellor RUTLEDGE delivered the decree of the court.

Upon considering this case, the court are of opinion, that in the investigation of it, no evidence has been adduced to shew that there was any agreement between the bankrupts and the defendant, that their part of the vessel and cargo should be considered as a security to indemnify him for endorsing their notes, and thereby to establish a specific lien on them. On the contrary, Mr. V. who delivered the papers relative to the vessel and cargo to defendant, and who was the clerk of the bankrupts, did it without any orders from them, and merely because he

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was a *partner in the business, and not with a view to secure defendant as an endorser. Another circumstance is, that the vessel and cargo did not come into the defendants possession until July. That he could not therefore be looked upon as having a legal lien on them before he had possession; four months previous to which, the Hargreaves had been bankrupts, and their rights transferred to their assignees. Had defendant been in possession of the property at the time he endorsed the notes, or had he endorsed them on account of the concern, the case would have been widely different. He can therefore only be viewed in the light of a common endorser: but though not really a bona fide creditor at the time of the bankruptcy, yet as he was liable to pay the notes, and has been obliged ultimately to pay them, he must come in as a general creditor in consequence of the liberal construction which has always been given to the 42d section of the bankrupt law. He must therefore account before the master for the bankrupts share of the vessel and cargo.

Peace & Cheves for complainants.
Dickinson for defendants.

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2 Desaus. 290

Case XXXIX.

[Present, Chancellors Rutledge and Marshall.]

WILLIAM BRAILSFORD and MARIA, His Wife, v. THOMAS HEYWARD and Others.

(November, 1804.)

[*Wills* ⇐⇒681.]

A. devises real and personal estate to trustees, in trust, for the use of testators daughter, E. during her natural life, and at her death, the land to the male heir of her body, when he shall attain 21 years of age; the personal estate to be divided equally among the heirs of her body: But in case of no such heirs, then to the youngest child of the testator who should attain 21 years of age. E. died unmarried and without issue: And M. was the youngest child of the testator, who attained 21 years of age. She takes an estate in fee in the whole devised estate, though no words of inheritance or perpetuity are used either in the devise to the trustees, or to the youngest child

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*who should attain 21 years. The manifest intention required this, and the court would supply the requisite words, especially in an executory trust estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1612; Dec. Dig. ⇐⇒681.]

The bill was filed in this case to obtain the judgment of the court, on a clause in the will of Daniel Heyward, senior, deceased.

The decree states the case, and the question, so fully and clearly, that it is unnecessary to do more than furnish the decree itself.

After the cause was heard, Chancellor MARSHALL delivered the decree of the court:

The question for the decision of the court in this case, is upon the construction of the following clause of the will of Daniel Heyward, senior, the testator, who inter alia de-

vised as follows: I will to my sons Thomas and William in trust for the use of my daughter Elizabeth, during her natural life, the following lands, slaves, stock thereon and appurtenances thereunto belonging; and at her death, I give the land to the male heir of her body, lawfully begotten, when he shall attain to the age of 21 years; and for want of such, to the eldest female that shall attain to that age, or her lawful issue, if she should have such, before she attains that age; and the slaves, &c. to be divided between the heirs abovementioned; and in case of no such heirs, then I give the land and slaves to my youngest child that shall attain to the age of 21 years, viz. my plantation or tract of land on Port Royal, containing 526 acres, &c. (Vide the will setting forth the property.)

If this question rested on the construction of the clause, as devising a legal estate in fee to complainants wife, Maria, (who was the youngest child that attained 21) there would be but one opinion on the subject. The words used by testator in such case would not be sufficient to convey the absolute estate in fee. But from a careful examination of the clause, and a comparison of it with other clauses in the will, we can not view it in any other light than as a trust estate, devised to

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Thomas and William in fee. *There are indeed no express words employed by testator for that purpose, but this court will supply words of intention, in cases of executory trust estate, where they are necessary to carry the intention of testator into effect. This trust is connected with and attached to the different limitations in the clause before us, and of course vests the fee ultimately in complainant's wife, as the youngest child, that should (and who did) attain the age of 21 years.

The distinction between trusts and legal estates is a strong and marked one. It is said there is not a point in which the books more clearly and accurately agree, than the distinction between a legal devise and a trust. They are rights arising solely out of the intent of the party who created them; and therefore such intent could be the only guide in the execution of them.

The trust estate in Thomas and William, is constituted in this way:

1st. The estate is given to them for the use of Elizabeth during her natural life, and at her death the land is given to the male heir of her body, lawfully begotten, when she shall attain to the age of 21. Here the trust attaches. If it were to cease after the death of Elizabeth, who would be entitled to the possession of the estate? Not the executors, for they are not at all contemplated. The trust must therefore be continued in the trustees.

The clause then goes on, 2dly. "And for want of such, to the eldest female, that shall attain to that age, or her lawful issue, if she should have such before she attains that age." Here the same question arises, what is to become of the estate till the female issue, or her issue, attain 21 years, if the trust ceases? This evinces the propriety of continuing the trust. It undoubtedly follows the limitation; especially as the clause in the next line directs the slaves, &c. to be divided between the heirs above mentioned. Who were to divide them, in case these contingencies had happened? Certainly the trustees were intended. It was made their duty. The executors had nothing to do with it. The concluding words of this clause are,

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and *in case of no such heirs, then I give the land and slaves to my youngest child that shall attain to the age of 21 years; evidently annexing the trust to the disposition of the estate, throughout this whole clause.

The cases quoted by the counsel for defendant are strong, but they apply almost exclusively to devises of legal estates, and in cases of that description, they will apply with force, as being correctly decided.

It is to be admitted, that the general rules of property respecting legal and trust estates are the same; but the particular modes of construing the limitations of them may vary. The conformity between the rules of property in legal and trust estates, respects the allowed measure of the limitations, and not the mere construction of them, as Lord Hardwicke observed in the case of Bagshaw and Spencer. The limitations of trust estates cannot be carried to a greater length, or go further to a perpetuity, than the limitations of legal estates; but it does not follow that the first may not be expounded more freely, with more regard to the intent, and with less adherence to the legal import of technical expressions than the latter.

The governing rule in the construction of wills, is the intention of testator. To support and aid this as much as possible, where it is not inconsistent with established rules, is certainly the duty of courts; and is the only true mode of expounding wills. This doctrine is universally maintained in the books, and the Lord Chancellor said in the case of Dobbins against Bowman, 3d. Atk. 340, there are no particular words required to pass the estate, but any words that shew the intention of the testator are sufficient, and the words in this will plainly manifest, that the testator intended that Clitheron and Dobbins should have the estate, upon the trusts of the will.

Is it possible to look attentively at this clause, and every other of the will (now under consideration) and not to say, but Daniel Heyward, the testator, intended to dispose of the absolute estate? It is manifest he did so, because in all the other clauses of his will

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(wherein he has created *a trust) he has dis-

posed of the estate therein devised in case of failure of issue, but not in the clause before us. It cannot be supposed he intended only a life estate, because he was anxious to provide for his youngest child; and in so doing, he could not intend that the issue of such child should be disinherited. His anxiety on this score is particularly apparent in the first clause of the will. He did not intend it should go to his heir at law, because testator had amply provided for him in his life time, and has made no provision at all for him in his will; and lastly, it cannot be deemed a part of the residue of his estate, it having been previously specifically devised and bequeathed to his daughter Elizabeth for life. * The trustees in this view must be considered as taking a fee in the lands, in order to enable them to fulfil the intention of testator, respecting the several limitations contained in the clause under consideration. Upon the whole of this case, under the particular circumstances of it, and for the reasons stated, it is the opinion of the court that complainant's wife is entitled to the absolute estate of the lands and slaves in question under the trust.

It is therefore ordered and decreed, that defendant T. Heyward, the surviving trustee, do forthwith join with complainants in conveying to defendant Baynard,† the land in bill mentioned, under the direction of the master, pursuant to the agreement between him and the complainant Wm. Brailsford, as therein set forth, as defendant Thomas is a trustee under the will.

The costs must be paid by the complainant.

Parker for the complainant.

Desaussure and Ford for defendant.

† NOTE.—The complainants had contracted with Mr. Baynard to sell and convey to him, their interests in said real estate.

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2 Desaus. *295

*Case XL.

[Present, Chancellors Rutledge, Marshall and James.]

MATHEW O'DRISCOLL, Executor of D. Munro, v. JOSEPH KOGER and Others.

(May, 1805.)

[*Husband and Wife* ⇐31.]

A. was entitled under a will to an estate in certain negroes; but if she died, leaving no issue, then a remainder to the children of B. B. left only one child, who died before A. and A. was her nearest of kin, and entitled to her rights and interests.

A. owned other negroes besides, absolutely.

C. marrying A. under age, settled all these negroes on himself for life; and if he died, leaving issue of the marriage, one half to go to her, the other half to the issue.

C. died without issue, having devised his whole estate to his wife for life, with other provisions with respect to her, which did not take effect.

After C. had made his will, but before his death, his brother dying, bequeathed certain property to his own daughter, and if she died under 18, or without issue, then remainder to C. She died under 18, and without issue, but after C.

Of the negroes A. owned absolutely before marriage, she became entitled to one half under the settlement.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 178–195, 883, 884; Dec. Dig. ⇐31.]

[*Wills* ⇐614.]

Under her husband's will, she took a life estate in all his property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1393–1416; Dec. Dig. ⇐614.]

[*Wills* ⇐782.]

She was not bound to make an election between the settlement and the will; and if bound, yet acts more positive and more clearly indicative of her having made her election, was necessary.

[Ed. Note.—Cited in Snelgrove v. Snelgrove, 4 Desaus. 294, 300.

For other cases, see Wills, Cent. Dig. § 2030; Dec. Dig. ⇐782.]

[*Descent and Distribution* ⇐33.]

She is entitled to one half the personal estate of her husband's brother, under the act abolishing the rights of primogeniture.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 93–96; Dec. Dig. ⇐33.]

The object of the bill was to establish the rights of complainant as executor of Munro to certain negroes, which the said Munro had claimed in right of his wife Lucretia.

The case made is fully and distinctly set forth in the decree and therefore is here omitted.

The questions that arose were:

1st. Whether the legacy to Jane Liddle, limited over after a life estate to the said Lucretia, became lapsed by her death before the determination of the life estate?

2d. Whether the said Lucretia was bound to elect between her marriage settlement and

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the will of her husband *David Youngblood? And if so bound, whether her acts amounted to such election?

3d. What estate the said Lucretia had acquired in David Youngblood's share of his brother's estate?

The cause came to a hearing, and was fully argued.

Chancellor RUTLEDGE delivered the following decree of the court:

Mary Sleigh by will gave to her two grand daughters Ann and Lucretia Sharpless five negroes, and their issue, and if either of the grand daughters died before 18, or day of marriage, or without lawful issue, the survivor should inherit her deceased sister's part; but if both should die, leaving no issue, then that her daughter M. Liddle's children or heirs lawfully begotten of her body, should inherit the said negro slaves, and their issue. Ann, one of the legatees, died under 18, unmarried, and without issue.—Lucretia, sur-

viving, married David Youngblood. Previous to their marriage, and whilst she was a minor, David Youngblood executed a deed, by which he covenanted with James and Peter Youngblood, that the negroes to which his intended wife was entitled, should be settled and secured to himself for life, and after his death, in case he should die before her, leaving issue, one half to be for the use of his wife absolutely, and the other half for the issue; and if the wife should die in his life time, then the deed to be void. Lucretia was entitled to other negroes than those bequeathed by her grand mother, which she derived from other persons, and were included in the deed.

David Youngblood made his will on the 29th May, 1790, and died 7th July, 1791, without leaving issue: his wife survived him. After disposing of some small legacies, he gave the remainder of his estate, real and personal, to his wife, and any child she might have or be pregnant with at his death: his personal estate to be equally divided, share and share alike, and the real estate to remain in possession of his wife during her life, and

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then go to his *children or heirs. In case of no issue, his wife to enjoy his whole estate during life, and at her death, if she died without issue, the estate to be divided between his brothers P. and J. Youngblood's children, and his sister's children by P. Hyrne. But if his wife should marry and die, leaving issue, then she might dispose of one half of his estate to such issue; the other half to be divided, &c. There was no issue of the marriage. J. Youngblood, the brother of David, made his will on the 11th April, 1791, and died immediately afterwards. He gave his estate to his daughter Anna Maria, but if she should die under 18, or have no issue, then he gave the estate to be equally divided between his brothers Peter and David, and his sister Sarah Anna, and their heirs. J. Youngblood's daughter Anna Maria, died the latter end of July, 1791, about three weeks after David Youngblood. Lucretia, the widow of David Youngblood, married Munro, complainant's testator, in March, 1795, and she died in August 1799.—Jane Liddle, the only child of Mrs. Liddle, died a minor soon after Lucretia married Daniel Munro. Complainant claims exclusively, the negroes given to Lucretia under Mrs. Sleigh's will, which are included in the settlement; she having only a life estate in them under the will: but on the death of Jane Liddle, a minor, (long subsequent to David Youngblood's death) she became absolutely entitled to them as her legal representative: And he also claims one half of the other negroes named therein, with their issue, by virtue of the clause which gave to Lucretia one half, if she survived her intended husband D. Youngblood: Also, one half of David Youngblood's share of the personal estate of Isaac Youngblood, which was bequeathed to him in the event of Isaac Youngblood's daughter dying before she became entitled to it, which she did. That share was contended to be a vested interest in David Youngblood, and not disposed of by his will, which was made antecedent to his brothers, and was therefore distributable under the act for the abolition of the right of primogeniture, &c.

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*For defendant, it was contended that the negroes did not vest in Lucretia on the death of Jane Liddle, but it was a lapsed legacy, and became distributable among David Youngblood's representatives. That the legal estate was in him on his marriage, and he only covenanted to make a settlement according to that deed, which was never done. That even if the deed was valid, David Youngblood, having by will made a disposition of his estate much more in her favor, and she having possessed herself thereof, she had made her election to take under the will, rather than the settlement, and was bound by it.

The question respecting David Youngblood's share of Isaac Youngblood's personal estate was given up, and it was acknowledged to be distributable. The question for the determination of the court is to whom the negroes belong, that were bequeathed by Mrs. Sleigh to her granddaughter Lucretia, for life, &c. and on the contingency of her dying without issue, were limited over to Jane Liddle? This is a very plain case. Lucretia Sharpless, afterwards the wife of D. Youngblood, being only entitled to a life estate in the negroes under her grandmother's will, no settlement or deed for that purpose made by her husband previous or subsequent to the marriage, could alter the nature of her estate or give him a better title to them than she had; consequently the disposition made of them by the deed was altogether nugatory and void. Jane Liddle to whom the negroes would have belonged (in the event of Lucretia's dying without issue) having survived D. Youngblood, the husband of Lucretia, many years (and indeed until after she had married Munro) and then dying a minor without issue, the property in the negroes vested absolutely in Lucretia, she being the only legal representative of J. Liddle. That of the remaining negroes named in the deed, which were the property of Lucretia, independent of her grandmother's will, she was entitled to one half of them absolutely under the deed, which though not such an one as the court would have directed, yet as it appears upon

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the whole to have been a fair trans*action, the court will not alter. The testator, D. Youngblood, having taken no notice in his will of the deed executed before marriage, and his bequest to her not being in any respect conditional, but he having given the whole of his estate to his wife during life,

if there was no issue of the marriage, the court are of opinion she was under no necessity to make any election, but was entitled to take the profits of his estate during life. With regard to this doctrine of election, the court are by no means inclined to deprive a woman of her legal rights under the idea of her having made her election, merely by a bare acquiescence; but it should be made to appear that she is perfectly conusant of all her rights, and has done positive clear acts indicative of her having made her election. The share of Isaac Youngblood's personal estate to which D. Youngblood was entitled, must be distributed according to the act for abolishing the rights of primogeniture, &c. which would give to his widow one half. Complainant must therefore account for the hire of one half of the negroes named in the deed, to which Lucretia was not absolutely entitled from the time of her death; and the defendant must likewise account for the hire of one half of the distributable share (to which Lucretia was entitled) of Isaac Youngblood's share of the other personal estate.

Desaussure and Ford for complainant.
Pringle for defendant.

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2 Desaus. 299

Case XLI.

[Present, Chancellors Rutledge, Marshall and James.]

Mrs. SUSANNAH CARNES and Others v. WILLIAM L. SMITH, Executor of Barnard Elliott.

(May, 1805.)

[*Executors and Administrators* ⊜289.]

A person being about to marry a lady entitled to a large fortune, agrees, in consideration of her fortune, to charge his whole estate with a certain sum, as a settlement on his wife and children. He receives her fortune, and dies insolvent.—Afterwards an additional part of his wife's fortune comes to his executor's hands:

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It *shall be first applied to make up the sum charged on his estate, for his wife.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1150; Dec. Dig. ⊜289.]

[*Husband and Wife* ⊜31.]

[By marriage articles the intended husband, reciting that he was to receive about £84,000, charged his whole estate to secure that sum to the wife. *Held*, that he was entitled to her whole property, though it should exceed £84,000.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 182; Dec. Dig. ⊜31.]

The bill sets forth that complainant is the daughter of the late Benjamin Smith; that she intermarried some time prior to the year 1778, with the late Col. Barnard Elliott, and was at the time of her marriage entitled to a considerable sum of money from the estate of her said father. That being so entitled and in consideration thereof the said Barnard Elliott made a settlement previous to the marriage, by which he charged his whole estate for securing the sum of £84,000 old currency, which was stated to be her proportion of her father's estate.

That the said B. Elliott died in the month of October, 1778, and by reason of his debts and other causes, complainant hath never received the full amount of the said settlement, the deficiency thereon amounting as she believes to upwards of £600 sterling. That complainant is informed and believes that a part of the estate of her said father, consisting of bonds and notes and real estate which never came into the possession of her deceased husband in his lifetime, is now about to be divided among the devisees and legatees of said Benjamin Smith.

Complainant conceiving herself entitled to her distributive share thereof, has made a demand for the same, of Wm. Loughton Smith, the only acting executor of the said Barnard Elliott who has received and retains the same as executor aforesaid, under the above-mentioned marriage settlement, alleging that the same ought to be considered as assets in the hands of the executor of the estate of the said Barnard Elliott, for the payment of the debts due thereout.

The bill prays that the said defendant, Wm. Loughton Smith, may be decreed to pay over to the complainant the said sum of £600 sterling, the deficiency of her said settlement, or such other sum or sums of money as may be due her thereon, or as her distributive share of the estate of her father as aforesaid.

The answer of the defendant admitted the

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facts charged *in the complainant's bill, as to the marriage, and as to the settlement. But whether the said complainant has received the full amount of her marriage settlement, he of his own knowledge knows not, but that he has heard and thinks it very probable that she has not received the full amount thereof. Admits that there still remains to be divided among the legatees and devisees of the late Benjamin Smith, a small residuary fund, which on account of its doubtful state, was not comprized in a former division of the said Benjamin Smith's estate, which was made in the year 1785; one distributive share of which said fund will accrue either to the said complainant in her own right, or to the estate of the said B. Elliott, as this court shall see fit to decree; and which hath not been hitherto paid to the said complainant, because a doubt has existed and still exists, whether the said marriage settlement made by the said B. Elliott with the said complainant did not vest in the executors of the said B. Elliott, all right and title to any interest which the said complainant might have had at the time of her marriage, or which might afterwards accrue to

her from any undivided surplus fund, of the estate of the said Benjamin Smith, to be applied by the said executors as assets to the discharge of the debts due by the estate of the said B. Elliott. The answer saith that the said fund now to be distributed as aforesaid, arises from a surplus of certain bonds which were retained for the payment of legacies, and also from other dubious bonds the value of which has been recently ascertained; and that it is yet uncertain what will be the precise amount of the said fund, inasmuch as some of the bonds are still of a doubtful nature, but whatever may be the said amount, defendant is ready to pay the said complainant a distributive share thereof, as this honorable court may direct.

It was agreed that Mrs. Carnes had not received from the estate of her first husband, Col. Barnard Elliott, the amount of the sum

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charged upon his estate by the marriage *articles; and that the estate was not sufficient to pay all its private debts, and the balance due to Mrs. Carnes. The fund which was now under discussion was an unexpected surplus of the estate of Mrs. Carnes' father, which was to be distributed among his children. Mrs. Carnes claims her proportion of this fund, as property not paid over to her husband during the coverture, or to make good the deficiency of the sum secured by the marriage articles, and charged on the whole estate of Col. B. Elliott, and she insisted on a priority over his other creditors.

The executor of Col. Barnard Elliott submitted, on the part of the creditors, whether the late Col. B. Elliott did not stand on the footing of a purchaser of his wife's whole fortune derived from her father's estate; and if so, that his estate was entitled to the benefit of the sum now in question, and it would be distributable among the creditors of Col. Elliott's estate proportionably.

Mr. Gaillard argued for the complainant, that the property Mrs. Carnes carried in marriage to Col. Elliott, was equivalent to the property settled on her; and this was charged on his whole estate; besides she has given up her dower as part of the price of the settlement, and the court would have compelled a settlement to the amount of her fortune. The whole estate is bound to make good the settlement in preference to other creditors. 1 Atk. 440. 1 P. Wms. 429. P. Wms. 268. The settlement was made in her minority, and she was not bound by it. But she has made her election to abide by the jointure, provided it be effectually secured to her. 1 Atk. 439.

The sum now in question was a surplus of her father's estate, never reduced to possession by the husband, and must survive to the wife. 2 Vern. 68, Lister v. Lister. Amb. 692, Solway v. Solway. Powell on Cont. 47, 8.

Mr. Desaussure and Mr. Parker contended that the husband became in consideration of the settlement, a purchaser of all his wife's fortune of every kind, & whenever it was collected. That the fund in question must therefore go into Col. Elliott's estate;

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when there it was to be dis*posed of by the executors according to the rights of parties. That the covenant in the marriage articles charging the estate of Col. Elliott with the amount settled, had not been construed to be a specific lien on his estate, giving a preference over other creditors. In the discussion formerly before the court, she was placed on an equal footing with other creditors, and that was all that could be done now.

Chancellor RUTLEDGE afterwards delivered the decree of the court.

By the marriage articles of Mr. Elliott, it is stated that the portion he was to receive with his wife was about £84,000 currency, and he thereby charges his whole estate with the securing that sum to her, and the issue of the marriage. It appears from a settlement of his account with the executors of Mr. Smith, the complainant's father, that Mr. Elliott did not receive the amount of his wife's fortune: a small portion of Mr. Smith's estate remains to be distributed among his children. Complainants have not received from Mr. Elliott's estate near the amount of the settlement, and there are other creditors yet unsatisfied. Mr. Elliott's estate is insolvent. A doubt arises how the money of Smith's estate is to be applied, whether to complainants exclusively, or to be divided among them and the other creditors generally, in average and proportion? The court are of opinion that Mr. Elliott, by the settlement, having charged his whole estate with securing his intended wife's fortune to her and her issue, he would, if alive, be undoubtedly entitled to the money now in the hands of Mr. Smith's executor, even if he had received the £84,000. That as the complainants have not received the sum agreed to be settled, and his whole estate was charged with payment of it, the money in question ought to be applied towards the discharge of their demand in the first instance. Why the claims of the complainant were not fully satisfied in the former suit, does not appear; but we presume it was, because it was then

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thought *that the estate was fully competent to satisfy the settlement, debts and legacies; or Mrs. Carnes would not have been paid her legacy.

2 Desaus. 304

Case XLII.

[Present, Chancellors Rutledge, Marshall and James.]

ANONYMOUS.

(May, 1805.)

[*Fraudulent Conveyances* ⇐74.]

A conveyance of land for which no valuable consideration was given, decreed to be fraudulent and void against prior creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 186–190; Dec. Dig. ⇐74.]

[*Fraudulent Conveyances* ⇐299.]

Although the defendant who was heir at law to the purchaser, in his answer, swore to his belief that the purchase was bona fide, and that a part of the purchase money was paid down in cash; and although the bond for the balance was found among the purchaser's papers after his death, cancelled, and with receipts to the full amount endorsed; yet the sale was set aside as fraudulent, under strong circumstantial evidence, and some positive proof.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 876; Dec. Dig. ⇐299.]

The bill states that R. C. was indebted in 1788, to complainants, in two bonds amounting together to £193 with interest. That on the 15th November, 1791, for a pretended consideration of £950 the said R. C. conveyed to J. W. a lot of land in Charleston to evade the payment of this debt. That defendant G. W. was the heir at law of J. W. That J. W. suffered R. C. to receive the rents and income of the lot, and after his death, his widow received the same for R. C's. heirs. That part of the land has been sold to satisfy the widow's dower. That since J. W's. death, the person who married R. C's. daughter, has been suffered to receive the rents. That J. W. always refused to cancel the conveyance, or to give any satisfactory answer as to it: and his heir at law G. W. alleges that the conveyance was made for a bond of 950*l.* given by J. W. to R. C. which has since been paid: when in fact this bond was given merely to colour the transaction, and though there are receipts endorsed, yet no money was ever paid; nor was the land ever delivered. The

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bill *prays a discovery and that the deed of conveyance be set aside.

The answer of G. W. the defendant, among other things states, that the consideration of £950 for the lot was not a fraudulent pretence; but that he understood that £350 was paid in money, and the balance was secured by a bond, which bond defendant has since found among his father's papers cancelled, with receipts endorsed, discharging the whole bond. That the greater part of the land has been sold to satisfy the widow's dower; and that the payments made by J. W. were more than a full consideration for the remainder. Defendant denies any fraud in the purchase —denies that J. W. suffered R. C. or his widow, after his death, to receive the rents to their own use; but believes that they were regularly accounted for; admits that the son in law of R. C. has occupied the land, but it was against defendant's consent. Defendant has applied to him for payment of rent, which he has promised repeatedly to pay, but has not yet done.

Several witnesses were examined, but their testimony is noticed so particularly in the decree, that it is unnecessary to state it here.

The cause came to a hearing, and Chancellor RUTLEDGE delivered the following decree of the court:

This suit is brought by the creditors of R. C. for the purpose of setting aside conveyances from said R. C. to defendant's father, of a lot of land, on the principle that it was not made bona fide, and for a good or valuable consideration, but with an intention to defraud his creditors.—The defendant by his answer denies any knowledge of the transaction; says he believes the conveyance was made bona fide for a valuable consideration of £350 paid down; and that a bond was given to R. C. for £600 balance of the purchase money: that there are receipts for money paid on the bond, and that it is in his possession cancelled. If the case had rested altogether on defendant's answer, it had all the appearances of a fair transaction; but when the evidence which has been adduced is

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critically examined *and weighed, a question arises whether the whole business was not a contrivance to secure the property from R. C's. creditors, for his or his family's benefit. In order to make the conveyance a valid one against creditors, according to the statute, there are two requisites absolutely necessary, viz: It must be made upon good consideration, and bona fide. It is admitted if it be made bona fide, and for a valuable consideration, it will be good. Whether this sale was bona fide, must be collected principally from the circumstantial evidence, which is almost as strong as positive proof. That it was not bona fide, is evident; for although he is said to have purchased in November, 1791, and recorded his conveyance immediately, he never returned the property as his, till December, 1795, four years after, and then not on oath; and the returns are in the hand writing of other persons, although he makes regular annual returns in his own hand writing and on oath, of all the property he possessed previous to that day. In October, 1795, this lot is returned by J. W. C. for J. W. In 1796, no return is made of it. In 1797, it is returned again by J. W. C. for J. W. who was then dead. J. W. C. in his examination swears, that the tax returns were wrote by him at J. W's. request; that J. W. paid some of the taxes, but that other parts were paid by him out of the rents, by

J. W.'s. desire. Further, it appeared that the property was mortgaged by R. C. to the public for paper medium; that J. W. never paid the debt or interest, and that the interest has been paid either by R. C's. widow, or his representatives. Another strong circumstance of the conveyance not being bona fide is, that although the purchase is said to be for a valuable consideration, and the wife of R. C. joined in the conveyance, she did not renounce her dower; and four years afterwards, (three years after his death) in J. W's. life time, she applied for her dower, and the greatest part of the land was sold to satisfy her claim.

It was not proved that J. W. was either a weak or an ignorant man; and it is presumable from his possessing a considerable real estate, that he knew it was necessary

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for *her to renounce her dower, to bar her of it. Yet that is not done, and she recovered at the end of four years, after signing the deed, £748 for dower in lands, which had been sold for £950. All these circumstances collectively taken, are a strong and convincing proof to the court that the transaction was not bona fide: that it was for what the law calls a good consideration, is not pretended; but it is alleged that it was for a valuable consideration: although the answer states that £350 of the purchase money was paid down, there is no proof of it. The testimony of M. who was examined on interrogatories, and is a subscribing witness to the deeds, fully developes the whole transaction; and though his character is a bad one, he may possibly relate the truth. We shall, however, only make use of his testimony, as it regards that part of Mrs. C's. respecting the payment of the purchase money, wherein she says, that though money was placed on a table, some in gold, some in dollars, and another part in paper medium, the latter only was brought by J. W.; the gold and silver was put down by Mrs. C. and by her afterwards removed, and J. W. put up his paper money again. The money was produced purposely to deceive the other witnesses to the deed, and R. C. did not actually receive a shilling.—This part of his testimony, as it relates to the money, is in part confirmed by Mrs. C. who was examined for defendant, and swears that a quantity of dollars were placed on a table in the room where she was sitting; (then a girl about 13 years old) to what amount in value she knows not; by whom put there, she could not tell; and after the deeds were signed, the money was taken away, but by whom, she was also ignorant: nor did she know whether there was any gold or paper medium: she thinks she saw the bag that contained the dollars afterwards in her mother's trunk. This witness swears with great caution, and very properly, for she was then young, and probably did not take much notice of what was going on; but it is somewhat remarkable that though she was in the room the whole time, she cannot recollect by whom the mon-

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ey was *brought in or removed, though it must have taken up some time to place the money in the order she described it, and the noise which the removal of so large a sum must have occasioned, one would naturally imagine, could not but have attracted her attention. Upon this part of the case, respecting the payment of the money, the proof is strongly against the payment. Nor do we think the case is made better by the receipts on the bond, for it is evident there was no money paid by J. W. for the first receipt, because it expressly states, to be received by the rents of the house which Mrs. C. was then in possession of, and had lived in from the time of making the conveyance: and the second receipt for £200 is in full of the bond. It must be observed that the bond was for £600 bore interest from the date, and no time was limited for the payment. It was not paid till November, 1795, four years after the date, at which time no more than £600 is pretended to have been paid, which was the principal debt, and not a farthing of interest. From all these circumstances, it is manifest that a valuable consideration was not paid for this property by defendant's testator. Upon full consideration of the testimony, and the very singular circumstances of this case, the court are of opinion, that the transaction was not bona fide, and for a valuable consideration, but merely fictitious, and made solely with a view to protect the property from R. C.'s creditors. It is therefore ordered and decreed, that the conveyance from R. C. to J. W. be set aside and cancelled.

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2 Desaus. 308

Case XLIII.

[Present, Chancellors Rutledge, Marshall and James.]

RALPH and GEORGIANA IZARD, Minor Children of Ralph Izard, Deceased, and THOMAS LOUGHTON SMITH and ANN C. SMITH, Minor Grandchildren of R. Izard, by Their Next Friend, W. L. Smith, v. the Executors and Legatees of RALPH IZARD, Deceased.

(June, 1805.)

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[*Wills* ⇐620.]

*The word children used in a will, shall not be construed to include grandchildren, unless a strong case of intention or necessary implication requires it. Maintenance and education directed by the will to be given to minor children must be provided out of the residuary estate.

[Ed. Note.—Cited in Logan v. Brunson, 56 S. C. 10, 33 S. E. 737.

For other cases, see Wills, Cent. Dig. § 1438; Dec. Dig. ⇐620.]

This was a bill filed to obtain education and maintenance for two of the grandchildren of the late Mr. Ralph Izard, out of his estate generally, under a clause in his will providing maintenance and education for some member of his family, and also to procure a fund for the support of those directed to be so educated and maintained.

The bill sets forth that Ralph Izard, father and grandfather of complainants, died 30th May, 1804, leaving a will, wherein among other things he devised "all the residue of his estate to all his children then living, and the children of his deceased daughter Charlotte (they standing in the place of their mother and taking the share to which she would have been entitled if alive) to them their heirs, &c. to be equally divided among them; if any of his children should die before him, their children to represent them; and directed that his children should receive their respective proportions at the age of 21, or marriage; and in the mean time be educated and maintained out of his estate, at the discretion of his executors." That complainants by their guardian, have called on defendants to allot and designate a fund out of testator's estate for their maintenance and education by the said will, and to specify and ascertain the amount and sum at which they mean to limit the same. That defendants refused, pretending that it was not testator's intention that said maintenance and education of said minors, should be a charge on his general estate, but charged to the separate fund and estate of each minor, which they are entitled to as aforesaid; and also pretending that although such should be declared testator's intention as to his own children, yet it was not his intention to extend said benefit to his grandchildren; (the children of his daughter Char-

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lotte,) whereas *the complainants, Thomas Loughton and Ann Caroline Smith, (the children of said Charlotte,) aver that it was the intention of their grandfather to extend such benefit to them also, which appears from his having designated no period at which the portions of his said grandchildren should be paid; whence it results, that they are virtually and specifically included in the same clause of his will which fixes the period of marriage or majority for the payment of the portions to his children, and that it was his intention to place his children and grandchildren on the same footing, in respect to maintenance and education. Bill prays that defendants may assign and set apart an adequate fund for the maintenance and education of complainants, including therein the expenses of education and maintenance of complainants Thomas Loughton Smith and Ann Caroline Smith.

The answer of the executors and legatees of Ralph Izard admits all the facts stated in the bill, but differs from the complainants as to the conclusions drawn from them. That as to the complainants Thos. L. Smith and Ann C. Smith, the grandchildren of testator, by his deceased daughter Charlotte, they cannot conceive he intended to include them in the clause of the will last recited in said bill, because he has therein used the word children and not grandchildren; and that the said word children has never been held to signify grandchildren unless in compliance with the clear intentions of testator. That here such intention does not appear, because testator in the preceding clause of said will, has used the word children as a term different from that of grandchildren; and by applying the former to his own offspring, and designating the others by the terms "the children of my deceased daughter," he shews that he was aware of the distinction; besides by placing his grandchildren in the stead of their parents in the preceding clause he shews an intention of equality, which would be defeated, if the word children should be

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construed grand*children. That the argument in the bill is drawn from omission in the will, which is stronger than one drawn from expression; and the rule requires that the intention should be manifest, and puts the onus on the party alleging. That the law designates the time for paying the portions, though it must be admitted that it was far more natural to testator to be looking to his own children.

Defendants insist that strong evidence of testator's intentions results from the clause last recited in bill, to shew that the grandchildren are not entitled to education and maintenance out of his estate, exclusively of the portions allotted to them, because the same is given expressly at the discretion of his executors, a mode he had a right to impose on his own children, whereas his grandchildren having their father alive, he was the best judge of the mode and stile of their education and maintenance, and (although he is also an executor,) such an interference with his children could not be intended.

As to the other point embraced by the bill, that defendants designate a fund out of testator's estate for the education and maintenance of his own children, defendants submit to the court, and pray a decision as to what estate testator alluded by the words "out of my estate." Whether his estate at large, his residuary estate, or the portions of said minors, in such residuary estate: and as to the limit of such expenses, they are willing to be controuled by this court: and as to the costs of this suit, being amicable and intended to apprize all parties of their rights and duties, they submit whether the same should not be paid out of the estate of testator.

At the hearing of the cause, it was argued for the complainants, the grandchildren, that the generic term children, includes grandchildren. That the two grandchildren in question had lost their mother, lived with

their grandfather and grandmother, and were treated and considered as children. The direction that his children should receive their respective proportions at the age of 21 of

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*marriage, (which undeniably applies to the grand children as well as the children) is inseparably connected with the rest of the sentence, which goes on to provide, that in the mean time they should be educated and maintained out of his estate, at the discretion of his executors.

That with regard to the fund, out of which maintenance and education is to be provided, it is clear that it must be out of the residuary estate.

For the defendants, it was argued that the force of the word children, does not generally reach or extend to grand children. It must be shewn to have been the special intention of the testator to include grandchildren under the word children. And this intent must appear on the face of the will. 4 Ves. jun. 698.

It is true that children may mean grandchildren, when there can be no other construction. 2 Vern. 107, 8. See also Ambler, 603, 4, 555, and 4 Ves. jun. 437. But no necessity exists in this case for such a construction.

The testator distinguishes between his children and grandchildren, and desires the latter to take the share of their deceased mother.

The education and maintenance is to be at the discretion of the executors. But the grandchildren have a father living, who alone had the right to control and regulate the education of his children.

As to the fund for the maintenance and education of the minor children, it is contended for the defendants that the same should be paid out of their portions and not out of the residuary estate, for that is so disposed of as to shew a different intent.

Chancellor RUTLEDGE afterwards delivered the decree of the court:

Upon a careful review of the testator's will, it evidently appears that he knew perfectly well how to distinguish between his children and grandchildren in the several bequests of his will. Cases may be found in the books where grandchildren have been

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considered as children, where *there has been an ambiguity of expression in the testator's will, which rendered it absolutely necessary, and without such construction, the testator's intent could not be otherwise satisfied: but that is not the present case, and we think it would be a most strained construction indeed to say that the word children in the bequest, before the words of maintenance and education, meant to include grand children.

The testator having directed that his minor children should be educated and maintained out of the profits of his estate, that expense must be defrayed out of the residuary estate at large, that being the fund usually applied to the payment of debts and legacies.

Smith and Bacot and Desaussure for complainant.

Parker and Lightwood for defendant.

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2 Desaus. 313

Case XLIV.

[Present, Chancellors Rutledge, Marshall and James.]

ANDREW M'DOWALL, v. HENRY PEYTON, and HUGH HUTCHINSON and ANN, His Wife.

(July, 1805.)

[*Wills* ⇐222.]

Where a will has been proved before the ordinary, without opposition, the next of kin interested to oppose it being abroad, and knowing nothing of the will till after the probate, this court will give the parties an opportunity of examining and litigating the will, by directing those benefited by the will to consent to a revocation of the probate and a re-examination of the will before the ordinary.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 543; Dec. Dig. ⇐222.]

The bill of complaint stated, that the complainant Andrew M'Dowall of Carrickfergus in Ireland, is the only brother and next of kin to Alexander M'Dowall, deceased, who departed this life in the year of our Lord, 1799, in Charleston. That the said Alexander died seised and possessed of a considerable estate, real and personal in this state; and that the said Alexander entertained for complainant a sincere and fraternal love, as appeared by his letters filed as exhibits, and

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numbered 1, 2, 3, *4, 5, 6, 7 and 8, which contain expressions of strong attachment, and which made complainant believe that it was the intention of his brother Alexander, that he should possess his estate; and particularly by a letter, a copy of which is filed as an exhibit and marked A. from the said Alexr'. addressed to Mr. John Levingston Largan. Complainant shews that soon after the death of his brother Alexander M'Dowall, a paper written on and said to be the last will and testament of the said Alexander was set up, of which a copy is herewith filed and marked B. which was very much to the surprise of complainant as by the said paper the estate of the said Alexander M'Dowall is made to go in a channel different from that which the said Alexander would have pointed out, had he been in a sound and disposing mind, or had not improper means been used to make him sign the said paper. And complainant affirms that the said Alexander M'Dowall was not at the time that he is said to have signed the said paper, of sound and disposing mind, and that improper means were used to make him sign it. And that the

same is not his last will and testament. And complainant states that the residue and remainder of the estate, that is mentioned in the paper called a will, is not worth one shilling. That the said Alexander M'D. knew well the state of his property, and intended complainant and his children to be the objects of his bounty; and complainant states that the said Alexander M'D. when he is said to have signed the said paper, declared that he intended that his property should go to complainant's children. Complainant charges farther that the said Alexander M'D. did not sign the paper aforesaid voluntarily, but that his hand was held when it was signed. That the said Alexander was speechless and did not by any act or expression of assent authorize his signature to the same, disposing of his estate from his nearest relations, to Miss Nancy Peyton, who hath been since married to Capt. Hutchinson of the said city and state, and to Capt. Henry Peyton, who had married a daughter of the said Alexan-

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der, *but she was dead without issue. And complainant further charges that the said H. Peyton, Hutchinson, and his wife Nancy, have since possessed themselves of all the estate of the said Alexander M'Dowall, and set up a claim to the same, under said pretended last will and testament.

The bill prays for relief in the premises, and that the defendants may be compelled to account to complainant for all and singular the rents and profits of the estate of the Alexander M'Dowall that have come into their hands said and possession.

To this bill the defendant filed an answer denying the fraud charged in obtaining the execution of the last will and testament of the said Alexander M'Dowall; and also pleading in bar to said bill and the demand for an account, the probate of the will made before the ordinary who had exclusive jurisdiction on the subject.

The answer set forth, that the above named defendants can neither admit or deny, having no knowledge and therefore require that it may be proved, that the said Alexander M'Dowall died, leaving the said Andrew his only brother and next of kin. They admit he died, seised in fee of real and personal estates as will be shown per exhibits A. and B. That his personal estate has fallen short of paying his debts, as will appear by H. Peyton's accounts, who qualified as executor of said estate; that all his real estate, (2 houses and lots of land excepted, which were devised by him to the said Ann) were sold under execution, being mortgaged for the purchase money, the greatest part of which still remains unpaid. That he the said Henry is apprehensive that recourse must be had to the houses and lots above mentioned to satisfy the debts remaining of the said Alexander. That as they the defendants have not seen the original letters exhibited with complainant's bill, they neither admit or deny their authenticity; but that they do not admit of the construction and inferences drawn from said letters by complainant. That they admit the will filed with complainant's bill

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is a true copy. That Hugh *Hutchinson acknowledges himself a stranger to all the circumstances attending the execution of the said will. That Henry Peyton and Ann Hutchinson deny the said Alexander M'Dowall not being in his senses when he signed the said will, or that any fraudulent means were taken to obtain said signature. That they do not know or believe that either before or after the execution of said will the said Alexander had declared that his property should go to none but the children of the complainants: But that they had understood he had declared to the contrary. That he voluntarily signed the said will, and that though weak in body, he made observations which plainly shewed he was in his senses. That said will was lying several days on the desk before him; that they believe it was made conformable to what he previously declared.—That he the said Henry Peyton was his son-in-law, and that the greatest friendship subsisted between them; and a constant intercourse and mutual good offices. That the said Ann lived with him, and was much regarded by him. That he the said Henry Peyton has taken no part of the said estate as legatee. That he apprehends said estate will prove insufficient to pay his legacy. That the said Ann Hutchinson is in possession of said houses, but is apprehensive that recourse will be had to them to satisfy outstanding debts. That they have answered the complainants bill sufficiently to acquit themselves of the fraudulent practices therein charged to them; but do contend that the probate of said will, made by the ordinary of Charleston district, should be conclusive, and operate as a bar to the said complainant having any further account, discovery or relief in this honorable court, touching the real and personal estate of said testator and defendants.

At the hearing, it was contended by Mr. Pringle and Mr. Cheves for the defendants that the plea in bar should be first disposed of. They argued that the jurisdiction belonged exclusively to the court of ordinary, and that the will having been proved in that court, the probate was conclusive. That this

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was the case in England, and more *strongly in this country, where the legislature had by the express provisions of the statute of 1789, given an appeal to any party dissatisfied with the sentence of the court of ordinary, to the circuit court of law, which excluded every other mode of examination. That no appeal had been made in this case, and this court

ought not now to open the probate. That it would be better to follow a known and fixed course, and that the law should be settled, even if injustice should sometimes be done to particular parties. They cited 7 Bac. 380.

Mr. Gaillard and Mr. Drayton argued that this court was bound to interfere, and to prevent injustice.—That though the jurisdiction was in the court of ordinary, with appeal to the court of law, that did not prevent this court from interfering in a case where the justice of the case had not been obtained, by fraud, or accident or surprize.

That the probate made in the court of ordinary, was made ex parte, with no person to oppose it. That the complainant and the nearest of kin of the deceased, were living abroad in Ireland at the time of the probate, and knew nothing of the will, or the proceedings to establish it, till long after the will was proved, and after the time for appeal, (which is only twenty days) had expired.

That ex necessitate rei, this court was obliged to take up the case, as in the alimony cases, and to open the door to relief in some way, else great injustice might result by surprize on the parties.

They cited 1 Ves. sen. 287, 8. Barnsley v. Powell; 8th Viner, 167. Eq. Cas. abr. 133. 2 Vesey, sen. 155; and 2 Atk. 378.

The court being of opinion that the case should be gone into, the will of Alexander M'Dowall, was produced. It bore date 26th December, 1799; and disposed of the estate to defendants.

The evidence taken under commission was produced, to prove that the complainant and the deceased were brothers, and on friendly terms. Eli Plumb proved the hand writing of the testator to several letters from testator

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to the *complainant, from the year 1785 to February 1799. The letters were read, and were of a friendly nature, and went to prove the good footing the complainant was upon with his brother the deceased testator.

Mr. Hunter proved that he knew the complainant and the testator, both here, and in Ireland. The testator always spoke of his brother the complainant with affection.

Dr. Irvine attested that he had attended the testator between one and two years before his death, and immediately before and at his death. One or two days before his death, he was attacked with a nervous complaint. He had convulsions, and after them was incapable of making a will; but upon the operation of a blister, he spoke something, yet it was incoherent, and the witness could not say he was in his senses. The severe attack began four or five days before death, and when witness was called in, he was by no means capable of making a will. But he might have been capable an hour or two before. He had some lucid intervals. Witness cannot say if there was any fraud in obtaining the execution of the will. A close friendship existed between the testator and the defendants Mr. Peyton and Miss Ann Peyton. She attended him for eighteen months.

Mr. Plumb attested that he was with the testator prior to the convulsion fits; he was very low; he was there the evening before his death; he died early the next morning. He had no conversation with him before the convulsions about his brother the complainant.

On the part of the defendant, Mr. Robert Stewart proved that there was apparently a strict friendship between the testator and the defendants. That the day after Christmas, (December, 1799,) a message was left for him to go to Captain M'Dowall's, that he went after candle light. He was then sitting up in his bed with assistance—that his will was real to him. His spectacles were handed to him, and he, the testator, looked over it, and said seal it, seal it; and Mr. G. White then sealed it. Some person observed that none of

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them had noticed that it was not *sealed but himself. The testator looked over the will long enough to have read it. When the pen was put in his hand, it shook so, that he could not sign, and the witness held his wrist—but neither he nor any other guided his hand. He had grasped the pen before witness held his wrist. The testator pointed to the spot where the seal ought to be put. The witness saw no practises or fraud. Mr. Peyton, the defendant, is a man of rectitude.

Mary Garner proved that she was the testator's nurse, and was with him from the 26th December, till his death on the 28th.

At the time of executing the will, Miss Peyton helped him on with his spectacles. Mr. Stewart read the will to testator, and he said seal it, seal it. She saw Dr. Irvine there several times after the 26th December. He was there on the 26th December. Some one was in the back room. The testator enquired who it was, naming some person.

Dr. Denny proved that there was a friendship between the testator and the defendants. Heard testator say Miss Peyton should be provided for.

Mrs. Armstrong proved that there was a friendship between the testator and the defendants. Heard him say long before his death that he would provide for Miss Peyton.

Mr. W. Smith proved that there was always a friendship between the testator and the defendants. The testator often said that he meant to give Miss Peyton something handsome. The Peytons bear good characters.

Mr. George White and Mr. Findley were also examined, but I have not been able to procure a full note of their testimony; nor was it material to the question.

Chancellor JAMES afterwards delivered the decree of the court.

The plea before the court, we believe, is a novel one in this country: the principle is undoubtedly true, that the jurisdiction of wills of personal estate belongs to the ordi-

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nary, *and must be tried by the ecclesiastical laws. It is also a settled principal of law that this court cannot set aside a will of personal estate for fraud; but it must be tried in the court of ordinary. The will has been already proved in that court without any opposition; and indeed there could have been none by complainant, he being out of the state at that time; so that the question whether it was fraudulently obtained or not, was not agitated. A difficulty arises how that question, (that of the alleged fraud) is now to be tried; the ordinary having already done his duty. That this court may not infringe the jurisdiction of the court of ordinary, and for the furtherance of justice, the only method that we can devise is, to decree that the defendants do consent to a revocation of the probate in the court of ordinary, which will then be set aside, and the parties be at liberty to proceed in the case before the ordinary de novo, who will then examine witnesses and determine the question as to fraud or no fraud, so far as his jurisdiction extends, respecting the personal estate: and as the will contains devises of real estate also, this court will in the mean time examine witnesses, and direct an issue if necessary, to try the question devisavit vel non. Vide post, Palmer v. Mikell and others [2 Desaus. 342].

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2 Desaus. 320

Case XLV.

[Present, Chancellors Rutledge and James.]

MARTHA CANNON, Executrix of Daniel Cannon, v. THOMAS MITCHELL.

(November, 1805.)

[*Evidence* ⊂⊃450.]

A purchaser at the sale of estates at auction, is bound by verbal declarations made by the vendor publicly at the sale, and before the biddings; which declarations are not variant from the terms advertised, but are additional and explanatory thereto. And he shall be compelled to complete his purchase according to the terms so explained.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2074; Dec. Dig. ⊂⊃450.]

[*Vendor and Purchaser* ⊂⊃176.]

If there be a small deficiency in the land, a reference may be made to the master to ascertain it, and report the value.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 333–340; Dec. Dig. ⊂⊃176.]

This was a bill filed to compel defendant

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to complete *his purchase of a tide saw mill near Cannon's Bridge, on the neck of Charleston. He became the purchaser at a sale made at public auction. The terms of sale had been advertised in the papers. At the sale, and prior to the bidding, a plat of the lands, mills, creek, &c. was shewn, and it was repeatedly and publicly declared by the agent of the vendor, and the auctioneer, that the creek laid down on the plat was to be kept open; that being for the benefit of both mills, which were put up and sold separately, and purchased by different persons.

The defendant resisted the bill, on the ground that the declaration alleged to have been made at the time of the sale was variant from the advertisement, and materially changed the terms of sale; and that the defendant did not hear the declaration, and could not be bound by it.

The defendant also resisted the bill, on the ground that there was some deficiency in the marsh land.

After hearing argument, Chancellor RUTLEDGE delivered the decree of the court.

In this case there are two questions.

1st. Whether the declaration made by the agent of complainant at the sale of the mills is variant from, or inconsistent with the terms of sale mentioned in the printed advertisement, and therefore defendant not obliged to accept titles containing such declaration?

2d. Whether there is any deficiency in the quantity of marsh land intended to be sold, as specified in the advertisement? And if any, how much, and what abatement should be made in the purchase money? With respect to the first point, it is a very plain one, and none but a person interested in the question could have any doubt upon it. Referring to the advertisement, it offers for sale, two complete tide saw mills; to each of which will be attached a certain quantity of high land and marsh land. Conditions, one third cash, and the remainder in one and two years, &c. Nothing more is said of the mills or terms of sale. On the day of sale,

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a plat of the land is shewn, *which is declared not to be perfectly accurate, but intended only to give purchasers a general idea of the situation of the land. At the same time, and previous to the sale of the mills, it is publicly and repeatedly declared by the agents of complainant, and by the vendue master also, that the creek laid down on the plat is to be kept open for the mutual benefit of both the north and south mills. The court is of opinion that such declaration is not repugnant to, or inconsistent with the terms contained in the advertisement. It appears to be merely explanatory, and to obviate any doubts that might arise, whether the purchaser of the south mill might not stop the creek, if he thought fit to bank in his marsh land, which would in that case

effectually ruin the north mill as a tide mill, or put the owner of it to very great expense and trouble to cut a canal through the marsh to enable him to work his mill. That the declaration was publicly, loudly, and repeatedly made, has been proved by a number of witnesses; and Mr. W. D. the agent of complainant, who made the declaration, has positively sworn that he mentioned it to defendant himself previous to the sale. Although the defendant has sworn he did not hear the declaration till after the sale, and several witnesses have sworn they did not hear it at all, and although they may all be persons of equal respectability and veracity, yet the court in weighing evidence, are bound to give more credit to those who swear positively to facts, than to mere negative testimony.

Upon this point, we are of opinion that it was a very prudent precaution on the part of complainant to make the declaration, and also to insert it in the titles, which may be the means of preventing numerous law suits at a future day, when the witnesses to the transaction may perhaps not be in existence.

It is therefore ordered and decreed, that the defendant do accept the titles from complainant containing the restrictive clause above mentioned; and as there are upwards of two thirds of the purchase money now due, that the defendant do forthwith pay the

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same to the complain*ant, together with interest thereon from the day of December, 1803—and also give his bond to the complainant for the remaining third part of the purchase money agreeable to the conditions of the sale. As to the second point, the court think it necessary to refer it to the master: for the quantity of marsh land deficient, (if there is any) is so small, that the purchase cannot be much deteriorated in value—and if it really is an object with the defendant, he can have it set off by way of discount to the bond he is to give complainant, if he should think proper on that account to withhold payment of it when due.

Costs to be paid by the defendant.

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2 Desaus. 323

Case XLVI.

[Present, Chancellors Rutledge and James.]

JOHN VERMONET, an Alien, v. DELAIRE and VILLENEUVE.

(November, 1805.)

[*Sales* ⟸235.]

The sale of a brig by a person who has a bill of sale of her (given him to cover her as American property) for a fair price, to a person ignorant of the complainants concealed rights in the brig, was held to be a valid transfer.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 681; Dec. Dig. ⟸235.]

[*Shipping* ⟸76.]

A consignee who has made advances, is justified under strong circumstances, to break up a voyage, and to vacate a policy of insurance; and in taking measures to secure himself.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 323–325, 327–331; Dec. Dig. ⟸76.]

[*Equity* ⟸345.]

The answers of defendant corroborated in part by one witness, and contradicted by one witness only, must prevail.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 715–724; Dec. Dig. ⟸345.]

This was a bill to establish a property in the complainant who was a Spaniard, to a brig called the Sally, which the complainant alleged to belong to him, and had sent to Charleston, under the care of Spooner, as captain, and of Gleises as supercargo, but which was covered as American property, in the name of Spooner; and the bill sought an account from defendant Delaire.

The cause came to a hearing, and much testimony was given, and much argument gone into. But the court took so full a view of the case in the decree, that it is unneces-

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*sary to make any other statement than that which appears on the face of the decree.

After the argument, Chancellor JAMES delivered the decree of the court.

The plaintiff in his bill, among many other matters sets forth that he being an inhabitant of St. Augustine, was in April, 1804, the owner of a schooner called the Amistad, which he sent under the care of a certain Mr. Gleises as supercargo, and a certain Mr. Spooner, as captain, with a cargo, to Baracoa. That Gleises sold the schooner and cargo at Baracoa, and with the proceeds purchased a Spanish brig which he named the Sally. That he executed a bill of sale of the brig to Spooner, an American, to cover the property from the British, and took a counter bill of sale from Spooner, acknowledging the vessel not to be his, and then proceeded with passengers on board to Charleston. That the brig arrived in Charleston in the beginning of August, 1804, and Gleises applied to the defendant Delaire to take the consignment of her, and to make the requisite advances; and that he at the same time acquainted him that the complainant was the real owner of the brig Sally, and that she was covered property, and though the right to her was ostensibly in Spooner, that yet he had a counter bill of sale, which he shewed to the defendant Delaire. That Delaire after receiving the above information agreed to accept the consignment, and make the necessary advances. That Gleises and Spooner on various occasions told Delaire, that the complainant was the owner of the brig; and that Gleises wrote to the complainant on account of all his proceeding and communicated the sub-

stance of his letter to Delaire. The bill then states that the defendant Villeneuve also knew that Vermonet was the real owner of the brig; and further charges that Delaire knowing the brig to be the property of complainant, planned a voyage for her to Bourdeaux, put on board freight of his own, obtained that of others, and loaded her, having made sundry advances for her repairs

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*and out fit, to the amount of about $2,000. That with a direct view to said voyage, and to secure repayment of his advances, he took from the captain a bottomry bond for $2.217, on the brig and freight, payable at Bourdeaux, and a bill of exchange payable also at Bourdeaux. That the brig being ready for sea on the fourth of September, Gleises, on demand of Delaire, to obtain insurance, delivered to him all the brigs papers, and that Delaire effected the insurance, viz. $6.215 on the body of the sea letter brig Sally, whereof Wm. Spooner was master, and $2,344, on her freight at a premium of 5 per cent. The bill further charges that the brig with a pilot on board was detained in the Roads, having commenced her voyage, from the 5th to the 8th of September, and then was driven ashore by a storm. That the defendant Delaire being informed thereof, sent a message to Gleises not to be uneasy as the brig was insured. That at first he cooperated with the brokers of the insurers, and proceeded to unload the brig, but soon after, anxious to get his advances repaid, he instead of waiting the arrival of the brig at Bourdeaux, he broke up the voyage, and cancelled the insurance, of his own authority; though there had been no protest. The bill further states that complainant having received no accounts of his schooner Amistad for five months, and casually learning that she had been sold, and the Sally bought, and that the latter was in Charleston, he sent in August a certain Fitzpatrick to Charleston with a power of attorney to obtain from Gleises a settlement of accounts, and possession of the brig; and having heard a good report of Delaire, he recommended his attorney to him, and wrote, requesting his aid, for the purposes aforesaid. That the said Fitzpatrick immediately on his arrival in Charleston, delivered to Delaire, complainant's letter, which stated his great confidence in him; that the brig was his property, and Gleises supercargo, and Spooner only captain; that both had betrayed his confidence, and that he had sent Fitzpatrick as his attorney, with papers to substantiate his

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claim, and requested his assistance *for that purpose. "And though Delaire received complainant's letter between the 15th and 20th of September, and on the 10th of October, wrote a letter to complainant, assuring him that he would take the same care of his interests as his own," that yet he had proceeded on the 3d of October to cancel the insurance and to break up the voyage to Bourdeaux; and afterwards negligently suffered the brig to remain 6 weeks on the marsh, continued the crew on board at a great and unnecessary expense; suffered provisions valued at $400 to be unnecessarily wasted, and the brig to be despoiled of a great number of articles, valued at $800 more, which are not in the inventory delivered by Delaire after the sale. The bill further states a communication between Delaire and Villeneuve respecting the sale of the brig; and that the latter knowing of the counter sale, hesitated about purchasing; but Delaire having made Spooner cancel the bottomry for $2,217, and give a new deed for the sum of $3,060, including therein sundry pretended charges, he then exhibited the same to Villeneuve as an evidence of Spooner's proprietorship in the brig. Villeneuve however still hesitated, and Delaire to obviate all objections, arrested Spooner for the $3,060, and while in the custody of the sheriff, extorted from him a bill of sale of the brig, on which he said with exultation to Villeneuve, "all is now settled, the brig is mine;" but Villeneuve still refused to buy without the concurrence of Gleises. That in the mean time Gleises had been arrested by a certain Flotard, and thrown into gaol, where he was tampered with by Villeneuve, and a bribe offered him to obtain the counter bill of sale, but he constantly refused to give it up. That Delaire finally consented to warrant the vessel, and a sham sale of her was made on the 22d of November, from Delaire to Villeneuve for $4,300. The bill further charges that Fitzpatrick, complainant's attorney, had no power to sell the brig, and could convey none to Delaire. That complainant vexed at the delays and other disagreeable circumstances attending the ves-

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sel, did *write on the 20th of October to his agent Fitzpatrick, to sell the brig, provided he could clear $1,200 by the sale; but that he would prefer a freight of $4,000: and that notwithstanding the above express provision, the said brig has been sold, and the said Delaire pretends that there is, after deducting all the charges upon her, a balance of no more than $234 in favor of complainant.

The bill then prays that defendants may answer fully, and account, and that the title of complainant to the brig may be established.

The separate answer of the defendant Delaire, sets forth that he knows nothing about the schooner Amistad, or of her being sold, and the Sally purchased with the proceeds, or of her being covered as American property. That he saw the bill of sale from Gleises to Spooner, and supposed it a bona fide transfer. He denies that Gleises told him he had purchased the brig for complainant, or that

she was covered property, or that he had taken a counter sale, or that he shewed the counter sale to him. He admits that Gleises said something about a counter sale, at the same time holding a paper in his hand, but that he did not look at it. That Gleises did deliver to him several papers relating to the brig, but he denies that any of them shew any interest in her to be in complainant. He acknowledges that Gleises told him he meant to write to complainant, but was ignorant of the substance of the communication. Defendant denies that Spooner ever told him that complainant was the owner of the brig, or that Gleises ever spoke of him as such, or represented him in any other light than as a partner. He states that the true reason for his advances was the importunity of Spooner, to whom he did in the first instance advance $2,000 on account of the brig; to secure which, he insisted on a bottomry on the brig and freight, payable at Bourdeaux, and a bill of exchange payable in the same manner. He admits that when the brig was ready for sea, Gleises delivered to him the papers relative to the brig, and he upon the order of Spooner, effected the insurance as

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set forth in the bill, but does not rec*ollect being informed by Gleises that the brig was transferred to Spooner merely to make her a sea-letter brig.—On the contrary, the defendant avers that Gleises always declared that the brig was his property, while Spooner also declared that she belonged to him. Defendant admits the brig had on board a valuable cargo belonging to defendant and others, and was insured for $3,000. That she had a pilot on board, had commenced her voyage, and was driven upon the marsh on the 8th September. That he was informed of it by Spooner, and advised a protest.—That he ordered the cargo to be unloaded, and in the first instance did not intend to break up the voyage. But he admits that he did on the 3d October cancel the insurance, and break up the voyage, the same being a just and prudent measure, and the only mode by which a return of the premium could be obtained, the said brig not being so found and furnished, as in case of loss to entitle the insured to a recovery from the underwriters. Defendant denies persuading the freighters to take back their goods; they demanded the restoration of them as a right, and threatened to make defendant responsible for their detention. He denies refusing to order a survey, and that he broke up the voyage through interested motives only: the fact was that more monies were necessary to carry it on, and he did not choose to advance them. He denies that he persuaded Spooner to cancel the bottomry; but admits that finding it in vain to expect payment of his advances from the freight, without additional advances, he drew out an account for the disbursements already made, and presented the same to Spooner, and that he acknowledged the account, but refused to pay it. That defendant then sued him, and held him to bail, and when in the custody of the sheriff, but of his own accord, Spooner gave defendant a bill of sale of the brig, which defendant accepted, being persuaded that the property of her was in him. That the consideration of the transfer was $3060, being the sum due by Spooner, and for which defendant gave him a discharge of his debt. Defendant denies all col-

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lusion between *himself and Villeneuve, and avers the sale to him to have been fair and public. He admits that he was informed by Fitzpatrick, that he was dispatched to Charleston by complainant, to obtain from Gleises a settlement of accounts and possession of the brig, and that Fitzpatrick brought him a letter from complainant, stating that he was the owner of the brig, and that such information was communicated to him previously to the transfer made by Spooner; but both Gleises and Spooner having declared themselves to be the owners, and this third claim being then brought forward, defendant thought the bill of sale to Spooner must establish the right in him, and that he might conscientiously take his bill of sale of the brig. That defendant also got complainant's agent Fitzpatrick to witness the bill of sale from Spooner, supposing if he had any objections to such sale, he would make them, and if he made none, his principal could not afterwards censure defendant. Defendant admits that in his letter of the 14th November, he said he had then sold the brig, which was the case as he then thought, but upon some disagreement arising between Villeneuve and himself as to the terms of the sale, the brig was afterwards sold at public sale.

Defendant submits that he has merely received his due for monies advanced, and if a loss must fall either upon him or complainant, it is equitable it should fall on complainant, he having reposed confidence in those who have betrayed him, and made him a party to a clandestine transaction, violating one of the laws of the general government.

The separate answer of the defendant Villeneuve also sets forth that he denies any knowledge of complainants being owner of the brig Sally, or how she had been purchased, or that he examined her papers. That Gleises asserted the brig to be his and Spooner's. He denies having tampered with Gleises as stated in the bill. That he was satisfied with Spooner's title to Delaire; and Delaire's to him. He avers that Gleises, in his presence, told the Spanish captain for whom defendant bought the brig, that he had in his possession an important document rela-

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tive to the *brig, which he would surrender for $300, but denies that any bribe was of-

fered him to withdraw his opposition to the sale.

In making up the decree of the court in this case, the principal grounds for consideration are, 1st.—Whether the defendants acted without a knowledge of the claim of the complainant to the brig Sally? 2d. Whether the defendant Delaire can be justified in breaking up the voyage, and vacating the policy?

Upon the first ground, complainant to prove that the defendants knew him to be the real owner of the brig, has produced as a witness, the supercargo Gleises, who proves every thing indeed that complainant could wish. But the defendant Villeneuve denies in his answer all knowledge of the claim of the complainant; and the defendant Delaire also declares himself to have been a stranger to it until the arrival of Fitzpatrick, and that even then, as Spooner had a bill of sale, which appeared to be a fair one, and there were three claimants, Gleises, Spooner and Vermonet, he concluded that the legal right must be in him who had the bill of sale, and that complainant at most could only be a partner in the brig. He therefore, according to his answer, was in the dark as to the claim of complainant.—To corroborate these answers, defendants have produced the evidence of Mr. Chancoigne, who proves that Gleises always spoke of the brig as being his property, and that the witness, though a son-in-law of Delaire, and knowing most of his concerns, never heard of the claim of Vermonet until lately. Complainant therefore has sought a discovery, and here are the answers of two defendants of respectable character upon oath, corroborated by the evidence of Mr. Chancoigne, another respectable witness, to prove that defendants were strangers to the claim of complainant; and to contradict this, there is only the testimony of Gleises, who appears to say the least of him, to prove a great deal too much. Upon the weight of evidence therefore, the court must determine that Villeneuve at least acted without knowledge of the claim of complainant, and is con-

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se*quently an innocent purchaser. As to Delaire, some further objection arises against him, viz: That he recognized the right of complainant, when he wrote on before the sale of the brig, that he would take the same care of complainant's interest as of his own: but we must not garble the letter; and in another part of it Delaire expressly says, that we were unable to devise the nature of your connections, he (Gleises) having never mentioned your name.—From these expressions it would seem that Delaire has at least acted with consistency throughout, in denying that he ever heard of Vermonet's claim from Gleises, and the declaration that he would take the same care of complainant's interest as of his own, is consistent and reconcilable with his idea that complainant was a partner. But even supposing that Delaire did receive from Fitzpatrick a knowledge of the claim of complainant, yet it is granted on all hands that the captain (Spooner) did receive advances for the brig from Delaire, and that he had the power to make the bottomry as a security for repayment. What then will be the result? That if Delaire's conduct can be justified in vacating the policy, and breaking up the voyage, that then he was right to make use of every legal and reasonable remedy in his power to recover back his disbursements. This leads us to the second ground, and it appears from the evidence of Gleises himself, that though this brig was covered property, yet she was entered by Spooner, the agent of complainant, as American property, and that entry was sworn to. It further appears from the answer of Delaire, that by the order of Spooner, he had the vessel ensured as American property, not knowing her to be covered. And again, we learn from Mr. Tunno that the premium for ensuring covered property is much higher than that for ensuring American.—What then is the conclusion? It is that by the contrivance of Spooner, and in all probability that of Gleises also, the agents of complainant, there was a fraud practised upon the underwriters, and the policy would have been void. The case being thus circumstanced, and the brig also

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be*ing not well found, the freighters in the mean time come to some knowledge of the transaction, and demand a return of their goods as a matter of right, or that they would make Delaire liable for them. Whereupon, he as a prudent measure, and with the concurrence of Spooner, the ostensible owner, breaks up the voyage, and vacates the insurance. Under all these circumstances, the court cannot blame him: they are not willing to favor consignees in breaking up voyages, and vacating insurances without orders from consignors; but yet at the same time they think the rigor of the general rule must bend to circumstances, and that Delaire in this case was justified in taking the steps which he did. Besides there being three claimants in the case, it is probable that Delaire did not well know to which of them to apply for orders, and therefore acted in concurrence with the one who appeared to have the best claim, and was in possession of the bill of sale. As to the sale of the brig from Spooner to Delaire, it appears to the court that it was a compromise that took place while Delaire was enforcing his legal remedy for the recovery of his disbursements, and that the brig sold for nearly the sum complainant asked for her. It also appears that Fitzpatrick, the attorney of complainant, was privy to the whole transaction, and did not object to it. Indeed it seems that he gave it an implied sanction by becoming a witness to the transfer. How then can Vermonet expect to recover? He is bound by the

acts of his agents, and if he has been unfortunate, he must place it to his own want of sagacity in employing such improper persons. He who trusts most must suffer most. It has indeed been said that Fitzpatrick himself had no power to sell, and therefore could convey none to Delaire. But upon examining his power of attorney, there appear in it the following expressions, viz. that he was vested with the most ample power which he might stand in need of without limits. This needs no comment. Upon these reasons therefore the court are of opinion that if Delaire could not be said to be entirely a

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stranger to the claim of *complainant, that yet he did not become acquainted with it, until after he had made his advances and his own rights had accrued; that under the particular circumstances of this case he was justified in breaking up the voyage of the brig Sally, and that the subsequent sale of the brig from Spooner to Delaire was a fair transaction, founded upon his right to recover back monies advanced, and that the same took place under the implied sanction of the agent of complainant.

It is therefore decreed that the sale of the brig to Delaire by Spooner is a good one, and that the accounts be referred to the master.

There was afterwards a motion for a rehearing; but it does not appear that there was any alteration in the substance of the decree.

Smith for complainant.
for defendant.

Chancellor Marshall dying in the autumn of the year 1805, Waddy Thompson, then Solicitor on the Western circuit, was elected in his room, in December, 1805.

2 Desaus. 333

Case XLVII.

[Present, Chancellors Rutledge, James and Thompson.]

ANONYMOUS.

(May, 1806.)

[*Usury* ⇐66.]

Notes proved to have been usurious in their origin; and a note given without any new usury, but for the balance of a note originally usurious, must all be set aside as void by the statute; more especially as there are strong presumptions that the defendant knew them to be usurious. And these transactions being the basis, and the inducement to a subsequent sale of stock, that sale is tainted with usury.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 139; Dec. Dig. ⇐66.]

[*Usury* ⇐31.]

But the sale of the stock itself, independently of that circumstance, was usurious and void, because it was made to a necessitous man, (whose object was to raise money) at a price

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much above the market *price of stock. It was therefore considered a covered loan, at usurious interest, under the name of a sale of stock, and therefore void.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 79, 81; Dec. Dig. ⇐31.]

[*Usury* ⇐95.]

In giving relief, the court requires the complainant to do equity; and to pay all that was justly due on these transactions to the defendant after stripping them of the usury.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 200; Dec. Dig. ⇐95.]

This cause had been previously heard on a demurrer to part of the discovery sought by the bill of complaint.—The court on argument sustained the demurrer. The defendant having answered to those parts of the bill not demurred to, the cause now came to a hearing on the merits. The complainant and defendant went very fully into evidence, as to the nature of the transactions between D. C. and J. F. of which the plaintiff, as a creditor of D. C. complained, as being usurious, and destroying his security. The argument of counsel was also very full. But the court having noticed, in its decree, the important parts of the testimony, and some of the principal arguments of the counsel, it is unnecessary to make a previous statement.

After the hearing, and time taken by the court to advise, Chancellor JAMES delivered the decree of the court.

In the consideration of this case, the grounds most material to be enquired into by the court, are:

1st. Whether the three several notes stated in the evidence to be paid by D. C. to the defendant J. F. and commonly called accommodation notes, were or were not usurious?

2d. Whether they were usurious within the knowledge of the defendant?

3d. Whether the usurious consideration of the notes was not so blended with the consideration for transferring the stock as to contaminate the whole transaction with usury?

4th. Whether the transfer of stock, though nominally a sale, is not in the construction of law, a loan for more than the legal interest, and thus within the act of assembly against usury?

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*On the first ground, whether the accommodation notes were usurious? It appears from the testimony given by the broker for D. C. that two of the notes, viz. the one drawn by D. C. and endorsed by Dr. C. and the other drawn also by him, and indorsed by M. & R. drew an interest of five per cent. for 30 days, and 10 per cent. for 60 days forbearance of the principal, which at the end of the year, including brokerage and commissions (which fall upon the borrower) would double the principal sum advanced;

so as upon one hundred pounds principal, to make it two hundred pounds, instead of one hundred and seven pounds according to the legal interest.

As to the third note given by D. C. to the defendant, Mr. C. states in his evidence expressly that it was given for a balance of monies advanced by L. & B. for the defendant, at 4 per cent. a month. But if it was usurious in its commencement, it must be so throughout. Therefore it fully appears to the court from the evidence, that the notes in question, all carried an interest greater than the legal interest, and consequently that they were usurious.

2d. ground.—Were those notes usurious within the knowledge of the defendant? The broker has proved that the note indorsed by Dr. C. was sold by him to the defendant, at a discount of 10 per cent, at 60 days, so that defendant must have known that this note was usurious. On the note indorsed by M. & R. this witness did not appear to be so clear that defendant knew it was usurious; but it is stated by D. C. in his evidence, that this note was an usurious one, and that he paid it to the defendant. The circumstance of its being usurious, must therefore have come to the knowledge of defendant, if not at the time of the sale, yet at the time of the payment of it, when he had it fully in his power to have stopped short, and to have received no more than the legal interest. As to the remaining note given to the defendant by D. C. it also appears from the testimony of D. C. that L. & B. advanced him money at four per cent. a month on sundry notes, and for a balance due on the same,

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he gave a note, dated *4th March, 1794 to defendant. That at the negotiation for the sale of the stock, he expressly promised defendant prior to the conclusion of the bargain, that the said note should be paid to him, and that the said note was actually paid. As this note was taken by L. & B. for the balance of monies lent on usury, and was so taken in the name of defendant; as it was afterwards stipulated at the negotiation for the stock, that it should be paid, and it really was paid; it is impossible to draw any other conclusion from all these circumstances, but that it was usurious within the knowledge of the defendant. But further, since the defendant was called upon for a discovery as to his knowledge of the usurious nature of these notes, and as by the proviso in the act of assembly against usury, he would have been permitted to deny upon oath the truth of what the borrower offers to swear, in which case the borrower is not admitted as a witness, and since the defendant has not so denied the charge against him on oath, but has demurred to the discovery, there arises upon this ground a strong presumption, both that the notes were usurious, and that they were so within the knowledge of defendant. We proceed to the third ground, whether the consideration of the notes was not blended with the consideration for transferring the stock, so as to contaminate it with usury? This being charged in the bill, the defendant in his answer denies "that the notes entered into by D. C. were given partly to secure notes which had been given by the said D. C. to defendant on usurious loans, and partly to secure payment of the purchase money of the said funded stock:" But it is stated by D. C. in his evidence "that at the negotiation for the loan of the stock he expressly promised defendant prior to the conclusion of the bargain, that the note given to himself should be paid." And again, as the evidence of the broker is only as to his belief, whether he advised D. C. to pay off the notes before or after the transfer of the stock, it is the most reasonable to conclude that it was before the transfer, because it was the most likely step to effect the object in view.

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*But besides, though these notes might have formed no part of the consideration of the bonds, as being either already paid off, or guaranteed by D. C.; yet they might, and there can hardly be a doubt but that they did form a part of the inducement to transfer the stock: so that the denial of the defendant may in strictness be true, and yet the expectation of receiving payment of the notes have formed part of the consideration for parting with his stock. Under these circumstances, the court is strongly inclined to think that the consideration for transferring the stock was contaminated by the usurious consideration of the notes: They will not, however, found their decree entirely upon this ground.

It now remains to inquire into the 4th ground, whether the transfer of the stock, though called a sale, be not in construction of law, a loan for more than the legal interest? Upon this ground complainant has proved the necessitous circumstances of D. C.; that defendant knew his object was to raise money; that the money was raised through the intervention of the defendant, and that it was so raised by a loss of about 37 per cent. On the other hand, the defendant produced respectable witnesses to shew, that according to their opinion, this was no loan, but a sale, made in the common course of trade, and that many others purchased stock about the same time, at nearly the price that D. C. agreed to give.—But in this inquiry we are not bound by the prices which other people agreed to give for stock, when it appears that their necessities were not great as were those of the borrower in this case, and that their object was not to raise money by an immediate sale of the stock at whatever loss, but to turn such stock to advantage by a remote speculation. This was the case with all the witnesses, who proved

that they sold out stock at the time at 20s. in the pound; and it is to be remarked in passing along, that the case of none of the purchasers is before the court. Taking these positions therefore, that the borrower in the case before us, was in very necessitous cir-

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cumstances; that his object *was to raise money; that he effected it through the intervention of the defendant, and that at a great loss, we are warranted in determining that there exists a great difference both in equity and at law, between his case and that of another purchaser, who by his easy circumstances, is left free to act. That it exists in equity, we have among others the authority of the case of Twisleton against Griffith 1st P. Wms. 310, where it is laid down, "it cannot be said in any case of oppression, that the party oppressed is particeps criminis, and not entitled to the relief prayed, since it is that very hardship that he is obliged to submit to, (it being imposed upon him by others, and not voluntarily acceded to) that constitutes the crime." Again, it is laid down in the case of Heathcote against Paignon, 2 Bro. Rep. 175, by Lord Thurlow, "if there be such inadequacy as to shew that the person did not understand the bargain he made, or was so oppressed that he was glad to make it, knowing it's inadequacy, it would shew a command over him which amounts to a fraud.

That the rule laid down holds equally at law, see the case of Moses and M'Farlane, 2 Burr, 1812, where it is stated by Lord Mansfield, "that an action for money had and received, will lie for money paid under undue advantage taken of another's situation contrary to laws made for the protection of persons under those circumstances.—It is therefore established by decisions both in equity and at law, that there is a great difference between the case of a man who makes a purchase on a remote speculation, and not to raise money, and one who goaded on by his necessities is willing to submit to any imposition rather than not to raise money to supply his wants. If this doctrine needs any further confirmation, we refer to the cases of Lowe against Waller, Doug. Rep. 736; Moore against Beattie, Amb. 371, a case which bears a strong resemblance to the present one; and the case of Barker against Vansommer, 1st Bro. Chan. Rep. 149. From these cases, it may also be collected that it makes no difference whether the money to be raised is to be effected by a sale of goods,

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or of stock, *or whether the necessities of the borrower arise from the immediate oppression of the lender, or from extraneous circumstances: But the case of Davison, executor against Barnard, assignee of Timmings a bankrupt, resembles the present case more strongly than any other which has been cited. It was decided by Lord Kenyon, and is reported in Espin. Cases at nisi prius, and in 7th Bac. Gwillim's edit. p. 197. In this case, it is stated that Timmings the bankrupt, having occasion for a sum of money before his bankruptcy, applied to the mortgagee. That the mortgagee said all his money was in the funds, and that to sell out stock at that time would be a considerable loss, stock then standing at 73 per cent. but that if Timmings would take it at 75, he should have the sum he wanted. This was agreed to, and the mortgagee transferred stock at 75 to the amount of 1500*l.* for which the bankrupt gave the mortgage in question. The bankrupt lost two and a half per cent. on the sale of the stock.

The executor of the mortgagee could not maintain an ejectment on the mortgage deed, for in fact the deed was void by the statute: and moreover no action could be maintained on a contract usurious at common law. Thus far goes this case, as abstracted from the two books above mentioned, and it resembles the principal case in five strong points. 1st. That the bankrupt and D. C. were both in needy circumstances. 2d. That the object of both was to raise money by the sale of the stock. 3d. That this circumstance was known to the lenders in both cases. 4th. That the stock in both was transferred through the intervention of the lenders. And 5th. That there was a loss of two and a half per cent. in the case cited, and of about 37 per cent. in the case before us: so that the cases run upon all fours in the four first particulars, and in the 5th, there being a much greater loss in the principal case than in the one cited, it thereby becomes the more strong against the defendant. It has been urged here that there is a great difference between the situation of England where this case was decided, and of this country; the first deal-

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ing *principally in cash, the latter on credit; and therefore that a different principle should govern. But in this case the court do not look to the credit on the mortgage, they look to the sale, which the borrower was immediately obliged to make for cash, and the immense loss of 37 per cent. which he was obliged to sustain.

Besides, it has not been made to appear to the court that there is such a great disparity between cash and credit in this country and Great-Britain as would amount to 34 1–2 per cent. Also it may be fairly retorted, that usury has been one great cause of the existing disparity. Can any one seriously believe that if usury had not taken such deep root in this country, that if money lenders, content with moderate gains, had loaned out their monies to prudent and industrious men, and not to the desperate and adventurous, and could money in consequence have been more easily obtained, we say that had this been the case, can any one seriously believe that there ever would have existed

the present disparity between cash and credit in this country? We apprehend not. While usury therefore produces such mischief, and while moreover it is contrary to law, this court is bound to set their faces against it, wherever, and under whatever form it may appear.—This case of Davison, executor against assignee of Timmings, has been attacked on the ground of its being a nisi prius case. But let it be remembered that the court does not found its opinion on that case alone; we have already said that the case of Moore against Beattie is strongly in point, and we may well resort to the authority of a single judge, when that judge is found to be the learned and accurate Lord Kenyon. But since it was decided in this last case, and also in the others cited, that tho' goods may be delivered, and stock may be transferred under color of a fair sale, yet if there have been suspicious circumstances such as a great loss and others we have mentioned, the whole is considered as a mere shift to evade the statute of the 12th of Ann: So in the present case we think ourselves bound to decide that this transfer of stock, though

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*nominally a sale, is notwithstanding in construction of law, a loan for more than the legal interest, and consequently within the act of assembly against usury.

A question next arises as to the extent of the relief to be allowed to complainant.

It is a settled principle in this court that he who seeks equity must do equity. If on the one hand defendant had come here to foreclose his mortgage, the court would have compelled him to take no more than the real value of his stock, and the legal interest; so on the other hand, we will direct that complainant shall be accountable to defendant for the real value of the money lent, with the legal interest. On mature deliberation, the court are of opinion that all circumstances considered, this case must stand on its own peculiar merits, respecting the relief to be granted on account of the laches of complainant, in not having his mortgage recorded as the law directs. We will therefore only allow the complainant what the borrower D. C. bound himself for at the time of the loan, over and above the cash price of the indents in market, which was proved on the trial by Mr. J. S. C. to be seventeen shillings for six per cents.; nine shillings for three per cents.; and nine shillings and sixpence for deferred stock.

It is therefore ordered and decreed, that the mortgage stand as a security to defendant, only for the balance which shall on a settlement of the bond appear to be due for the real value of the stock at the market price, when he loaned to complainant, together with the interest thereon, to the present time; and that it be referred to the master to ascertain the same.

Messrs. Smith, Bacot & Gaillard for complainant.

Messrs. Parker, Ford and Ward for defendant.

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*Case XLVIII.

[Present, Chancellors Rutledge, James and Thompson.]

CHARLES PALMER, v. E. MIKELL, Junior, WILLIAM SEABROOK and Others.

(May, 1806.)

[*Wills* ⇐222.]

A will having been executed under circumstances which made it doubtful whether the testator was in such a state of mind & body as to be capable of duly making a will, and the same having been proved before the ordinary without opposition from the nearest of kin, because they were unapprized of the grounds of doubt, the court decreed that the executors and those benefitted by the will should consent to open the probate, so as to let in the parties to a fair and full litigation in the court of Ordinary.

[Ed. Note.—Cited in McDowall v. Peyton, 2 Desaus. 320.

For other cases, see Wills, Cent. Dig. § 543; Dec. Dig. ⇐222.]

The bill of complaint set forth, that the late Archibald John Calder, of Edisto Island, was seized and possessed, at the time of his decease, of a considerable real and personal estate; and died on or about the 15th April, 1804, without leaving alive a father, mother, brother, sister, wife or child; but the following relations: your orator Charles Palmer, who was the brother of his mother, John and William Palmer, grandsons of John Palmer, a deceased brother of the mother of the said A. J. Calder; Ephraim Mikell, jun. Ann Seabrook, (wife of Gabriel Seabrook) Elizabeth Mackie (now wife of Mungo Mackie, late wife of William Baynard) and Mary Ann Seabrook (wife of William Seabrook,) who are the children of the late Mrs. Mikell, (wife of E. Mikell,) who was the sister of the father of said A. J. Calder, and also Mrs. Sarah Baynard, (wife of Thomas Baynard,) half sister of the father of said A. J. Calder. Complainant charges that A. J. Calder resided on Edisto Island, and for some years before his death, had so addicted himself to the use of ardent liquors, that his body and mind were much debilitated. That toward the close of his life, his imbecility was so extreme, and his lucid intervals so rare, that he could not manage his own affairs, and was incapable of exerting the judgment requisite for the disposition of his estate by deed or will. That E. Mikell, (the husband of A.

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J. Calder's aunt, and father of his *cousins) also resided on Edisto, but that no intercourse subsisted between him or his family and A. J. C. but such a degree of aversion, that said A. J. Calder frequently declared, (after the death of his wife) even before he

was addicted to liquor, that the Mikell family should never get a shilling of his property; and he continued in this disposition toward that family as long as his faculties were sound, and even after they were affected. Complainant charges that said A. J. C. being about to die, in March or April, 1804, several attempts were made to induce him to make a will in favour of the Mikell family, particularly by Gabriel Seabrook, who married a daughter of said E. Mikell, a fortnight before the death of said A. J. C. but he refused to make any will in their favor. On 9th April, 1804, E. Mikell came to the house of said A. J. Calder, whom he had not visited for several years, and who was then extremely ill, having been deranged all the night before and that day; the said E. M. sent the persons present out of the room, and drew up a paper purporting to be the last will of said A. J. C. then calling in three witnesses, caused the same to be signed by said A. J. C. whose body was supported, and whose hand was guided in the act of signing. Complainant charges that when he signed said paper, said A. J. Calder was entirely deranged, and void of that mind and memory requisite to give validity to a last will; nor did he declare to the witnesses that said paper was his last will; nor did he require their signatures, nor in any thing manifest that he knew what he was about. And said A. J. Calder continued thus intoxicated and insensible until he died, on or about 15th April, 1804, during which time neither said Mikell nor family visited said A. J. C. but left him wholly to the atttendance of strangers. Complainant further charges that the papers thus obtained from the imbecility of said A. J. Calder, and purporting to be his last will, devises all his real estate on Edisto, consisting of three valuable tracts of land, and a small Island surrounded by a great body of valuable marsh, to be equally divided among

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*his cousins Ann and Mary Ann Seabrook, Elizabeth Baynard and Ephraim Mikell, jun. (children of said E. Mikell) and at their death, to the heirs of their body, begotten; while no part of the real estate was devised to complainant, uncle of the testator, nor to Mrs Sarah Baynard, aunt of the half blood, nor to the grand-children of his uncle, John Palmer, nor were any lands devised to complainants son, of any value, except one tract which is in dispute, claimed and occupied by other persons. And said paper also bequeaths all the negroes of said A. J. Calder, in number 64, to be equally divided among Ann and Mary Ann Seabrook, Elizabeth Baynard and Ephraim Mikell, jun. and their heirs, except 6 new negroes, bequeathed to complainant's son Charles. Thus cutting off entirely, complainant, the nearest living relation of said A. J. Calder, as well as other relations, as nearly connected with him as the children of said E. Mikell, and bestowing a mere pittance on complainant's son Charles. Complainant charges that although he and his son, (not quite grown up) had not an opportunity of frequently seeing their kinsman, A. J. C. as they lived in Beaufort district, there was no difference or coolness between them; and the intercourse subsisting, although rare, was kind and cordial, and said A. J. C. frequently expressed his friendship and kind intentions toward complainant and son.

Complainant further sheweth, that on the death of said A. J. C. on or about 15th April, 1804, said paper was proved by one of the subscribing witnesses, and recorded in the office of the Ordinary, in Charleston district, on 11th May, 1804, and E. Mikell, jun. and W. Seabrook, who were nominated executors thereof, qualified thereon. Complainant believes that said executors of said will have possessed themselves of the real and personal estate of said A. J. Calder, and made an inventory of the whole personal estate, including certain personal estate not included in said pretended last will, and which cannot possibly pass thereby, even admitting the

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same to be valid, and which *must be distributed among the nearest relations of said A. J. C. according to the act of the legislature, for the abolition of the rights of primogeniture. And said E. Mikell, jun. and Wm. Seabrook are taking measures for the division of the whole of said estate, among the several devisees and legatees, under said pretended last will; and copies of said will and said inventory, are filed with bill, marked A. and B.

Complainant charges that residing far from his said kinsman, A. J. Calder, and not having time or opportunity to investigate fully the circumstances attending the execution of the pretended last will, and having unfortunately injured his leg immediately after the death of said A. J. Calder, which disabled him for many months, and being unapprized of the time fixed for the probate of the will, he did not oppose the probate thereof before the ordinary, or appeal from the same when proved, as he would have done, had he been informed in proper time of the circumstances attending its execution, and had he been able to attend to any business, or had he been aware of the application for a probate thereof. Complainant having been since informed of the state of A. J. Calder's mind and body when he signed said last will, applied to said executors, expressing his dissatisfaction with said paper and his resolution to contest the same, requesting either that it should be set aside by consent, or contested before the ordinary, as to the personal estate said to be passed thereby, and that an issue "devisavit vel non" might be joined as to the real estate therein mentioned, and the cause tried before a jury; and that his right to a share of the personal estate of said A. J. Calder, not comprehended by said

pretended last will, (admitting that the same were valid) should, at all events be acknowledged, and a distribution made accordingly.

Complainant hoped that the said executors with the devisees and legatees under said pretended last will, sensible of the state of A. J. Calder, at the time of signing said will, and of his incapacity to make a legal disposi-

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tion *of his estate, and the unjust disposition made thereof; of the right of complainant to a share of the personal estate of said A. J. Calder, not passed by said will, (even supposing it valid) would have consented to set aside said paper, and agreed that his estate should be distributed among his relations according to their legal rights, as in case of intestacy:—Or at least would consent to the distribution according to law, of the personal estate, not comprehended in said will; or to a solemn contest of said paper before the court of ordinary and a jury.

Complainant further states, that said E. Mikell, jun. and William Seabrook, and the legatees named in said pretended will, (except complainant's son Charles,) have refused to set aside said paper, or to consent that said estate should be distributed as in case of intestacy, or even to have a rehearing before the ordinary, or any competent tribunal on full proofs relative to the due execution of said pretended last will; pretending and holding out that said paper was executed according to the forms of law by said A. J. Calder, who then enjoyed his faculties in full perfection, and was competent to dispose of his estate according to his affections, and that the same was executed by him with full knowledge of its contents; whereas complainant charges, that said A. J. C. was utterly incapable of exerting a sound mind in the execution of any deed or last will, and that said paper, purporting to be his last will, was obtained by surprize, while he was incompetent to act according to his free will. All which doings are contrary to equity, and tend to injure complainant.

For as much then as complainant is remediless at common law and in the court of ordinary, and can only be relieved in this honorable court, he requires that defendants may be obliged to discover, whether testator was legally fit to execute his will, at the time he did. That they discover the true state of his body and mind at that time; that they set forth a full account of the real and personal estate of testator, and of the crops and income

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thereof. That they be *directed to consent to set aside the probate, and consent to a contest of said will, and go into full proof of the execution thereof, so far as respects the personal estate passed thereby. And that an issue "devisavit vel non" be directed to be tried before a jury, in the Court of Common Pleas, as to the real estate, and that the executors be directed to render a just account of the personal estate, not passed thereby, and make distribution among those legally entitled thereto.

The answer stated, that the defendants, Ephraim Mikell, jun. William Seabrook, Gabriel Seabrook, Mungo Mackie, Ann Seabrook, wife of Gabriel Seabrook, Elizabeth Mackie, wife of Mungo Mackie, and Ann Seabrook, wife of William Seabrook, admit that A. J. Calder was possessed of a considerable real and personal estate; that he died April 20th, 1804, without leaving any relations but those mentioned in bill of complaint. They admit that said A. J. Calder, at intervals, did make use of spirituous liquors, but assert that he was nevertheless capable, and did manage his own business. They deny that any coldness or aversion did exist between the Mikell family and said A. J. C. but on the contrary, from their infancy to the time of his death, he frequently visited said family, and was visited by them, when he had become a house-keeper; that he married a daughter of said E. Mikell the father, and that said E. Mikell, in September, 1803, lent said A. J. C. a considerable sum of money, secured by bond, and which remained unpaid at the time of his death.

Defendants positively deny that they ever used any efforts to induce said Archibald to make the will mentioned in bill, but on the contrary, said Archibald sent for Gabriel Seabrook, and requested him to have his will made, as said Gabriel avers, and the other defendants believe. Defendants deny that they were present at the execution of the will, but according to the best of their information the said Archibald was, though very

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sick, fully *capable of exercising his reason, and was possessed of that soundness requisite to give validity to a last will, and that he did execute the same, and declare it to be his last will. Defendants deny positively that part of the bill which asserts that neither the aforesaid E. Mikell, senior, nor any of his family ever visited said Archibald in his last illness, but on the contrary, they aver that E. Mikell, jun. G. Seabrook and William Seabrook, three of the defendants, visited him frequently, and set up with him at night, and that said E. Mikell, jun. was with him the night of his decease. And defendants declare that they knew of no friendly intercourse subsisting between complainant and the said Archibald, except a single visit made by the former to the latter, on Edisto, where his stay was very short, when and where complainant witnessed the frequent intercourse between the Mikell family and said Archibald. The said defendants admit that E. Mikell, jun. and Wm. Seabrook, have taken upon themselves the execution of said will, and admit that they took into possession, with the rest of the personal estate, such part thereof as was not disposed of under the will, as they apprehended they were

bound by law to appropriate the proceeds thereof to the payment of the debts of the estate, which are so great, that the whole of the personal estate will not be much more than sufficient to discharge the same.

Defendants deny that complainant had not an opportunity to make investigation of the circumstances under which the will was made, before the probate thereof, and that he was unapprised of the time fixed for the probate of the will, for said executors aver, and the rest of said defendants believe, that on the Monday after the decease of said testator, complainant was on Edisto Island, and at the house of deceased only three days after his death, when he saw the will, and was informed of the time when said will would be proved, and that after examining said will, he, in a letter addressed to said Wm. Seabrook, declined any interference with the same; and that it was not till February last, (almost twelve months after decease of

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the *testator) that the said defendants were informed of the present views of complainant; a copy of which note or letter is filed with the answer. Defendants therefore contend and submit the same to the court, that the probate of the court of ordinary is conclusive as to the personal estate. Defendants deny all unlawful combination, &c.

The cause came to a hearing. The following testimony was given:

Mathew O'Brien, swore, that he had been the overseer of Mr. Calder, the testator, and resided on the plantation with him from the 1st of February, 1804, till his death in April. To the best of his recollection he never saw Mr. Mikell there before the day the will was executed; no message was sent for him; none could have gone without his knowledge. Mr. Gabriel Seabrook had come about half an hour before him; the night before the deceased was not in his right mind; he dozed frequently, and called out when no persons were there, what men are these? Mr. Calder never gave any directions as to his plantation, after the first week of witness's being there. He could not keep from drink. The witness asked Mr. Seabrook, before Mr. Mikell came, if he thought Mr. Calder would make a will; he answered, no, for he had been asked and had refused. Mr. Seabrook took him afterwards to walk towards the landing, and said I fancy a will, will be made now. When they returned he saw blank paper put on a table for Mr. Mikell, with pen and ink. Witness walked out again with Mr. Seabrook, and on returning into the hall, saw Mr. Mikell writing at the table. He was writing about half an hour. When the witness went in, Mr. Mikell laid down the pen and went into the room of the sick man, but left the papers. He does not know how long he staid, for Mr. Seabrook again took him by the arm to walk. Whilst they were walking, Dr. Auld called for the boat, which was sent, and he came over. Dr. Auld and Mr. Seabrook then went into Mr. Calder's

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sick room, *and staid about ten minutes, and then came out. He and they then went to see a sick negro, and returned, soon after which Dr. Auld went away. Does not know if Dr. Auld went a second time into the sick room. In about an hour after the doctor went away the will was executed. Mr. Seabrook sent for Mr. Megget, who came in three quarters of an hour. Mr. Mikell assisted Mr. Calder, and he signed the paper. Witness was about to retire, but Mr. Seabrook asked him to sign as a witness, and Mr. Kelly said, surely you will sign this; witness did so; but unwillingly, because he did not think Mr. Calder was in his senses; believes the paper executed was the one written by Mr. Mikell. Mr. Seabrook desired the witness, if he was asked about the situation of Calder when the will was executed, to say that he was in his senses; but he told him he could not; then he desired him not to say any thing on the subject, till he came before the ordinary. Witness never said he would prove the will; but in conversing with persons interested in the will, he said, if nothing was said about the will, all would be well.

Mr. Calder had told witness he never would give his property to the Mikells, because he had married into the family, and when his wife died, old Mr. Mikell had sent and taken away the negroes which he had given him with his daughter, and he had returned them all except one favorite slave.

Mr. Palmer, the complainant, arrived in his boat at Mr. Calder's, about five or six days after his death. He had a very sore thigh, appeared to be very infirm, and complained of his head, and of a fever. He was in constant pain. He went away on the second day; walked to Mr. Megget's landing in much pain, and with the help of a stick. Mr. E. Mikell, Mr. W. Seabrook, and Mr. G. Seabrook, and Mrs. Ellis were present when Mr. Palmer came, but went away in less than an hour. There was a horse and chair at the place, but Mr. Palmer did not ask for it, and it was not offered to him. If he had asked, witness would have been uneasy to have refused, and would have been

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*apprehensive of displeasing the Mikells by granting it. Mr. Palmer used the provisions of the place whilst he staid.

Mr. Megget, a subscribing witness to the will. He swore that he was sent for on the 9th April, 1804, by Mr. E. Mikell, to do some writing. That he went to Mr. Calder's, and found Gabriel Seabrook, T. Kelly, and M. O'Brien. Mr. E. Mikell was sitting at a table in a room adjoining that in which Mr. Calder lay. Mr. Mikell told witness, he had sent for him to witness a will. Witness said he had better see Mr. Calder first. He did so, and found him very poorly. He spoke to him,

and thought him in his senses. He was not then intoxicated. He spoke but few words to the witness, but those were rational, and he called the witness by name. The paper was put on a waiter for him to sign, but it was not stated what the paper was, which he was to sign. The witness put his arm under the sick man's, to assist him. The sick man did not say it was his will. Mr. Mikell said, here is the paper you are to sign. He did not know whether it was a deed, a bond, or a will. Calder had not time to read it. He was asked if he acknowledged it to be his hand and seal, and he said yes; but not till the question was asked. He did not desire him to witness it. He did not think Calder in a situation fit to make his will. By after conversation with Calder, he found that he knew it to be a will; but he does not think he knew the items of it. He asked Calder if he was satisfied with all that was written, and he said yes. Between the time of his coming and going in to sign the will as a witness, there was not time to have read the will over to the deceased. Upon his entrance into the room the second time, Mr. Mikell had the paper in his hands. Witness never saw Mr. Mikell there during Calder's sickness, but that day, though he (the witness) was there several times a week. Witness was afterwards applied to by Mr. W. Seabrook, to prove the will, but he said it would not be in his power to prove the will.

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*Mr. Megget cross examined, said that he would not prove the will, because he thought the proper formalities were wanting. Calder could not in his situation have dictated the will at once. It would have taken him two or three days in his situation, to have dictated a will. Therefore he told Mr. Seabrook he could not prove the will.

Witness believes Mr. Mikell's character as to moral integrity, to be good.

Mr. ——— Calder was acquainted with Mr. Calder, the deceased, whose will is in question, five years before his death. He lived 10 or 11 miles from him. He saw him the week before his death; he was then very sick, reduced in body and weak in mind. He was not capable when he saw him of making a will, or talking of business. He would ask if there were not people in the room, and would start and ask witness if he was not afraid. He never would converse about his dispute with the Mikells. On the 16th February, preceding his death, Calder rode to witness's house, and the witness asked Calder if he would not make his will. He said no, the law would make a will for him, just as he wished. He asked him if he would not give something to the Mikells. He said no. If I die in my senes, I never will leave them a shilling. He mentioned that the law would give his property to his uncle Palmer. He shewed Mr. Calder a copy of his father's will as a form. He objected to it, because in favor of the Mikells. Saw him twice afterwards—very weak in body and mind.

Mr. Joseph Seabrook, swore, that he lived two miles from Mr. Calder, who was a man addicted to intoxication. He saw him on the 9th April. He was then very sick, and witness desired him to send for the doctor, but he would not; and witness sent for him, himself. Calder's mind was not correct, but deranged. Witness went away at two o'clock, and returned at five o'clock. Calder was in the same state, and not fit for business. He staid with him all night, and went

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away at 8 in the morning. *Calder was then somewhat better, but would only speak when asked questions, and then could not connect his ideas. Calder has expressed to him his affection for his uncle, Mr. Palmer, and his son, and said he would give the son a place, or sell it to him very cheap, if he would come and live near him.

John Patterson swore, that he has heard Mr. Calder, the deceased, say some years before his death, he would never leave the Mikells anything. He was a man of a fickle disposition.

For the defendants, the following testimony was given:

Dr. Auld swore, that he saw Mr. Calder the testator on the 9th April, before his death. When he got to the house he saw Mr. Mikell, the elder, coming out of the inner room, with a paper written on one side. He found Mr. Calder not so bad as he at first thought. He said he had been very ill the night before, but was then better, though he had a pain in his side. To all enquiries about his health, his answers were rational and connected. He was about half an hour with him the first day. It was the same on the second day. Saw him frequently after till his death; before which he had a consultation with Dr. O'Driscoll, in which the patient appeared consistent. Indeed he always appeared so to witness.

Mrs. Ellis. She was sent for as nurse, to take care of Mr. Calder in his last illness, after the will was made. He was then in his senses, and asked for what he wanted, tea, &c. He often asked for rum and water, and was vexed when it was not given to him.

Mr. Westcot, called to see Mr. Calder, before the will was made. He said he was unwell. He took spirituous liquors with his medicine.

Mr. Mikell, senior. He had heard that Mr. Calder approved of his father's will. The witness told him it had nothing to do with his property—that he was of age, and could make his own will. Calder sent a servant to a trunk for paper, and to another place for pens, which he said were of Kelly's making.

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Then he had a table *brought, and he began to give him the heads of his will, which he took in writing as directed. After he had tak-

en down the heads, he retired into another room, and wrote the will. When it was done, he took it to him, and directed him to read it. After reading some time, Calder complained of his side, and requested witness to read it to him; which he did. As soon as he had read it, witness told Calder if he wished alterations, he would write it over. He said there was no occasion. So far the witness recollected perfectly. After that, he did not notice much till Calder signed the will. Witness saw him sign it. He appeared to be collected. He gave the witness the names of six of the negroes whom the witness did not know. First he named five of them, and was then interrupted by the coming of the doctor; and he afterwards gave the name of the 6th negro. He said they were new negroes. Witness loaned Mr. Calder $5,000 some time before to pay his debts. He took the negroes away after his daughter's death, because he had only loaned them; and told Calder if he would give them up, he would give him one favorite slave, the furniture and £500. Mr. Calder was of a fickle temper.

Mr. Parker, Mr. Desaussure and Mr. Ford, for the complainant, contended, that there was abundant reason to set aside, or to open the probate in this case. That it was very dubious, to say the least, whether Mr. Calder was in a proper state of mind to execute a will, when he did it. And that the probate had been made before the ordinary, without opposition or discussion, so that the rights of the parties were decided without examination or argument. That the question of fraud or imposition was not before the ordinary; and that the complainant had no correct or full information of the true state of things before the probate. When Mr. Palmer visited the plantation, it was immediately after his kinsman's death, he was in extreme ill health, and great pain, which incapacitated him from making full and proper enquiries,

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and no one then *volunteered to make a full disclosure to him. Consequently he was not conusant of the wrong done, and of his rights. Two of the subscribing witnesses swore they could not prove the will; there must be a strong doubt then on the mind of the court, whether justice had been done in the ex parte examination which had been made; and if such doubt existed, that was quite enough to induce the court to put the case into a proper train for a regular examination, and a plenary hearing. The counsel cited 1 Vesey, sen. 287. 4 Burns' Eccl. Law, 45. 3 Atk. 161. 1 Fonb. 65, 6. 2 Burr. 1012. And the case of M'Dowall and Peyton, recently decided in this court. (Vide ante, p. 313.)

Mr. Cheves and Mr. Pringle for the defendants, argued that this court ought not to interfere in the case. That the evidence does not make such a case as to induce the court to believe that fraud or imposition had been practised to obtain this will from the deceased, Mr. Calder; and without such proof, the court would not intermeddle; more especially as there was no proof that the complainant was kept in ignorance of the existence of the will, and of the intent to prove it. He was at the plantation of the deceased soon after his death, and was then apprized of the will. He made no objection—he entered no caveat in the court of ordinary; but permitted the will to be proved without opposition, and acquiesced for twelve months.—That this ought to be conclusive; for the jurisdiction over this subject is given by law to another tribunal. It is in the court of ordinary, with an appeal in a limited time to the circuit court of law; and that jurisdiction is final and conclusive, and should not be meddled with, unless in most extraordinary cases of fraud, or where there would be a palpable defect of justice. The counsel cited 1 Fonbl. 70. 7 Bac. 378. Godolphin, 154. Swinb. 6, 69, 70; and Heyward and Hazzard's case, Bay's Reports.

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*Chancellor JAMES afterwards delivered the decree of the court.†

The application made to the court in this case on the part of complainant is, that an issue of devisavit vel non should be directed to the Court of Common Pleas, to try the validity of the will of Archibald John Calder, deceased, so far as it relates to his real estate; and that it should be referred back to the ordinary to enquire whether said will was fairly obtained, so far as it relates to was proved before the ordinary by one of the personal property. The will, it appears, the subscribing witnesses of the name of Kelly, after the two other witnesses Megget and Obrien had declined proving the same, because they thought that the testator at the time of executing the will was not suffi-

† NOTE.—There is a good deal of delicacy and difficulty on the subject of the Court of Chancery, interfering with the decisions of the Court of Ordinary, in relation to the probate of last wills and testaments.

There is no doubt that the jurisdiction belongs to the Court of Ordinary in the first instance. And it is laid down in the English books, that the only case in which fraud cannot be (directly) relieved against in equity, concurrently with courts of law, though discovery be sought, is the case of fraud in obtaining a will, which if of real estate, is constantly (since the case of Kerricke v. Bransley, 3 Bro P. C. 358, decided in 1727,) referred to a court of law, in the shape of an issue, devisavit vel non; and which, if of personal estate, is cognizable in the Spiritual Court. But though the Court of Equity cannot directly set aside a will for fraud, they can convert the person practising the fraud, if he claim benefit under the will, into a trustee, (at least to the extent of such benefit,) for the benefit of the person injured by the fraud. 1 Fonb. 12, 13. 2 Fonb. 63, 4. In the case of Fearon, reported in 5 Vesey, 647, the Lord Chancellor said, "this case affords a strong instance of the inconvenience of that decision, (of Kerricke v. Bransley, 3 Bro. P. C. 358) that this Court cannot take cognizance of wills of personal estate, as to matters of fraud."

Indeed the subject has been much contro-

ciently in his senses to dictate or make his will.

On the part of the complainant, the two surviving witnesses to the will, Mr. Megget

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and Mr. O'Brien, have *been produced to shew that the testator was insane at the time of making the will. Mr. Megget appears to be somewhat doubtful, but says that he does not think that testator could have dictated the will at the time; that his ideas were not sufficiently connected to have dictated it in two or three days, and that he told Mr. Seabrook, one of the defendants, that he could not prove it. The other witness, Obrien, seems to have been very positive as to the insanity of testator; he says it arose from intoxication, and that he could not keep him from drink. That he was the overseer of testator, and resided on his plantation from the first of February till his death, about the 20th April: That in all that time he never gave him any directions about his plantation, except in the first week: that from excess of drink and weakness, he was almost constantly in a stupid state, and would doze and wake up, and then call out what men are those in the room, when none

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*were present; and ask witness if he was not afraid. This witness also states that the will was made in half an hour or three quarters. Mr. Calder and Mr. Joseph Seabrook have also supported the testimony of Obrien as to the insanity of the testator; and one of the witnesses called for the defendants, has stated that the testator carried his love of strong drink so far as to take spirituous liquors with his medicines. On the other hand, two of the witnesses for the defendants, Dr. Auld, the attending physician, and Mr. Mikell, sen. who drew the will of testator, both of whom appear to be entitled to the highest credit, have declared that the testator appeared to be perfectly in his senses. Dr. Auld states that when he called as a physician to see him, which was on the day the will was made, that to all his enquiries as to his state of health, he was rational and connected, and he thinks he corrected his servants in their statements.

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Old Mr. Mikell says that he *gave him instructions to draw his will nearly in the same manner as his father's; that he accordingly drew it as directed; that he suggested to him the names of some new negroes he had lately acquired, and this after an interval in which he was interrupted; that witness himself did not know the names of those ne

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verted and various decisions had upon it, at different periods. Formerly it was decided that a will as well as a deed might be set aside in

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Chancery for fraud *or circumvention. Welby v. Thornaugh. Prec. in Ch. 123. A will of land may be good at law, if duly executed, and yet may be set aside in Equity, if obtained by fraud. Goss v. Tracy. 1 P. Wms. 287. 2 Vern. 699. (Decided in 1715.) And vide 1 Chancery Rep. 12, 16, for other instances of a will of lands being set aside in Equity, for fraud. But the later decisions have been the other way, see James v. Greaves, in 2 P. Wms. 270; Bennet v. Vade. 2 Atk. 324. Webb v. Claverden. 2 Atk. 424; Anonymous, 3 Atk. 17. In all which cases it was decided that the validity of a will of real estate, is triable only at law. And so with respect to testaments of personal estate, it belongs to the Spiritual Court to determine questions of fraud in obtaining them, as well as the sanity of the testator. See Archer v. Moses. 2 Vern. 8, Nelson v. Oldfield. 2 Vern. 76, Kerricke v. Bransly, 3 Bro. P. C. 358; Marriott v. Marriott, Stra. 666; Barnsley v. Powell, 1 Vesey, sen. 287; Meadows v. Dutchess of Kingston, Ambler, 756. But in cases of fraud affecting a part only of the will, Equity will decree the legatee to be a trustee for another. See Marriott v. Marriott. Stra. 666; and in Barnsley v. Powell, 1 Vesey, sen. 119, 284, Lord Chancellor Hardwicke set aside, for fraud, a deed of proxy, under which probate had been obtained from the Spiritual Court, and decreed the guilty party, to consent to a repeal of the probate.

And there are many cases relating to wills in which this court is forced to interfere to prevent manifest injustice.

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*As in a case where a former will of land was cancelled by the testator, on a presumption that his later will was duly executed and good, but which proved not to be so, equity relieved under the head of accident, and enjoined the heir in favor of the first devisee. Onions v. Tyrer, 2 Vern. 741, and Prec. in Chancery 459.

So where a will was decreed in the exchequer to be well proved, which was afterwards found to be forged, the court of chancery decreed that no use should be made thereof. A will of personal estate is examinable in the ecclesiastical court, but chancery will, if possible, avoid sending it there, after it has been found to be forged by a jury, if the real estate is thereby bound; and the court will go as far as it can to decree the parties trustees. See Barnsley v. Powell, 1 Vesey, sen. 284, 7, (decided in 1749) and Kerricke v. Bransley. 3 Bro. P. C. 358; and Powis v. Andrews. 2 Bro. P. C. 476.

Mr Fonblanque lays it down, that all parties prejudiced by the fraud, in obtaining a will, may file a bill in equity for a discovery of all the circumstances; and the invariable practice in such cases is, to seek relief; and the issue directed is to furnish the ground on which the court is to proceed in giving relief. Fonbl. chap. 2, sec. 3, note (n.)

The footing on which the different jurisdictions as to wills of real estate, and testaments of personal estate now stands, produces embarrassment, and sometimes contradiction: and Lord Chancellor Hardwicke thought it an absurdity that a will set aside at law for the insanity of the testator, might still be litigated

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on account of the personal *estate in the ecclesiastical court, and expressed a wish for a change.—In such a case, he appointed a receiver instead of the executors, until the litigation in the ecclesiastical court should be terminated. See Montgomery v. Clarke. 2 Atk. 378.

Mischievous effects flow from this conflict of jurisdictions, complained of by Lord Hardwicke. Contradictory decisions were made by the ecclesiastical court, and by the court of law, on the question whether a man was compos or non compas, and both decisions stood, to the disgrace of justice. See the case of Faker v. Hart. 3 Atk. 546. So too the Dutchess of Kingston was convicted of bigamy in the house of lords,

groes; that after he drew the will, he read it over to the testator, and that he approved of it.

From the evidence which has been recited, it therefore plainly appears, that the question of the sanity or insanity of the testator is extremely doubtful, and that of itself would be a sufficient reason for the court to interfere, as they did in the case of M'Dowall & Peyton; and the more especially as the will was proved by only one witness, when the other two declare that they could not have proved it. But to this inference it is objected that the complainant Palm-

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er had visited the plantation of the deceas*ed five or six days after his death, where he had an opportunity at least to have examined the witness Obrien, and that from thence he had written to defendants that he relinquished his objections to the will; that he went away the next day, and did not stir in the business until twelve months after. It is therefore urged that this case is different from that of M'Dowall, who was out of the state, and could not be connusant of his rights; whereas the complainant was in the state, and if not connusant of his rights, might have made himself so; that consequently he has been guilty of gross laches, and is not entitled to the relief of this court. But it appears on the other side that the complainant lived at a considerable distance; that at the time he visited the plantation of the testator, he was in a very ill state of health, arising from a wound he had received in his thigh; and that from a fever he was in constant pain: Also, if we are to

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believe the witness Obrien, *(and there is nothing to contradict his testimony) he had been tampered with by one of the defendants, Wm. Seabrook, not to give complainant any information on the subject, and that he did not do so at that time. These circumstances which have been stated form a pretty good excuse for complainant; and we think this unfairness on the part of one of the defendants, which we must at present believe, will more than counterbalance the laches on the part of complainant, and afford an equitable ground for the interference of this court. The court therefore decrees that the defendants do consent to a revocation of the probate in the court of ordinary, which will then be set aside, and the parties be at liberty to proceed de novo, as to the will of the personal estate.

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for marrying Capt. Harvey, and afterwards in his life time, the Duke of Kingston. Yet she was permitted to keep the great fortune bequeathed to her as his wife, by the Duke of Kingston, because the court of chancery was precluded from enquiring and deciding, according to the fact, by a sentence of the ecclesiastical court obtained by the Dutchess against Capt. Harvey, in a suit for jactitation of marriage, which decided that she was not married to Captain Harvey, and enjoined perpetual silence on him. See Meadowes v. Dutchess of Kingston. Ambler, 756.

In the case of Fearon, 5 Vesey, 633, the court of delegates had set aside a will on parol evidence, that it had been obtained by undue influence, or that the testator intended to make a material alteration, from which he was deterred by the management and contrivance of Fearon. On the application of Fearon, by pe-

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tition for a bill of review, *the counsel argued that the admission of parol evidence to revoke, alter or annul a will, was contrary to the statute of frauds. This was opposed by the counsel on the other side, who cited many cases to shew that the court of delegates had, on parol evidence, struck out particular clauses of wills obtained by fraud, and inserted clauses omitted by fraud or mistake. (See 5 Vesey, 638, 9, 640,) and the Lord Chancellor said (pages 644, 5) that bound by the statute of frauds, this court has nevertheless directed an issue to try, whether a will has been obtained by fraud, or whether a testator has been hindered from altering a will, and that both these issues are consistent with the observance of the statute of frauds. He was against issuing a commission of review in the case of Fearon, because he concurred with the court of delegates, that the evidence made out a case of fraud on which the will ought to have been set aside as it had been.

So in cases where the executors or heirs promise to the sick person to pay certain legacies, or convey certain lands to others to whom the testator wished to devise, and would have made his will accordingly, but relying on such promises, forebore to do so: This court will interfere and give effect to the intentions of the deceased person, even in the case of lands, notwithstanding such promises were verbal, and the statute of frauds relied on in defence. See Reede v. Kennigate, 1 Ves. 123, 4. Ambl. 67 (decided by Lord Chancellor Hardwicke in 1748.) Also, Oldham v. Litchfield, 2 Vern. 506. Thynn v. Thynn, 1 Vernon, 296; and Sellach

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v. Harris. 5 Viner, abridged—de*cided by Lord Cowper. See too Drakeford v. Wilks. 3 Atk. 539.

See also the case of Dufour v. Pereira, in Hargreaves's Juridical Collections, in which Lord Chancellor Camden decreed a devisee and legatee to be a trustee for another under the circumstances of the case.

So if a will be suppressed by the heir or other person, this court gives relief by decreeing the heir, &c. to convey the property to the person intended to be benefited by the testator: And the decree directs that he shall hold the property. The rule is laid down that upon reasonable proof of the suppression of the will, it must be most strongly presumed against the suppressor, and the will to be taken as set forth in complainant's bill till the will is produced. Hampden v. Hampden. 1 Bro. P. C. 250. Dalston v. Coatsworth. 1 P. Wms. 731. 1 Vern. 452, 408. 2 Vern. 32, 561. 2 P. Wms. 748 to 753.

So too, though the court of equity does not exercise broadly and directly, a concurrent jurisdiction in cases of fraud in obtaining wills, this relates to the mode of execution, and the capacity of the testator, for there are other cases where it does interfere. If a legacy is given to a person under a particular character which he has falsely assumed, and which alone was the motive of the bounty, the rule of the civil law is adopted, and the legacy fails; and this court will interfere to prevent its payment. Swinburn, 557. Kennel v. Abbot. 4 Vesey, 802. Ex parte Wallop. 4 Bro. C. C. 90. Roach v. Haynes. 8 Vesey, 593; and see Cooper's Justinian—and Co. Litt. 79 note (1.) And where a title depends on the words of a will, Lord Chancellor Talbot expressly lays it down that this court may determine it as well as a judge and jury. 3 P. Wms. 296, 7.

*Case XLIX.

[Present, Chancellors Rutledge, James and Thompson.]

ANN MACKIE, Widow of James Mackie, v. WILLIAM ALSTON and Others.

(May, 1806.)

[*Wills* ⇐565, 630.]

Testator makes sundry provisions for his wife, and amongst others, bequeathes her certain negroes, and says I give her the liberty to plant my land with her negroes during her widowhood. The court will not confine her right of planting to those negroes only that she took under the will. Testator also devises all his residuary estate, real and personal, to his daughter for ever, when she attains the age of 21 years or day of marriage, which ever shall first happen: If she dies before, he then devises over. The contingency was annexed to the estate, and so not vested. And she dying single at 18 years, her representatives take no share of the intermediate profits, &c. They go to the devisees over.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1233, 1477; Dec. Dig. ⇐565, 630.]

The case made by the bill was, that Dr. Jas. Mackie, of Georgetown, died in 1795, leaving his wife, the complainant, and an infant daughter Harriet. That he left an instrument purporting to be a will, in which he gives to his wife a certain number of negroes, some cattle and horses, and 50*l.* to buy a riding chair; and also gave her, whilst she remained his widow, "liberty to plant my land with her negroes, under the direction of my executors." Also, he gave her the use of his dwelling house, and out houses, and kitchen furniture; all of which provisions were in lieu of dower. The testator then proceeds thus, "I give, bequeath, and devise all the rest and residue of my estate, both real and personal, consisting of lands, negroes, horses, cattle, &c. to my daughter Harriet Mackie, and to her heirs and assigns for ever, when she attains the age of 21 years, or at the day of her marriage, which ever shall first happen; but if my said daughter should die before the above-mentioned periods, then I give, devise, and bequeath that part of my estate which I had given to my said daughter, both real and personal, to Captain William Alston's two sons, John and William Alston." On the 11th October, 1795, the testator made a codi-

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cil, in which *he disposes of some property acquired subsequently to the making of the above will† to his daughter, in the same manner as above, and with the like limitation over.

That the daughter Harriet died in June, 1804, in her 18th year, and unmarried—and intestate. The complainant, the mother, insists that the devise to Harriet was a vested interest, that she was entitled to the rents and profits of the residuary estate during her life time. That the increase of the negroes as well as of all the stock, and the proceeds of crops rightfully belonged to her: and that the complainant, her mother, under the provisions of the primogeniture act, is entitled to succeed to the moiety of her estate; that nothing goes over to the defendant's two sons but the substance of the property under this will; and the defendant being sole executor, and having administered the estate, is liable to account with complainant for the moiety of those rents, profits, and increase of the estate between the death of the testator, and the death of his said daughter Harriet. The complainant also states that the land assigned to her by the executor for planting, with her negroes, is of an indifferent quality, inconveniently situated, and insufficient for her negroes. That he seeks to restrict her to plant with those negroes only that she derived under the will: whereas she contends that she is not liable under the will to be so restricted, but is entitled to have land enough for all the negroes she owns.

The bill prayed an account of rents, profits, and increase, that a moiety might be assigned to her, and that land might be assigned sufficient for all her negroes to plant.

The defendant (who was sole executor, and had also acted as guardian of the child until

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she died) demurred to *that part of the bill which claimed for complainant a share of intermediate rents and profits between the death of the testator, and the death of Harriet. He also answers and states, that during the lifetime of Harriet, he appropriated out of the proceeds of the estate, a sufficiency for her comfortable and proper support, until her death. He denies that the land set apart for complainant to plant is indifferent or inconvenient—insists that she is not entitled to plant with more negroes than those given her in the will: but is ready and willing to comply with such designation or order as the court shall make in this respect.

This case was argued by Messrs. Drayton, Gaillard, Desaussure and Ford for the complainant, and Messrs. Parker and W. L. Smith for the defendant.

For the complainant, it was contended that this devise to Miss Mackie, in the will of her father, was a vested interest, subject only to be divested afterwards in the event of her dying before attaining the age of 21 years or marriage. That this construction would square with the natural and obvious intent of the testator, her father, and not

† By a clause of the primogeniture act, passed in February, 1791, no lands or personal estate acquired by any person after making his will should pass thereby, unless the will should be re-published; but the testator was to be considered as having died intestate as to such property. This part of the act, however, was repealed in 1808, so far as it relates to personal estate.

impugn any rule of law; and that the contrary construction would, in effect, go to strip his only child of maintenance during the period of infancy. For if it were not vested, then the rents and profits were not hers; and if so, she had no support at all. The fact that the defendant had supported her out of the rents and profits, is no just answer to this difficulty. For if such support was not of right, it was matter of charity and curtesy in the executor; and it would be doing violence to all natural feeling to suppose that the father, whose will plainly designates his only child as the favorite object of his bounty and care, intended to subject her infancy to such a principle for her support and education. The purpose of the testator then cannot be doubted, and it is not only the duty, but it is the invariable usage of this court so to construe a will as to effect the natural and manifest intent of the testator. To construe this to have been a vested estate, would be to effect this plain intent. And such construction would

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*square with the principle laid down by Mr. Fearne in his introduction. "An estate vested is, where there is an immediate fixed right of present or future enjoyment." In this case, there was at the death of the testator, a fixed right in his daughter Harriet, of enjoying in future, (viz. at 21 or day of marriage) the substance of the estate in possession. The parent being bound by nature to provide for his child, is a principle that will materially influence in the construction of his will, and lead the intent of it. 2 Atk. 329. And this court gave essential operation to that principle in Heyward's case; also in the case of Perronneau v. the Executors of Perronneau. And where rest and residue are given, there it carries a larger implication than a single legacy. 2 P. W. 419. 3 Bro. C. C. 471.—But the counsel further argued that if this was not a vested estate, then it was left to descend to the heir at law until the contingency should happen. That heir (under our primogeniture act) consisted of the mother and daughter, and so the complainant is entitled to one moiety, and to the half of the other moiety of the intermediate rents and profits. 2 Ves. 430.

As to the widow's right to plant with her negroes, and with all the negroes she owns, there can be no pretence on which to raise a doubt. The words of the will are general, and unrestricted. This was one of the provisions in lieu of dower. This court has determined that the widow stands quasi a purchaser as to such provisions, and will extend to her the utmost benefit of construction.—Loocock v. Executors of Loocock. They also cited the case of Doe ex dem: Wheedon v. Lea. 3 T. R. 41.

For the defendants, it was contended that the intent was to be collected from the words of the will, as the testator has used them. That this is a legal estate, not devised in trust, and this court cannot indulge that latitude of construction which they sometimes do in moulding trust estates. The legal distinction between words of contingency being annexed to the substance of the devise, or to the time of enjoyment, is well

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known, and well established, *and we are not at liberty to fritter away the rule by speculating upon what the testator might have done, or ought to have done. Here the devise and bequest are to Harriet Mackie, when she attains the age of 21 years or day of marriage, which ever shall first happen, &c. directly placing the devise on that contingency. The case of Doe ex dom: Weadon v. Lea, cited by complainant, was of a trust estate. The words "till," and "until," and "when," makes it a vested interest where the estate is given to trustees. But that is not the case here.

The court will compare one part of the will with another. 2 T. R. 86. 5 T. R. 323. —And supply the defects of testator's words. 3 Bro. R. 405. Now if we look to the codicil we find him to give to his daughter, &c. "if she arrive at 21, or day of marriage." This shews what he meant by the words he used in the will, viz. that the gift itself was on a contingency. But it is said the rents and profits are undisposed of: That the estate cannot be in abeyance, but must descend to the heir, and the rents will go with them. But the plain intent is, that the rents and profits should accumulate for the benefit of the devisee and legatee, when she should come into possession, or to the devisees over in case she should not. 2 Ves. 430. The counsel also cited 2 Ves. 531. 2 Atk. 329, 473.—Cowp. 714.

As to the number of negroes, the testator had given his wife a certain number, and gave her leave to plant his land during her widowhood, "with her negroes." He must have intended these specifically given to her. Any other construction might give her power to plant all the land upon an accession of fortune in negro property. No line can be drawn, unless the one implied in the will. She might even hire negroes, and surcharge the land. This they contended would be a most unreasonable construction.

Chancellor RUTLEDGE delivered the decree of the court.

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*There are two questions in this case, for the consideration of the court, which depend on the construction of the two following clauses of the will of James Mackie, viz:

"I also give her whilst she continues my widow, and no longer, liberty to plant my land with her negroes, under the direction of my executor." "Item. I give, bequeath, and devise all the rest and residue of my estate,

both real and personal, consisting of lands, negroes, horses, cattle, &c. to my daughter, Harriet Mackie, and to her heirs and assigns for ever, when she attains the age of twenty one years, or at the day of her marriage, which ever shall first happen, but if my said daughter should die before the above mentioned periods, then I give, devise and bequeath that part of my estate which I had given to my said daughter, both real and personal, to Captain William Alston's two sons, John and William Alston."

The first question is, whether complainant is entitled to plant testator's land with any other negroes than those specifically bequeathed to her? And second, whether the complainants daughter Harriet Mackie was entitled to the profits of the estate from her father's death, to the time she died. The second question was principally argued, and complainant's counsel contended that the estate given to the daughter, vested in her immediately, liable to be divested on the contingency of her dying under age or unmarried. That she was entitled to the intermediate profits from testator's death, to her own; consequently, whatever of them remain in the hands of the executor, belong to complainant, as the legal representative of her daughter. That there being no disposition of them by the will, the daughter, to whom the estate was to go, was legally and equitably entitled to them. As a proof of that being testator's intent, it was urged in argument, that he had made no provision for his daughter's maintenance and education; unless therefore the profits of the estate belonged to the daughter, she must starve or be dependent on the bounty of the

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executor for maintenance. *Therefore it cannot be presumed that the testator intended to place his daughter, to whom he had given the bulk of his estate, in that predicament.

For defendant it is insisted that the estate did not vest in the daughter, but must wait until one of the two periods mentioned in the will, arrived, viz. Her attaining twenty one years, or marriage. That the time of the vesting of the estate is annexed to the substance of the gift. And that not happening, the profits must accumulate and go to the persons to whom the estate is limited, on the contingency of her dying before she attained the age of twenty one years or was married. Admitting at the same time that this being the case of a devise to a child she was entitled to maintenance, though no provision was made for it, and that a liberal one had been made by the executor.

A variety of cases contradicting each other, have been cited by the counsel on both sides, in support of their respective clients It is a circumstance much to be regretted that such contradictory decisions should take place, for it is impossible they should be both right. The contradictions can arise but from two causes, either the judges differing in opinion, or the mistakes of the reporters in the reports of the cases. The number of the cases however on either side of the question, is not the true criterion by which the court is to determine it; but the intention of the testator, as it can be collected from the whole will, is the only sure guide for the court.

This is an extreme hard case on the complainant, and the court have been much disposed to grant the relief prayed for. They have perused the will with the strictest attention, desirous of finding if possible, some words on which to found a decree in favour of complainant, thinking it scarcely possible, that it could be the testator's intention to give away nearly the whole of his estate in case of the death of his daughter, under age or unmarried, to persons whom he knew little of, was totally unconnected with, and absolutely strangers to him, in preference to his

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wife. Such however is the case. The *words he has used in the will and codicil, are so strong to shew that the time the devise was to vest, was annexed to the substance of the gift, as to leave no room in the mind to doubt of his intention. The words "when" and "if," are not to be got over. The daughter was to have the estate "when" she arrived at the age of twenty-one, or was married. But "if" she dies before the above mentioned periods, then the estate is devised over. The estate not having vested in her, she of course could not be entitled to the profits, but they must go over to the defendants, who are entitled to the capital. It is needless to say any thing on the subject of maintenance, because she was allowed it by the executor. As to the second question, whether complainant should be restricted to negroes bequeathed to her to plant on testator's land, the will is not explicit; the words are general, she shall have liberty to plant with her negroes, &c. There is no restriction as to the number; and therefore the court would not confine her to those merely bequeathed to her by testator; if she attempts to plant with others that do not belong to her, she can be restrained by application to the court.

Although the complainant has not wholly succeeded in her application, she is nevertheless entitled to her costs, because she was compelled to come here to have the land properly assigned to her, that she was to plant. Also to have the question ascertained whether she had a right to plant with more negroes than those specifically bequeathed to her by the testator.

2 Desaus. 369

Case L.

[Present, Chancellors Rutledge, James and Thompson.]

JOHN DUNCAN v. JAMES FISHER and ALEXANDER EDWARDS.

(May, 1806.)

[*Execution* ⊜171.]

There being two mortgage creditors on the same property, and a third creditor having obtained a judgment subsequent to both, who

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*was about to sell the premises under his execution, the court restrained him at the instance of the younger mortgagee, until the mortgages should be foreclosed; which the two mortgagees were directed to do with expedition.

[Ed. Note.—Cited in Warren v. Raymond, 17 S. C. 200.

For other cases, see Execution, Cent. Dig. §§ 497–518; Dec. Dig. ⊜171.]

The complainant stated that in 1802, he received from Philip Gadsden, a mortgage of sundry property, and amongst the rest, a lot on Charleston Neck of about eleven acres, to secure a debt of $40,000, due from Christopher Gadsden & Co. That some time since, John M. Ehric obtained a judgment at law against P. Gadsden, and levied his execution on that lot, and advertised it for sale by the sheriff for cash, but afterwards countermanded the sale, appearing contented to wait till P. Gadsden could make arrangements to pay him. That Alexander Edwards bought this judgment, and took an assignment from Ehric, and again advertised the land for sale in October last, for cash. That Alexander Edwards is agent of James Fisher, who is the holder of a mortgage from P. Gadsden, prior in date to that of complainant, comprehending sundry property, and amongst the rest, this same lot of 11 acres: that his mortgage covers some property not included in complainant's mortgage, and very probably adequate to the payment of James Fisher's debt, without resorting to the property mortgaged to complainant, and complainant contends that Mr. Fisher ought first to resort to the property of this latter description. That the lot in question doubly mortgaged, is in possession of Miss Edwards, defendant's sister, and to enable her to buy it in at an under rate, (at a cash sale,) this mode of getting an assignment of the judgment has been resorted to, so as to sell it under execution, thereby to make Mr. Fisher's mortgage effective, without the usual process of foreclosure, which might afford time and opportunity to raise money and redeem, or make the property sell more advantageously upon a short credit, as is usual in cases of foreclosed mortgages.

That the whole property mortgaged to complainant and James Fisher, is not more than

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sufficient for both the *debts: that Ehric's judgment is subsequent to both. But complainant states that the debt to J. Fisher is founded on two bonds, one in 1789, and the other in 1793: at the latter period a mortgage was given. In a subsequent year another mortgage was given, not as additional security, but to secure payment of the same bonds and interest; and after that, a third mortgage for the same end.—Complainant contends that the second mortgage cancelled the first, and the third the second, and he has no right to be paid until complainant is satisfied. And complainant also contends that the debt due James Fisher, is either a fictitious debt, or has been chiefly paid off—the debt was never claimed until the bonds appear to have nearly doubled themselves—that the incumbrances are kept up in order to defraud complainant, and to enable Miss Edwards to possess herself of the lot at an under value; that the assignment of this judgment is taken for that purpose also; and though taken in the name of Alex. Edwards, Jas. Fisher is the real purchaser, and is seeking to enforce it to the prejudice of complainant, without the forms usual in cases of mortgaged property. The complainant therefore prays injunction, discovery and relief.

Defendant Alexander Edwards, answers, that John M. Ehric had obtained judgment against Philip Gadsden on his note; but he also obtained judgment against Mary Edwards on the same note as indorser; and when defendant found that Ehric was about to take the property of defendant's sister, in execution for the debt, he applied to Ehric on her behalf, requesting he would resort to the property of P. Gadsden in the first instance, he being the real debtor, and to this Ehric assented, on condition that if the proceeds of the property should be insufficient, defendant should give his note with his sister's endorsement; or her note with defendant's endorsement, for the debt, and take an assignment of the judgment. This was assented to, and Ehric was proceeding to sell P. Gadsden's property, when the sale was prevented and postponed by the interference of complainant and P. Gadsden. De-

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fendant fear*ing his sister's property would be sold by Ehric, took an assignment of the judgment, for which he paid $843.58; which he hoped would be repaid by Gadsden, and defendant not be obliged to apply to his sister for it.

Denies that he was Mr. Fisher's agent: Fisher refused his consent to the assignment of the judgment or sale of the lot mortgaged to him. He denies that Miss Edwards intended to purchase at sheriff's sales, or that defendant wished to sell it at an under value. Believes if it were sold, and another lot sold with it, (which is claimed by the Santee Canal Company) both of which are included in Mr. Fisher's mortgage, it would fall short

of his debt. That in getting the assignment, he intended no injury to complainant, and believes he cannot be injured, as Mr. Fisher's debt is more than the value of the property. That said mortgage was to secure a real debt—defendant drew up the mortgages. The two last were given for and in lieu of land released from the first, and it was done at the desire of the said Philip Gadsden.

Defendant J. Fisher denied that A. Edwards acted in the premises as his agent or with his funds, but that he refused his consent. That he held a mortgage long prior to complainant: denies that the other mortgaged property would suffice for his debt, though sold on an extensive credit, even if the claim of the Santee Canal Company on one of the lots should fail. Denies that the bonds were given for a debt not bona nde due, or that discounts exist against it, or that payments have been made to lessen the amount. He sets forth the debts for which the bonds and mortgages were given. The reason of the second and third mortgages was to substitute property released from the first, at the instance of Mr. Gadsden. Defendant denies that he intended to sell at an under value, which if true, complainant might have prevented by attending the sale. That if he should sell at an under value, he would be a sufferer, as part of his debt would remain unpaid, all the other property of Mr. Gadsden being bound for debts to the extent of its probable value. Admits he has

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been indulgent to P. *Gadsden, and submits that he had full right to exercise his discretion in this respect.

An injunction had been granted in the first instance on the filing of the bill; and the case was now argued by Mr. Pringle and Mr. Duncan for the complainant, and by Mr. Edwards (in pro. per.) Mr. Desaussure and Mr. Ford for defendants.

It was argued for complainant that these several mortgages for one and the same debt, carry the indications of contrivance, and ought to be well scrutinized. That the court will, in all cases, so mould the conflicting rights of creditors against the same property as that one shall not be allowed to prejudice or prostrate the other. That Fisher's mortgage ought to be restricted in the first instance to the property not covered by both, so that the other may have a chance of being paid. That the judgment creditor being subsequent to both, ought not to be allowed to interfere, as it was plain he could have no payment out of the property; and if allowed to force it to a cash sale, he might materially injure the rights of the others, and particularly of the complainant who held the prior mortgage. Cited 1 Eq. Ca. abr. 142, and 1 Atk. 520.

For the defendant, it was admitted that by modern decisions, where one mortgagee abounds in securities, and the other holds a claim on a small portion of the property, this court will interfere and compel the former to go at first, upon that part of his security not pledged to the other. But that is not the case here, as Mr. Fisher's answer fully shews. As to the mortgagor, all he possessed was an equity of redemption, and that is a valuable interest that shall go to his other creditors; 2 Com. 636: and the second creditor shall redeem. Ib. 637, 638. An Equity of Redemption is an interest constituting an actual estate which may be devised, granted, and intailed, and of which there is a possessio fratis, and a tenancy by the curtesy; it may be conveyed by bargain and sale, and if devised, must be done

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according to the statute of frauds. 1 *Atk. 603. 2 Atk. 15. 2 Com. 441. And our act of Assembly for foreclosing mortgages at law, enacts the same thing in substance. And they contended that the equity of redemption was a tangible interest on which an execution may be levied; and a judgment creditor is not bound to wait the operation or measures of the mortgagee. This would be to subject the legal rights of one party to the convenience or caprice of another. If the mortgagee does not choose to foreclose and proceed, the judgment creditor may hasten the business by selling, subject to the mortgage, which is in fact to sell that equity of redemption, which is a substantial tangible interest in the debtor.

Chancellor JAMES delivered the following decree of the court:

It is stated in the complainant's bill, that Philip Gadsden had duly executed three separate mortgages to James Fisher, the amounts of which are specified in said bill. That subsequent thereto, Philip Gadsden duly executed a mortgage to complainant, in which was included certain property which had been previously mortgaged to J. Fisher. That a certain John M. Ehrick obtained a judgment against P. Gadsden, which is suggested in complainant's bill to have been assigned to Alexander Edwards as agent for J. Fisher, for the purpose of having the property levied on by virtue of an execution, founded on the aforesaid judgment, and selling the same at an inconsiderable price, by means whereof, Miss Edwards might be benefited. It is contended for complainant, that the property mortgaged exclusively to J. Fisher, should be sold in the first instance before any recourse should be had against that which had been doubly mortgaged to J. Fisher and John Duncan; and in no event to sell the property included in the mortgage to complainant, until the proceeds of the sales of the property mortgaged to J. Fisher were exhausted. The defendants deny unequivocally that Alexander Edwards acted as an agent for J. Fisher, but that the purchase of the judgment aforesaid was a

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*meritorious act, and that a bona fide consideration was given therefor. The said Alexander Edwards contends that being a judgment creditor, it would be hard to deprive him of the benefit of his judgment, by permitting the mortgages before mentioned to lie in a state of dormancy, which would have a tendency to keep his debt continually locked up, and would unquestionably operate a fraud. That the property mortgaged to Fisher will be entirely incompetent to the payment of his debt, exclusive of the lot included in the complainants mortgage, and of course the whole mortgaged property must be sold. The court can see no propriety in a selection of the property to be sold; nor why one person should be taken into its peculiar protection, in preference to another.† That the judgment creditor is entitled to enforce a foreclosure of the mortgage, we have no doubt.

It is therefore ordered and decreed, that James Fisher and John Duncan, do proceed with all possible expedition to foreclose their respective mortgages, and that the injunction be continued until the further order of this court.

† It is not to be inferred from this expression of the court, that it meant to lay it down that there are no cases in which the court would interfere between different mortgagees of the same property. There is a large branch of equity doctrine on the subject of double mortgages, which would doubtless be applied by the court to proper cases brought before it.

2 Desaus. 375

Case LI.

[Present, Chancellors Rutledge, James and Thompson.]

CHARLES LINING v. R. H. PEYTON and Others.

(May, 1806.)

[*Powers* ⟸44.]

A purchaser of land, held in trust, to certain uses, with proviso, authorizing a sale, and re-investment of the purchase money, to the same uses, is not bound to see to the application of the purchase money to the purposes of the trust. A trustee directed to be changed in the manner prescribed by law.

[Ed. Note.—Cited in Redheimer v. Pyron, Speers, Eq. 135, 141; Mayer v. Mordecai, 1 S. C. 398; Hyatt v. McBurney, 18 S. C. 220; Jones v. Hudson, 23 S. C. 500; Webb v. Chisolm, 24 S. C. 491; Campbell v. Virginia-Carolina Chemical Co., 68 S. C. 445, 47 S. E. 716.

For other cases, see Powers, Cent. Dig. § 164; Dec. Dig. ⟸44.]

The bill stated, that Ann Peyton, the wife of the defendant, was entitled under the

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will of her first husband, *J. Stobo, to an estate in fee, in a tract of land, called Archfield, in St. Paul's Parish, containing 694 acres. And she agreed to and joined with her present husband in selling and conveying the same, (through a public sale by the sheriff) to Dr. John Ramsay, on condition, that the purchase money arising from the sale should be applied to purchase a tract of land of equal value, to be conveyed in trust, to such uses as are therein set forth. That in pursuance of such agreement, the said R. H. Peyton, purchased of Charles Freer, a tract of land, called Block Island, in St. Paul's Parish, which the said Freer, in consideration of £1900 conveyed to Joseph Peace, his heirs and assigns, in trust, for the sole use of Ann Peyton, during her lifetime, and upon her death, to the use of the said R. H. Peyton, during his life, and upon their death, to the use of the heirs of the said R. H. Peyton, and Ann Peyton; with other uses, and for other purposes therein stated. And there was a proviso in said deed, that the said R. H. Peyton and Ann his wife, might change said trustee; and might sell and convey the said tract of land called Block Island, to any person they pleased: "Provided the proceeds of such sale should be immediately laid out and vested in the purchase of some other estate, or property of equal value, either in lands or negroes, or public funds, or bank shares, which should be conveyed and secured upon the same trusts, and to the same uses and purposes, as the lands and premises above described, were subject to."

That the said R. H. Peyton, and Ann his wife, in pursuance of said powers, had proceeded to change the trustee, & had appointed, by deed duly executed J. S. Fowke, to be the trustee, in the room of Joseph Peace, who had consented thereto, and the said J. S. Fowke had accepted said trusteeship.

That the said R. H. Peyton, and Ann his wife, had also thought it adviseable to sell the said tract of land called Block Island, and that the proceeds should be laid out in the manner, and to the uses prescribed in the

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said deed; *and they, together with the new trustee, J. S. Fowke, had by proper deeds conveyed the same in fee simple, to the complainant, C. Lining, for the sum of $15,000. That the said Charles Lining had paid $6,000 in cash, and secured the remaining $9,000 by bond and mortgage of the land. That the $6,000 cash, paid by the said Charles Lining, had been invested in the purchase of lands and slaves, and conveyed to the trustee, to the uses stated in the original deed from Charles Freer.

That doubts have arisen, whether upon the change of the trustee aforesaid, the estate in the Block Island tract of land, was so vested in J. S. Fowke, the new trustee, as to enable him to convey a fee simple estate to the complainant, and whether the original trustee Joseph Peace ought not to have joined in the said deed of conveyance. The bill therefore prays for relief, and that the court would direct the conveyances to be perfected, so as to vest a full, clear and indefeasible estate in

fee simple in said land in the complainant. The bill also submits to the judgment of the court, whether it is the duty of the complainant as purchaser of the Block Island land, to see to the appropriation of the consideration money to the purposes of the trust estate, it having been suggested that it was the duty of the purchaser to see to such appropriation and investment, otherwise he might not be safe in his said purchase, and prays that the court would make such orders, and give such directions in the premises, as will secure the complainant.

The defendants, R. H. Peyton, and Ann his wife, Joseph Peace, the former trustee, and J. S. Fowke, the present trustee, admit all the facts stated in the complainant's bill, and submit to the court that the deeds already made and executed, are sufficient to convey and assure the Block Island land in fee simple to the complainant; but they are willing to execute any other deeds or conveyances which may be thought necessary for that purpose. And the defendants deny that the complainant is bound to see to the application of the purchase money to the purposes

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of the *trust, or that he ought to intermeddle therein; the same being the duty of the trustee and the Cestuis que use.

The answer of the minor children of R. H. Peyton, and Ann his wife, by their guardian, states their ignorance of these transactions, and submits their rights to the protection of the court.

Mr. Lining appeared in propria persona.
And Mr. Parker for defendants.

The case came to a hearing, and afterwards Chancellor RUTLEDGE delivered the decree of the court:

This we believe to be a new case, no precedent having been adduced to shew that it ever has been determined in this country anterior to the revolution, which is more than probable it never was, as the proceedings of the court under the royal government were extremely relaxed; and since the establishment of this court in 1784, we are pretty certain the question has never been formally discussed. Whatever may be the law in Great Britain on this subject, from which our jurisprudence has been principally derived, there are a variety of local circumstances which render it not only highly improper, but almost impracticable that it should be adopted in this country.† The case before us proves the position, for scarcely would a purchaser be found of trust estates who would be inclined to be saddled with the inconvenience and embarrassment of seeing that the purchase money was applied to the purposes

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*of the trust. It has never heretofore been determined that he should, and we will not now establish a precedent, for it might tend exceedingly to embarrass, if not shake to the foundation, the titles of very many persons who have heretofore purchased at the sales of the trust estates without the remotest idea of responsibility, as to the application of the purchase money. We do not say that where property has been conveyed in trust for the payment of debts, or other specific purposes, that it is not the duty as well as the interest of purchasers at such sales to attend to the right appropriation of the money; but in cases like the present, and others that may be assimilated to it, purchasers are not, and ought not to be considered in the same light as trustees, and intrude themselves on the parties to see that the purchase money is applied as the trust deed directs, because the cestui que trust joining in the conveyance with the trustee, it is his particular duty as well as his interest to see the trust money properly applied, and if he finds the trustee disposed to misapply it, he can immediately apply to this court for redress. The court are therefore of opinion and decree, that in this case the complainant is not obliged to attend to the disposition of the purchase money of the estate in bill mentioned, conceiving that the cestuisque trust, who are parties to the conveyance, are fully competent, and the only persons who ought to interest themselves in the business. The trustee not having been

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changed in the manner the law directs, *that should be done, and the conveyances to complainant be then made as the deed directs, or the original trustee may join in the conveyance.

† NOTE.—The question in this case, whether the purchaser was bound to see to the application of the purchase money, to the purposes of the trust, arose from some decisions in the English Court of Chancery, which however had never been acted upon in this country, though they had never been denied to be the law of the court on the subject, in cases to which it might apply.

The general doctrine appears to be as follows: That if an estate be devised by will or directed or authorized by deed, to be sold for the payment of debts, which are enumerated or stated in a schedule, there, unless the trustees are authorized to receive the money, and give receipts, the purchaser is bound to see to the purchase money being applied to the payment of those debts. But he is not bound to

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see to *the application where the trust is to pay debts generally. See the rule laid down and illustrated, and the exceptions made in the following cases. Abbot v. Gibbes, 1 Equity Cases abr. 358. Spalding v. Shalmer, 1 Vern. 301, Dunch v. Kent, 1 Vern. 260, Rogers v. Skillicorne. Ambler 188, Lloyd v. Baldwin. 1 Ves. sen. 173, Ithell v. Beane, 1 Ves. sen. 215, Smith v. Guyen. 1 Bro. C. C. 186, Tenant v. Jackson; Cotton v. Everall, and Langley v. Oxford. 1 Bro. C. C. 186. (n. to 3d edition.) Jebb v. Abbot. Butler's notes to 14th edit. of Co. Litt. 290 Williamson v. Curtis. 3 Bro. C. C. 96, Jenkins v. Hiles. 6 Ves. 654, Braybrook v. Inskeep. 8 Ves. 417. M'Queen v. Farquhar. 11 Ves. 467, Balfour v. Welland, 16 Vesey, 151. See the doctrine well stated, and the cases collected, classed and reconciled in Sudgen's Law of Vendors, Chapter 12, p. 352.

2 Desaus. 380

Case LII.

[Present, Chancellors Rutledge, James and Thompson.]

JAMES KENNEDY v. W. H. GIBBES, Administrator, with the Will Annexed, of M'C. Campbell.

(May, 1806.)

[*Bills and Notes* ⟸121.]

Complainant seeking to be relieved from a bond, as surety, on account of an alleged extension of credit to the principal, by a new agreement, is not entitled to the relief sought; because he did not prove that he was a mere surety in the bond, in which he was bound jointly and severally with the other obligors; and because he did not prove that the person agreeing to give the extension of credit was the attorney of the obligee and authorized to act in the premises.

[Ed. Notes.—For other cases, see Bills and Notes, Cent. Dig. § 255; Dec. Dig. ⟸121.]

[*Principal and Surety* ⟸104.]

[Where a creditor, by a valid and binding agreement between himself and the principal debtor, without the consent of the surety, extends the time of payment, and thus ties up the hands of the creditor, the surety is thereby discharged.]

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 186; Dec. Dig. ⟸104.]

The bill was filed in this case, to get rid of complainant's liability on a bond, in which he was bound jointly and severally with Robert Tate and others, to the late M'C. Campbell, and on which judgment had been obtained at law.

The grounds were, 1st. That the complainant was merely security in the bond, though that was not expressed on its face. And 2d. That the late Mr. Campbell had by his attorney Mr. Jackson, entered into new agreements with Robert Tate, the principal in the bond, and extended the time of payment to him, which discharged the co-obligor.

The bill set forth that Robert Tate and William Tate being indebted to the late M'Cartan Campbell, made and executed their bond, dated day of June, 1786, in the penal sum of £900 sterling, conditioned for the payment of £450 with interest on or before the day of A. D. 1791, to the said M'Cartan Campbell, his executors, administrators and assigns, in which said bond,

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this com*plainant, together with Gen. Isaac Huger and Ephraim Mitchell, were bound as sureties. That the bond remaining unpaid after the time fixed for the payment thereof, M'Cartan Campbell agreed with the said Robert Tate to accept in satisfaction thereof, lands and negroes, at a valuation, which agreement was afterwards, to wit: 15th April, 1793, reduced into writing by James Tate, the agent of the said Robert Tate, and William Jackson, the agent of M'Cartan Campbell; by which the former engages that good and sufficient titles to a tract of land of about 300 acres, on Seneka River, and a number of negroes, to be appraised by indifferent persons, should be delivered by the said Robert Tate or his agent, before the 10th of July, 1793, in payment of the said debt; and Wm. Jackson agreed on behalf of Mr. Campbell, to accept the said land and negroes so appraised, and to deliver up the said bond, a copy of which agreement is filed, and marked A. The complainant further shews that in pursuance of said agreement, James Tate agent for Robert Tate, did on the 8th July, 1793, tender in satisfaction of the said debt, to Wm. Jackson, agent of Campbell, four negro Slaves, and also good titles for the land aforesaid. That Wm. Jackson agent as aforesaid, was satisfied with the compliance with the terms of the said agreement by Robert Tate, but declared that he could not then fulfil the said agreement on the part of Campbell, by delivering up the bond, because it was in the hands of Mr. Philip Gadsden, from whom it could not be procured in time. And he produced a letter from Mr. Campbell, making an apology for such non-compliance, and promised to procure and deliver the said bond for the purpose of performing the agreement. The complainant further shews that Campbell and his agents afterwards neglected to comply with or enforce the agreement, or to take any steps against Robert Tate for the recovery of the debt. That some time afterwards this complainant received a letter from Mr. Jacob Drayton, requesting payment of the said bond, and he desired the writ

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might be sent to Gen. Pinckney, *but the business was suffered to sleep from 1793, till 1796, when a suit was commenced by Mr. Isaac Motte Dart, on the bond in the name of George Jones and Sarah his wife (late Sarah Campbell) executrix, and Philip Gadsden and Edward Rutledge, executors of M'Cartan Campbell against Robert Tate, who not being found, another action was brought to March term, 1796, against Isaac Huger and this complainant, the sureties to the said bond. That the copy writ was sent to Gen. Pinckney, who appeared thereon, without this complainant then knowing that such a suit was instituted. That Gen. Pinckney soon after departed on his embassy to France; and a judgment was obtained against him by default, and entered up on the 27th March, 1797, without his knowledge, so that he could not avail himself of the defence founded on the above circumstances. That sometime afterwards this complainant discovered the said judgment, and applied to the judges of the constitutional court for a new trial on the ground of surprise in the obtaining said judgment. That they after full argument, granted a new trial, on condition that it should come on at the then ensuing court, which commenced its sitting on the Monday following. That some of the witnesses, to prove

the foregoing facts, residing in Pendleton district, and others in Georgia, it was impossible to procure their attendance; by which this complainant was deprived of their testimony, and his defence founded thereon, and the judgment remained in force against him, and has since been revived by scire facias in the year 1803, by William Hasell Gibbes, administrator of Campbell; to which scire facias this complainant could not set up any defence available at law. The complainant further shews that Robert Tate was at the time of giving the said bond, and long afterwards, possessed of considerable property; and the complainant is persuaded, that if instead of extending the time of payment, and entering into an agreement, and neglecting to enforce the execution thereof, the said Campbell had pursued regular steps for the recovery of the debt from Robert Tate, or aft-

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*er entering into the agreement had complied with it on his part, that the debt could have been recovered from the said Robert Tate; or that if he, the complainant, had not been lulled into security by the agreement aforesaid made, he has no doubt he could have secured himself by pursuing proper measures against the said Robert Tate, which resource he no longer has, the said Robert Tate having died insolvent. He therefore prays this honorable court to take his case into consideration, and that the said William Hasell Gibbes may answer, &c. and that he may be restrained from any further proceedings against this complainant at law upon the said suit, &c. and that he may have a writ of subpœna, &c. and that in the mean time your honors would grant a writ of injunction to be directed to the said William Hazell Gibbes, his agents and attorneys, and also to the sheriff of Charleston District, enjoining them from all further proceedings against this complainant upon the said suit so commenced as aforesaid, until the answer and further orders of your honors in this honorable court may be had in the premises, &c.; and he will pray, &c.

The defendant admits the bond as in bill specified, and that the several judgments referred to in bill were obtained at the periods therein mentioned. He says that he knows nothing of any such agreement as is alluded to in bill, and made an exhibit of, having never heard of such an agreement until the filing of complainant's bill; nor of the tender therein said to have been made, or of any appraisement of property tendered; nor doth he know that James Tate and Wm. Jackson, were severally the general agents of Robert Tate and M'Cartan Campbell, or that any expression of satisfaction was manifested by the said Wm. Jackson with Tate's compliance with the said alleged agreement; or that the letter in the bill mentioned was urged as a reason why the said Jackson did not perform the agreement, or that the said letter was ever written or produced. This defendant being ignorant of the conduct of

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*Campbell or his agent respecting the said agreement and bond, can neither admit nor deny the negligencies attributed to them, or the consequences resulting therefrom, but he has never deemed a security to a bond exonerated by indulgence shewn to the principal, but hath been advised that any extension of the time of payment might be granted by an obligee to a principal obligor, without at all impairing his rights against the security. This defendant does not admit the institution of a suit against the complainant on the bond without his having notice of it; for Mr. I. M. Dart, the attorney, who sued the said bond, hath deposed that to the best of his knowledge and belief, he applied at the time, either by letter or verbally, to be informed who would enter an appearance to the writ, and the complainant directed him to Gen. Pinckney, who accordingly on the 9th March, 1796, appeared for the complainant upon the back of the original writ, which is now of record.—This defendant submits that as Gen. Pinckney did not quit Carolina until the autumn of the year 1796, the complainant had sufficient time to have given any instructions he might have thought necessary to his attorney. This defendant admits the new trial as stated in the bill, and that the court commenced its sitting on the day alleged, and also that the complainant did declare upon oath, at the calling of the cause that he could not procure the attendance of his witnesses who resided in Pendleton district and in Georgia; but the defendant does not admit complainant's inability to obtain the said testimony—on the contrary, the court determined that due diligence had not been used to procure the presence of the witnesses, and on that account overruled a motion which was made by the complainant's counsel for a continuance of the cause upon the docket; and this defendant says, that the complainant having appealed from the decision of the court to the constitutional court, received a confirmation of the previous decision. This defendant further sets forth, that it is extraordinary that the complainant should delay applying to this honorable court until this time,

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as it is undeniable that *he must have been as conusant of his rights when he first discovered the judgment against him as he is at this day, and therefore he should in prudence instantly have applied for relief, instead of lingering in a court of law during the long interval between his discovery of the judgment and the present time, and waiting until a judgment had been obtained upon a scire facias, and an execution issued thereon against his property. This defendant is surprised at the complainant's application, to be discharged from the said bond, as having frequently spoken with the com-

plainant about the said debt, he (the complainant) never hinted in the remotest manner his intention to dispute the payment; on the contrary, when the judgment upon the scire facias was entered up, which was on the 18th July, 1803, the defendant was requested by the complainant to lend him the said bond in order to obtain a judgment against Robert Tate, in a suit which he had instituted against Tate in the district where he resided; which this defendant complied with, as appears by complainant's receipt to him for the bond (marked B.) upon which, in the hand writing of the defendant, is endorsed the following memorandum: "Promised him, after Mr. Drayton had obtained judgment on sci. fa. at April term, 1803, I would wait for the debt till after October circuit;" which memorandum was made by this defendant, on or about the day when the said receipt was given, at which time no expression passed the lips of complainant in this defendant's presence, by which the latter could suppose the former considered himself released from the payment: so far from it that the complainant then entreated as a favor, that forbearance, which by the foregoing memorandum was granted. And this defendant further says that he is ignorant of all the other matters and things in the complainant's bill contained, and requires the complainant to prove the same if he can; and denying all combination, &c. prays to be dismissed with costs and charges, &c.

The cause came to a hearing, and the following facts were proved:

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*For the complainant, the agreement between Mr. Jackson, alleging himself to be the attorney of M'C. Campbell, as stated in the bill, and made an exhibit, was produced.

Mr. John Burton proved that he was a subscribing witness to the deed or agreement; and Tate afterwards made a tender of property in satisfaction of the bond due to Mr. Campbell. There was no incumbrance on the property. Witness understood that Jackson was the attorney of Campbell. It was generally believed to be so.

Samuel Tate proved that he was present when the negroes were tendered by James Tate to Jackson, in payment of the debt. He understood that Jackson was Campbell's attorney—he was generally believed to be so—and James Tate was also known and reputed to be the attorney of Robert Tate.

(Mr. Drayton objected to the parol evidence of the power of attorney.)

For the defendant, Mr. Gadsden proved that Mr. Campbell's wife commonly wrote all his letters, and transacted business for her husband.

Mr. Ford for complainant. He stated the law on the subject, and cited the cases of Nesbit v. Smith, and Rees v. Beerington. He contended that the agreement was sufficiently proved, and shewed that the obligee in the bond had entered into a new agreement with the principal obligor, and extended the time of payment, and agreed to accept a new mode of payment, which discharged the other obligors. That though there is no positive proof that complainant was merely surety in the bonds, yet there were strong presumptions of it. He was not called upon for payment for many years though much more accessible than Tate; and all the obligee's transactions and arrangements about the payment of the debt, were with Tate.—And though no positive proof that Mr. Jackson was Mr. Campbell's attorney, his acts, his connection with Mr. Campbell, and general repute went a great way to establish it. It is not presumable he would have entered into

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*such an agreement without he had authority. Mr. Campbell was known to be a sickly man, almost confined to his house; and Mr. Jackson was his known connexion and friend.

The complainant could not get at the original power or other papers; they were res inter alios acta. The laches of the obligee had been very injurious to the complainant, and lost him the opportunity of securing himself.

Mr. Drayton for the defendant, insisted that complainant had not made out his case. He had not proved that he was a surety; then all the cases on that subject were inapplicable: and there was no evidence that Mr. Jackson had any authority to act for Mr. Campbell, and the court will not presume it.

The complainant also slumbered over his rights, if he had any, and should have availed himself of his defence at law. He cited Ambl. 436. 1 Atk. 490. 3 Atk. 646.—1 Vesey, 64.

Chancellor JAMES afterwards delivered the decree of the court:

The object of this bill was to obtain relief against a judgment obtained on a bond entered into by Robert Tate, William Tate, General Isaac Huger, Ephriam Mitchell and James Kennedy, payable to M'Cartan Campbell. The bill sets forth, that the said James Kennedy, was a surety for the said Robert Tate, and not a principal in the bond. It further states, that after the time fixed for the payment of the debt incurred, and expressed in the bond, the same being then unpaid, M'Cartan Campbell, the Obligee, contracted and agreed with the said Robert Tate, to accept and receive in satisfaction therefor, lands and negroes at a valuation; which agreement, it is stated, was reduced to writing, between James Tate, on behalf of the said Robert Tate, and William Jackson, as agent and acting attorney for M'Cartan Campbell. It is further stated that M'Cartan Campbell and his representatives suffered several years to elapse before he or

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they made *use of any measures to compel

payment from Robert Tate. That he remained solvent a sufficient length of time after the bond became due, to have enforced the payment thereof from him. It is contended by the counsel for the complainant, that an extension of the time of payment, by the obligee of a bond, beyond that stipulated between the parties, at the time of its being entered into, without the consent and approbation of the sureties, will be considered as such laches as will discharge them therefrom. It is further contended, that the supposed agreement, entered into between William Jackson and James Tate, so far altered the nature of the original transaction, as to exonerate the sureties. The doctrine on which the complainant's counsel relied, having been adopted in some recent adjudication in the Court of Chancery in England, and recognized by a late decision of the Court of Equity, in this state, must now be considered as established; and of course would operate on this case, provided the testimony would admit of its being comprehended within the same principles. But the reverse is the case. The complainant introduced no evidence whatever, to prove he was a surety, and not a co-obligor; nor that William Jackson, the supposed agent of M'Cartan Campbell had any authority to act as such; nor was there any person whomsoever to prove that the extension of time given by M'Cartan Campbell to the obligors of the said bond, was contrary to the inclination and desire of the complainant.

It is therefore considered by the court, that the present case does not come within the description of cases relied on, and referred to; and that the complainant is not entitled to the relief he claims in his bill. Wherefore it is ordered and decreed, that the same be dismissed with costs.

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*Case LIII.

[Present, Chancellors James and Thompson.]

HUGH RUTLEDGE v. WILLIAM GREENWOOD, Junior.

(May, 1806.)

[*Bonds* ⟸54.]

A. joined in a bond with two others, for the payment of a debt made up of many items, some of which were for advances of money, made for the use of A. then a minor, but on the credit of his elder brother, against whom all the charges are made. This is sufficient to constitute A. a principal in the bond, though his brother had made larger payments on the account, than the advances to A. and though A. had made payments to his brother.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 56; Dec. Dig. ⟸54.]

[*Principal and Surety* ⟸104.]

General indulgence given by the creditor to the first signer in the bond, will not release the other obligors in the bond, even if they were mere sureties.

[Ed. Note.—Cited in Pickett v. Land, 2 Bailey, 610.

For other cases, see Principal and Surety, Cent. Dig. §§ 186-190, 193-195, 197-199, 200; Dec. Dig. ⟸104.]

[*Principal and Surety* ⟸126.]

There must be a new agreement, varying the terms of the contract, and extending the time of payment, to work the effect of releasing the surety. A demand of the surety to sue the principal, shall not release the surety, if the creditor offers to sue all the obligors, but the surety declines that.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 335; Dec. Dig. ⟸126.]

[*Contracts* ⟸22.]

Propositions of the third obligor not replied to, shall not be deemed to be acquiesced in, so as to release him from his obligation, though he makes a payment which is accepted, as he insists in pursuance of his proposition.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 78; Dec. Dig. ⟸22.]

[*Judgment* ⟸632.]

The third obligor taking a bond of indemnity, and a mortgage, from the first signers in the bond, has no effect on his liability. And his being treated and spoken of as a mere surety in the bond, in another suit and decree, does not conclude the question as to his suretyship, for it is res inter alios acta.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1148; Dec. Dig. ⟸632.]

[*Principal and Surety* ⟸169.]

[On a bill by a surety to be discharged from his liability, the court, having denied the prayer of the bill, refused to grant an injunction restraining the creditor from enforcing the debt, to give the surety an opportunity to avail himself of collateral security.]

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 489; Dec. Dig. ⟸169.]

The bill was filed in this case to obtain a perpetual injunction against the defendant, to restrain him from suing and recovering on a bond in which the complainant had joined with two others, as surety, on the ground of laches in the creditor, in pursuing the demand against the principal, and in giving time for the payment, beyond the periods stipulated in the bond. And also on the ground that the defendant had entered into new stipulations with the complainant, which had released him from the bond debt.

The complainant's bill states that his brother John Rutledge, deceased, being in-

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debted in the year 1772, *in a balance of account in £1097 15s. sterling, to Greenwood and Higginson, of London, merchants; he was applied to in 1793, by the defendant, W. Greenwood, jun. as their attorney, for the payment of the said debt; that he proposed, as complainant believes, to take the said John R's. bond, with security, payable in five equal annual instalments, with interest at 5

per cent. if the said John would allow interest, and compound interest, on the account from the time mutual dealings ceased, which included a period of 20 years, and upwards; that in consequence of such proposition the said John Rutledge requested complainant would become surety together with their brother, the late Edward Rutledge, in the said bond, giving complainant positive assurances that he would pay the instalments as they became due. That complainant at first declined it, but after repeated solicitations of the said John, and also at the request of the said Edward, complainant at length became bound as one of the sureties in the said bond, conditioned for the payment of £2957 or thereabouts, in five equal annual instalments. That the said J. R. being in possession of a very large real and personal estate, (abundantly more than sufficient as complainant believed to pay all his debts) complainant after signing the bonds, not being called upon by defendants for payment of any of the instalments for 3 or 4 years, gave himself no concern about the payment thereof, implicitly relying on the promises of the said John, respecting the payment he was to make. That some time in 1797, the complainant finding that the affairs of the said John were much embarrassed, in a conversation with the said Edward, asked the said Edward who was thoroughly conversant with the situation of the said John's affairs, what payments had been made on it, and was informed that none had been made; but that complainant need not be uneasy on that account, for the debt was perfectly safe, as he had a mortgage or mortgages of property abundantly sufficient, not only to pay the debt above mentioned, but

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many others for which he had made *himself responsible: and further, to satisfy complainant, he gave him a bond to indemnify him from this and many other debts complainant had become liable for, at the special instance and request of the said Edward, all of which were originally the debts of the said John Rutledge. That after receiving the bond of indemnity from the said Edward, complainant was satisfied and continued so till the month of May or June, 1799, 13 or 14 months after the last instalment had become due, and within which time judgments to a considerable amount had been obtained against the said J. R. when the said defendant for the first time, and to complainant's great surprise, called on complainant to make arrangements for paying the said debt. That complainant told him it was the debt of the said J. R. and complainant only surety. That he ought in justice and conscience, to apply to the said John in the first instance, and obtain payment from him. That he only considered himself liable if the said John was unable; but believed that he was fully competent, and that at all events defendant should have pursued legal measures against the said J. R. as each instalment became due, Defendant replied, that he had repeatedly applied to the said John and Edward, for payment, and had uniformly been promised it; and that he had not sued the bond out of delicacy to them, or words to that effect. And that in a late conversation with the said John, he had told him the defendant, it was the debt of the said Edward and complainant. Complainant then offered to convince him that it was not; for that he had for some years previous thereto paid to and for the said J. R. monies to a considerable amount beyond the sum that had been advanced by the said Greenwood & Higginson for the complainants, that the said John was responsible for; but that the said defendant declined looking into the account. Bill further states, that after the application aforesaid by defendant, complainant having conversed with the said Edward on the subject, the said Edward and complainant agreed that complainant should pay defendant the

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*nett amount of his then crop, after deducting plantation expences; and the said Edward was to pay 1000*l.* and assume the balance of the debt, which proposition was communicated to defendant by letter, and he acquiesced therein.—Complainant nevertheless frequently verbally requested defendant no longer to postpone putting the bond in suit against the said J. Rutledge: which, however, he would not do, until April, 1800; which was at so late a period that he did not obtain a judgment, as the said John died in July following. That complainant paid defendant according to his engagement, 200*l.* and the death of the said Edward prevented him from complying with his engagement. That some months after the death of the said Edward, and immediately after that of the said John, complainant received a letter from defendant demanding payment of the whole debt from him. That complainant told him, in his opinion, the debt was safe, and would be paid out of the funds of the said J. R. without resorting to said complainant, and pointed them out to defendant; but it would be necessarily attended with delay, and complainant hoped that all circumstances considered, and particularly defendant's remissness, in not pursuing legal measures in a reasonable time, to procure payment from the said J. R. notwithstanding he was frequently remonstrated with, and pressed to it by complainant, the defendant would have been fully convinced of the impropriety of insisting on payment from the complainant, and would have relinquished his claim on complainant, and waited until the property of the said J. R. could have been disposed of to the best advantage for the benefit of his creditors generally, but in the first instance, for those whose names are particularly mention-

ed in the mortgages, one of which is that of Greenwood & Higginson, to whom defendant is attorney. But although complainant remonstrated with him on the injustice and inequitableness of his claim on complainant, in as much as defendant never took any steps whatsoever to secure or recover payment of the instalments on the bond from the said

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J. R. as they became due, *but on the contrary suffered him to be sued by numbers of his other creditors, and judgments to be obtained against him, whereby he lost the preference he might and ought to have gained of payment of the whole of his debt, (as there were no judgments obtained against the said J. R. till March, 1798, and these only for trifling debts,) when the last instalment was payable; and especially too as defendants had refused to comply with complainant's request in recovering and securing payment of the debt, and given considerably longer time for payment than was stipulated for in the condition of the bond, and that too expressly against the consent of the complainant; and had acknowledged to complainant that he had not till lately looked immediately to him for the payment of the debt. The defendant, nevertheless, persists in taking rigorous measures against complainant, and hath commenced an action against him, and threatens to obtain judgment and execution, and to seize and sell complainant's property as soon as he can have it in his power. The bill prays an injunction, which has been granted, and for relief in the premises.

The defendant put in the following answer:

Defendant in his answer admits his application to the late John Rutledge, in the year 1793, for payment of the debt in bill mentioned; but denies he proposed to the said John to take his bond with security, payable as in bill set forth: but that the said John Rutledge proposed that he and the said Edward Rutledge, and complainant, would join in a bond for the debt, to which defendant agreed. That in pursuance of their agreement, the said John wrote him a letter, desiring him to have the interest calculated, and he would have a bond executed. That the defendant calculated the interest and sent it to the said John, who sent back to him the bond in bill mentioned. Defendant saith he is ignorant of the conversation and assurances between the parties as in bill stated. He saith that same time in April or May, 1799, he called on complainant, perhaps for

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the first time, to make arrangements *for the payment of the bond; and that complainant might have told him the debt was the proper debt of the said John, and complainant only surety, and that defendant ought in justice and conscience to apply to the said John in the first instance, and obtain payment from him, and that at all events, defendant should have taken legal measures against the said John, to recover the money, or secure payment, as the instalments became due. That defendant might have replied that he had repeatedly spoken to the said John and Edward, relative to the payment of the bond, and been uniformly promised it; and had not sued it out of delicacy to the family. Defendant denies he had been frequently requested by the said Edward not to sue the bond; for he does not recollect he ever told him he would sue it. Admits he told complainant that in a late conversation with the said John, he told defendant the debt was the real debt of the said Edward and complainant, and that complainant then said he had paid monies to and for the said John, equal to what had been advanced by Greenwood & Higginson for complainant, and offered to shew him an account and vouchers therefor, which defendant declined looking into; and submits that such payment was a misapplication of the monies which should have been paid to Greenwood & Higginson; and to corroborate his opinion, that the debt was the real debt of complainant, and the said Edward, he refers to the accounts, and quotes extracts of several letters from the said John to him, to that effect, in May, 1799. Defendant then comments on complainant's letters to him, in June, 1799, and argues thereupon against his acquiescence in the measures therein proposed, although he admits the receipt of the letter. Defendant admits complainant requested him to sue the said John, and remonstrated with him for not doing it, and his refusal to sue the said John alone. That complainant afterwards requested him to sue the said John, and that he did so in April, 1800. He also admits the receipt of the 200*l.* from complainant—says he does not recollect he ever made application to com-

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*plainant for payment of the bond previous to April or May, 1799. Defendant admits that in August, 1800, he wrote a letter to complainant demanding payment of the debt, and that complainant might have mentioned some estate of the said John, mortgaged for payment of it, but knows nothing of it. Denies he acknowledged he had not until lately looked immediately to complainant for the debt, but admits that he did not until after the deaths of the said John and Edward Rutledge, look particularly to complainant. He does not recollect making any particular application to the said Edward for payment, prior to that made to complainant, but admits that he repeatedly spoke to the said Edward on the subject, when he called upon him on other business. Admits his commencing suit against complainant, and also against Henry Middleton Rutledge, executor of the said Edward, which last suit he has

never proceeded in, though not restrained by injunction.†

The cause came to a hearing, and Mr. K. L. Simons argued for the complainant:

He contended that the complainant was not a principal in the bond, but merely a surety, and entitled to all the equity which sureties have the benefit of in this court.—That though the original account against Mr. John Rutledge, on which the bond was given, did contain a few items of money advanced by Greenwood & Higginson, for the benefit of the complainant, blended with oth-

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er transac*tions, yet they were not advanced on the credit of the complainant, nor were they charged to him, but to Mr. John Rutledge, to whom alone the creditor looked, or had a legal right to look. In the year 1770, Mr. J. Rutledge had made large payments on account of the advances made by G. & H. more than sufficient to pay the advances made for the use of complainant, as appears by the account. And it appears also by the subsequent transactions, that Mr. H. Rutledge, (complainant) had paid and settled with his brother John, before the bond was given, more than sufficient to reimburse him for his liability to G. & H. on account of their advances on the credit of J. R. for the use of complainant.

It is manifest that Mr. John Rutledge did not consider his brothers Edward or Hugh liable for any part of this debt—for he in May, 1793, (only one month after the date of the bond) gave a mortgage of lands to his brother Edward to secure the payment by him of the whole of this very debt as well as other debts.

It was therefore clear that there was no privity of contract between G. & H. and the complainant, nor could they have enforced their demand against him at law or in equity. And the complainant many years afterwards joining his brother John Rutledge, in a bond to G. & H. for a large amount, five times as great as the advances made for the use of complainant, could never convert complainant into a principal for any part of the debt, and in no event to a greater amount than the advances made for complainant; and the creditors G. & H. never looked to the complainant, nor applied to him for payment of the account, nor even for an adjustment thereof, but solely to the said John Rutledge, as is manifest by the answer of the defendant.

It is clear then that the complainant was merely a surety in the bond for the debt, with the liabilities and the equities attached to that character.

Let us enquire what the equity is on this subject. It is that whatever may be the

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form or solemnity of the obliga*tion, a surety shall not be bound beyond the period fixed by his contract, or for losses which do not spring from the subject of his stipulated indemnity, but from the indulgence of the creditor to the principal debtor, or from his laches or supineness.

This is natural equity, and it has been adopted and sanctioned by this court by a variety of well considered adjudications, which will be presently adduced.

That the circumstances of this case bring it within the equity stated, will be apparent from a correct view of them. The bond was given to G. & H. on the 8th of April, 1793. The mortgage by Mr. John Rutledge to Mr. E. Rutledge, to secure the payment of the debt by the said John Rutledge, is dated the 2d May, 1793. The debt to G. & H. was to be paid in five equal annual instalments: No payments are made by the principal Mr. J. R. and the creditor brings no suit for the recovery of the debt, though he might have sued, and recovered a judgment on the penalty of the bond, on the failure of payment of the first instalment. He had frequent communications with the principal, and with Mr. E. R. on the subject of the debt; but he had none with the complainant. He states in his answer that he had repeated promises of payment from them. On these he relies, and grants indulgences, and an extension of credit to the principal, without the knowledge or consent of the complainant. In the mean time the affairs of the principal fall into decay, and he becomes more and more embarrassed. There were no judgments against him until March, 1798, and to no great amount until after the spring of 1799.

At length in April, 1799, the defendant for the first time, applies to the complainant for payment, fourteen months after the last instalment on the bond had fallen due. The complainant then complains of the defendant's delay, in seeking his remedy against the principal, and urges him to proceed against him, without further loss of time.—But the defendant still refuses and neglects to do so, and brings no suit till the spring

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of 1800, which was too late to *be of any use, for Mr. J. Rutledge died in July, 1800. before judgment could be obtained on this suit, though other creditors who had been more vigilant, had mean while obtained judgments to a very large amount, so as to take away all hope of complainant's being ever indemni-

† N. B.—In April, 1803, complainant filed a bill against H. M. Rutledge, executor of Edward Rutledge, for the purpose of obtaining a decree to authorize his selling the property mortgaged to his father by John Rutledge, in order to enable him to satisfy the debts enumerated in the mortgages, of which that due to Greenwood & Higginson is one. And the court in May, accordingly decreed he should sell the property for that purpose, on the terms in decree mentioned. Some parcels of land have lately been sold, and persons are authorized to sell the whole, but the present scarcity of money, in a great measure prevents their being sold, or selling for any thing like their real value.

fied, unless under the shelter of the mortgage given by Mr. J. R. to Mr. E. R.

This surely makes out a case of gross laches on the part of the creditor; and indeed of much actual indulgence and extension of credit on the faith of new promises and engagements. But it is still stronger, for the positive requisition of the complainant to sue the principal, is neglected for many months, and indeed until it was too late to sue and obtain judgment in his life time, to the manifest prejudice of the complainant. This state of things would bring the case within the equity of the decided cases. But there is still more; the defendant acquiesced in the proposition of the other surety, and of complainant to accept from them a certain amount, and to discharge them. He received this proposition, made no objection, and forbore to sue the principal. This changed the situation of the parties, and the defendant could no longer look to the sureties for more than their voluntary offer, which he had acquiesced in. Nor can it be said that this letter was a renovation of the contract. The letter must not be garbled; and if, when read fairly and fully, it should be supposed to amount to a renovation of the contract, it could be for no more than it offered, and the acquiescence worked a discharge as to the balance of the debt.

We come now to the decided cases which establish and illustrate the equitable principle which protects sureties from the laches of creditors, and their undue extension of credit to the principal debtors.

The case of Nesbit v. Smith, 2 Bro. C. C. 579, the counsel considered as directly applicable to that under consideration. There the defendant extended the payment to three years, and that was decided to be a release to the surety.

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*In the case before the court, the Creditor absolutely refused to proceed against the principal, when required; and he substantially extended the credit. His pretence of delicacy was no excuse when required to sue.

So in the case of Rees v. Berrington, 2 Vesey, jun. 540, the equitable principle is established. And it is distinctly laid down that the surety has a right the very day after the bond becomes due to have it sued. If the application is proved, it is a duty to comply with it. See also the cases of Skip v. Huey, 3 Atk. 91, and Law v. The East-India Company, 4 Ves. jun. 824.

These cases have been examined, and the great equitable principle laid down in them has been recognized by this court in the case of Butler v. The Comptroller General. (Vide ante, p. 226.)

It is absurd to speak of the complainant's letter as a renovation of his obligation, supposing that to be dissolved by the laches of defendant, for it cannot by any possibility amount to more than an offer to pay the amount of his then crop, provided he should be discharged.

Mr. Ward and Mr. Gaillard argued for the defendant.

They insisted that this was not a collateral undertaking by the complainant, nor was he a surety in the bond. The bond does not import that he was a surety, but he stands jointly and severally bound as a principal. The defendant swears in his answer, that complainant was considered a principal, and he is justified in that belief, by the uncontradicted fact, that part of the advances made by Greenwood & Higginson, were for the benefit of complainant, on which the bond was given by all the brothers, for all the advances. Then they were all principals, and Mr. J. Rutledge's letters speak of his brothers as joint principals with himself. Now he surely knew their relative situation; and it is not pretended that the equitable rule applies to cases where all are principals. Nor does it appear by satisfactory evidence, that Mr. H. Rutledge has ever discharged

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the amount of the advances made on *his account; certainly not to Greenwood; and doubtful if to his brother John. But if he had paid the latter, it was a mispayment. It should have been made to Messrs. Greenwood & Higginson.

It is a rule of refined equity invented for the protection of sureties, but never carried further.

The complainant appears to have relied on the bond of indemnity given by Mr. J. Rutledge, to his brother Mr. E. R. to secure the payment of this debt, and not upon the vigilance of the defendant, for he expressed himself satisfied when informed of the bond of indemnity. Complainant had not applied to the defendant to sue Mr. J. Rutledge, in 1797, but to his co-obligor, Mr. E. R. who satisfied his mind by stating to him that he had a mortgage to secure the debt.

This mortgage appears to have been given soon after the date of the bond to Greenwood & Higginson, and is strong evidence that Mr. E. R. then doubted the solvency of his brother J. R.

With respect to the application in the year 1799, by the complainant to the defendant, to sue Mr. John Rutledge, there are very conclusive answers. The defendant considered the complainant a principal in the bond, as he really was, and therefore he was not bound to attend to such notice. But he states in his answer that he offered to sue all the obligors, which the complainant declined. And defendant was not bound to sue one obligor and omit others, at their pleasure.

And to this it should be added that the request came too late to be of any utility. The request was in the year 1799. Mr. J. Rutledge died in July, 1800, and judgment could not with ordinary diligence have been obtained before his death. Besides which, so many

judgments had been obtained before his death, as to leave little hope of procuring payment from his estate.

Reliance has been placed by the counsel for the complainant, on the ground that he and Mr. E. Rutledge had made propositions

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to the defendant for the payment of *part of the debt, which it is argued implied an agreement, to discharge them from the remainder; and that this proposition was acquiesced in, and varied the contract so as to absolve these obligors from the bond. To this the following answers are given as satisfactory:

In the first place, the defendant could not have acceded to any proposition injurious to the rights of his principal. He was only an agent, or attorney in fact, and could not release any of the debtors in the bond, without actually receiving all the money.

There was however no such acquiescence as is stated; the defendant was merely silent. It is therefore merely a very slight implication which could arise that the defendant assented. But the solemn contracts of men are not to be dissolved by such slight and dubious implications: not suing immediately after, does not raise the implication of acquiescence in the proposition made by the defendant, for he had foreborne to sue for a long time before, merely from delicacy to gentlemen whom he highly respected. Nor did the proposition distinctly state, that upon the partial payment offered by Mr. H. and Mr. E. R. they should be released from all further liability. There must be an implication upon an implication to produce that effect, and this would be too loose for courts of justice in deciding on the rights and obligations of men.

Besides the agreement, (if such a proposition so alleged to be acquiesced in, can be called an agreement) depended on a condition precedent, the payment of £1000 by Mr. E. R. and of the complainant's crop of that year. But it is admitted that Mr. E. R. died soon after, without paying the £1000 and it never has been paid.

But again, the equity relied upon for the relief of the compainant is, that the creditor shall not be at liberty to enter into new arrangements with the principal debtor in the bond, and extend the time of payment for his benefit, at the risk of the sureties. This, however, is not the fact of the case under consideration, for it is not pretended that the creditors made any new arrangement with

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Mr. J. *Rutledge, the supposed principal. If any such arrangements were made, they were with those who call themselves the sureties. And this they must have considered for their benefit, and not to their prejudice. Nor can such a case be brought within the rule of equity above stated.—Nor was such agreement ever complied with: no more than 200*l.* were ever paid by complainant to defendant, and nothing by the other obligor Mr. E. R. Consequently no benefit can be claimed under it.

The decided cases relied upon by the complainant's counsel, are not applicable to this case. In Nesbit v. Smith, the creditor made a new agreement with the principal, by which he extended the credit for three years, so that he could not proceed to sue on the bond. And the cases of Skip & Huey, and Law, v. The East-India Company, have no circumstances analogous to the present. In Rees & Beerington, the creditors extended the credit by a positive agreement with the principal, even before the penalty attached.

In the case of Butler & Hamilton decided in this court, the chancellors recognized the rule of equity; but they did not give relief to the surety, because it was not satisfactorily proved that the surety had required the principal to be sued; and one of the bonds had been sued without effect.

The true principle is, that the surety shall be absolved where the obligee defeats the condition of the bond by his conduct. But that is not the case here; and merely permitting the bond to lay over, is not an extension of credit.

A bare application by a surety to the creditor to sue, does not of course absolve him, if the creditor neglects to sue. It only gives him the right of coming into this court to compel the creditors to sue, or to release the surety.—But this was not done by the person insisting that he was merely a surety. He did not come into this court for relief, but relied on a demand to sue, which was made too late to be of any use; and upon an alleged new agreement made with himself, and not with the principal.

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*The very proposition made by the complainant to pay part of the debt, proves that he felt himself really a debtor for part of the money; and if so, he was principal, and there is an end of the argument on the ground of suretyship.

Mr. K. L. Simons in reply. He contended that where the defendant's answer makes new allegations as to facts not charged in the bill, evidence must be brought in support of the answer; and this is the case with some of the material parts of the defendant's answer in this case, particularly where he insists that complainant is a principal in the bond.

That substantially the complainant can only be regarded as a surety. Greenwood & Higginson had no account nor charge against him. Their account was against Mr. John Rutledge. It is true some of the items of the charges against Mr. J. Rutledge were for advances for the use of the complainant; but they never looked to complainant who was a minor; they looked solely to Mr. J. R. to whom complainant was bound to repay the

money, and he has done so. His joining in the bond cannot alter the nature of the transaction.

That the defendant's not answering the letter of the complainant in 1799, led complainant to rest in perfect security. He considered it an acquiescence.

It was conceded that in the case of Butler v. Hamilton, the complainant had not proved any application to the treasurer to sue the principal, or he would have been released. This is important, for in the case under consideration, there was an application to the creditor to sue the principal, which was neglected: and this lets in the equity contended for, and brings this case within the rule of the decided cases cited.

An agreement was first made between Mr. E. R. and the defendant, that he would take 1000*l.* from E. R. and the crop of this complainant in satisfaction; and complainant then writes to that effect. No answer was given, but he was considered as acquiescing,

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and the defendant's *receiving the money afterwards from complainant, is evidence that he had acquiesced, and he was bound by it.

The complainant's availing himself of the bond of indemnity and the mortgage to protect him against this debt, does not affect his equity as a surety. He had a right to protect himself in every way. But these papers prove that neither he or his brothers ever considered him as a principal in the bond; and surely Mr. J. R. knew the fact, and acknowledged it by his acts.

As to the argument of the defendant's counsel, that no diligence would have been of any avail against Mr. John Rutledge, or would have secured the debt, that is a matter of uncertainty and of speculation, which the court will not inquire into. In the case of Rees v. Berrington, 2 Vesey, jun. 542, the Lord Chancellor said I cannot try the cause by inquiring what mischief it might have done. The indulgence given for that would go into a vast variety of speculation, upon which no sound principle can be built. It would be the same to inquire what disadvantage had resulted from neglecting to sue, when required.

The court took time to consider, and Chancellor JAMES afterwards delivered the decree of the court.

The application on the part of complainant is for a perpetual injunction against an action at law, brought by the defendant against him on a bond given by John, Edward and Hugh Rutledge, to the defendant, as attorney of William Higginson, survivor of Greenwood and Higginson. His principal grounds for obtaining the injunction, are:

1st. That he is only surety, and not principal in the bond.

2d. That the bond was dated the 8th of April, 1793, and payable in five equal annual instalments, and consequently suable when the first instalment became due; but that defendant never put the bond in suit against the principal, until April, 1800, when he was insolvent, though he had been required to do

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so by the complainant, about *fourteen months after the last instalment became due. That defendant therefore has been guilty of such great laches, as to exonerate complainant from his suretyship.

3d. That defendant has changed the nature of the original contract, by a new agreement made with complainant, and by receiving thereon a part of the debt on the bond.

On the other hand, the defendant has alleged, 1st. that the original debt for which the bond was given, was partly for monies advanced to the complainant for his education and necessaries while a minor in England: that therefore he is a principal and not a surety to the bond. 2d. That he never changed the nature of the original contract, by entering into a new agreement with complainant, and by receiving thereon a part of the debt on the bond.

In the case of Butler v. Hamilton, [2 Desaus. 226, 2 Am. Dec. 692], it has been decided by the court, that equity will give relief to a surety, where the obligee has not used due diligence to recover his debt from the principal in the first instance, and has refused or neglected to comply with the surety's request to use that diligence; and also where the obligee has extended the credit longer than the parties contracted for against the surety's consent; but it likewise appears from that case, that it is incumbent on the surety before he can expect relief, to apply to the obligee and require him to sue the principal. However, before we go into the inquiry, whether the complainant in this case is entitled to relief, upon the grounds stated in his bill, it will be necessary to examine whether he was really a surety to the bond, for if he was a principal, there is at once an end of the question on the second ground. The bond is joint and several, and nothing appears on the face of it to shew that complainant was a surety. But to prove him a principal, the defendant has produced the original account for which the bond was given, and from this it appears that the debits and credits were made in the name of John Rutledge, but many of the items on the debtor side, are for monies advanced to complainant and his brother. Being jointly

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charged in the account, there then *arises a presumption, that they were also joint principals in the bond; but the onus probandi, lies upon the complainant; and to make out his case to the satisfaction of the court, it was incumbent on him to prove that he was a surety. We are therefore of opinion, that complainant is not entitled to relief on the

ground of his being only surety. It will of course become needless to examine his second ground. But it is urged in his third ground, that defendant has changed the nature of the original contract, by a new agreement; and therefore that he has released complainant from his bond. Now if the premises are proved, the conclusion will follow. Let us then examine. Complainant states in his bill, that having conversed with Mr. Edward Rutledge on the subject of the bond, they agreed together that Edward Rutledge should pay 1000*l.* and assume the balance of the debt; and that complainant should pay defendant the nett amount of his crop for the year 1799; which agreement was communicated to defendant by letter, and that he acceded thereto. To prove this, complainant has produced his letter which contains no more than the proposition on his part. But defendant in his answer, denies that he ever acceded to the proposition contained in this letter. Complainant's allegation being thus denied by the answer, and no proof being brought to contradict it, according to a well known rule of this court, we are obliged to give full credit to the answer. Complainant then having failed to prove that he was only a surety and not a principal; and having also failed in his proof, that defendant has released him from the bond; and these being, in the opinion of the court, only strong grounds alleged in his behalf.

We are therefore obliged to decide that he is not entitled to the relief prayed for by the bill. Wherefore it is ordered and decreed that the injunction in this case be dissolved, and that complainant do pay the costs of this suit.

November, 1806.

A petition for a re-hearing was afterwards

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presented to *the court, and fully argued before Chancellors James and Thompson.

For the petitioner, it was contended by Mr. K. L. Simons, that the petitioner sets up a claim to the relief of the court, upon two grounds:

1st. That being only a surety for the debt, defendant's conduct to the principal, has discharged his responsibility.

2d. That the defendant virtually agreed to release him on being paid a part of the debt, which was accordingly paid.

The law is admitted that the answer of defendant is evidence. But what is his answer? The bill states that Mr. J. R. was applied to for the payment of the amount filed by complainant, which is admitted.

The averment of defendant however is only an inference of which the court is to judge. (Vide p. 3, of the answer.)

The admission of a consequence in law or equity, will not bind defendant. See the case of Pearce v. Groves, 3d. Atk. 522, Ergo it cannot conclude the complainant.

It must then rest on the account. What privity is there between Greenwood and Higginson, and the petitioner? None.

Could an action be maintained against him? Surely not. The books did not prove the debt to be the petitioner's. As well might an action be maintained against any other person.

But the counsel think it immaterial whether an action could be sustained or not, because Mr. John Rutledge being the head of the family, and there having been some sums advanced to the petitioner, equity will compel him to pay.

The sum advanced to the petitioner was £645. 19s. 6d. The sum claimed on the bond, is nearly £3000. Is the principle tolerable as a general rule? Surely it is not. It goes too far.

Does the connection of the parties vary the

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justice of the *case? Or must the court, because they are brothers, presume the petitioner had no supplies but from his elder brother?

Then it is material to the consideration whether an action would lie. If an action would lie against Mr. H. R. none could be maintained against Mr. J. R. to whom the credit was given, and the charge made. What motley principles of justice would this lead to.

But if all these absurdities were reconcileable, still the advances were paid long before the bond was liquidated; for that is admitted to be the fact, provided the remittances were applied to the advances exclusively. Apply them to the entire extent of J. R's. dealings during the period that H. R. was in England; apply them as they are in the account, and the entire debt for that period has been satisfied. On the 27th November, 1767, £645. 19s. 5d. was the whole amount advanced for H. R.

The entire balance against Mr. J. R. at that time, was £737. 17s. 8d.

On the 31st December, of that year, the sums paid by J. R. exceeded that amount by more than £390.

Did Greenwood ever apply to H. R.? Who compounded interest and principal? Who settled the terms of payment? If he was liable he should have been consulted.

See p. 1 and 2 of the answer, by which it appears that Mr. H. R. was not even consulted.

But it is said it does not appear to the court but that E. R. and H. R. signed for their aliquot parts: but there is no foundation for this idea.

The complainant was regarded as surety in this bond, in the case of H. R. v. the executor of E. Rutledge.

But the defendant contends that the decree in that suit was res inter alios acta, and not conclusive. This is true; but the decree may surely be evidence of a fact, though it does

not bind the rights of one who is no party to it.

Depositions in a former decree in Chancery are admitted to be read, the same matter being then under examination as now. Cases in Chancery 73, 175.

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*Though neither the plaintiff, nor any under whom he claims, were parties to the former cause. Reports of C. Cases, 73. 2 Roll. 679, cited in Comyns. by Kid, vol. 2, p. 306, 3d edition.

If Mr. H. R. should be considered as a principal, on account of the advances for him, he can't be so for £3000 when he received but £600.

It has been said that Mr. J. R. declared his brother H. R. was a principal. This is not proved—if it were, it is not evidence; and it could only extend to the advances.

It appears then that plaintiff was surety and not principal; and this lets in the equitable rule, That a surety has a right to call on the creditor to sue his principal, and if he refuses, it is at his own peril.

In Butler and the comptroller general, it was expressly so declared. In Rees & Berrington—"if the application is made, it is the creditor's duty to comply."

There are several grounds upon which this court has relieved; but the above is the one which has never varied.

Defendant made no application for payment to petitioner till May, 1799, one year after the five installments became due—(p. 2 and 6 of the answer.)

All former applications were made to E. and J. R.—(p. 2 and 7 of the answer.)

The defendant was required to sue Mr. J. R. in May, 1799, but he refused—(p. 5.)

There was a positive agreement with Mr. E. R. to extend the time—(p. 5.)

It is said defendant denies it, and that his answer is conclusive. But this is not so, if the answer be carefully examined—(p. 5.)

Again it is said it was with petitioner's assent the credit was extended. If his assent is proved, there is an end of the question. But defendant cannot give or alter the terms of the assent, by his answer.

It is said the petitioner had notice of the extension of credit, and the letters of J. R.

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are relied on to shew it. But *they are dated in 1799, and petitioner then required plaintiff to sue the bond.

But notice cannot affect the petitioner. It is not like the case of bills and notes. His having notice could not enable him to force defendant to sue the bond.

The bond of indemnity respects other claims besides this one.

The strong equity of the petitioner occurred when the request to sue was made and rejected, in May, '99. And the case of Nesbit and Smith shews that the bond of indemnity cannot affect it.

It is contended that the decree between H. M. R. and H. R. is a bar to the latter in this suit. The counsel has taken opposite grounds on this point. At one time it is res inter alios acta, and cannot be regarded. At another time it bars petitioner, because it was upon the ground of his being bound to the defendant, that it was made. But the truth is, that it embraces various subjects. The bill of petitioner rests part of his equity upon the liability of the funds embraced by that decree to the debt of defendant.

Had the petitioner dropt that suit, it would have relinquished part of his equity.

But it is said that if petitioner succeeds, defendant will be cut off from those very funds.

But this argument is contradictory. In one breath it is said the petitioner must lose his equity because he has rendered those funds amenable to the demand of the defendant, and yet if he succeeds, defendant will not have the benefit of those funds.

It is said the suit might have been useless against Mr. John Rutledge.

In Rees and Berrington the court said it would not speculate on that question.

The payment made by Mr. H. R. in consequence of the agreement, is said to have been merely on account, because it did not discharge the bond. But the creditor by accepting that payment, ratified the terms on

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which it was *offered, and acquiesced therein, and this put an end to the liability of Mr. H. R.

If the court should, after all, not perceive sufficient grounds to reverse the decree, yet it may surely continue the injunction, until the funds destined under the mortgage made by Mr. J. R. to indemnify his brothers, can be made available, for in agreeing to take 1000*l.* from Mr. E. R. and the crop of defendant, he is entitled to the benefit of the securities they had, and ought to wait till they are made productive.

For the defendant, it was argued, where the complainant calls for an answer, that answer is conclusive, unless contradicted by two witnesses. The defendant has denied the allegation that Mr. H. R. was surety, and produced an account, in which are items for the use and benefit of Mr. H. R. and he is not contradicted.

It must be admitted the bond was given in part for the advances to Mr. H. R. He would not inquire whether an action will lie at law, but Mr. J. R. being the head of the family, upon the principles of equity, Mr. H. R. ought to pay for these advances made for his own use.

Admits the account as far as it respects Mr. H. R. would be discharged, if the credits were applied exclusively to that account. But there is no reason why they should be so applied.

Answer states that defendant believes Mr.

J. R. communicated with Mr. H. R. respecting defendant's application for payment. Mr. J. R.'s letters prove it.

Admitting Mr. H. R. merely a surety, Mr. Greenwood has done nothing to discharge him. Mr. H. R. paid two hundred pounds unconditionally on the bond. Defendant expressly swears he did not intend to receive it in full or under any agreement—but as a general payment.

The decree between the executor of E. R. and petitioner was res inter alios acta, as to this defendant.

Consider Mr. Rutledge as surety, the case

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of But*ler & Hamilton, if properly examined and applied, concludes him. The court refused to release the security.

The principal of all the cases on this subject, goes upon the circumstance of the obligee extending the time of payment, and depriving the surety of his right to have the principal sued, when he might require it. Mere indulgence is not enough; it must be such an actual extension of the time of payment as varies the contract.

Was any credit ever given to Mr. J. R. against the consent of the petitioner? Mr. Greenwood offered to sue all the obligors, but it was refused. This shewed that he considered all to be principals. Greenwood never put it out of his power to sue the principal at any moment.

Mr. H. R. knew G. had indulged before the last instalment became due. The bill states that Mr. H. R. inquired of his brother Edward in 1797, respecting this bond, and took a bond of indemnity from Mr. E. R.

There is but one point on which any hope could be reasonably entertained, viz: a release. But what proof of that? The receipt for the £200 is unconditional. The answer is express to this fact, and it was not against the consent of the security that the creditor waited for the £1000 promised by Mr. E. R.

If Mr. H. R. was discharged by laches of the creditor, upon what principle did he apply to the court to indemnify her out of the estates of Messrs. E. & J. Rutledge?

The decree in the suit by H. R. against the executors of E. R. directs an indemnification of petitioner against the bond. This surely admits his liability under the bond.—But if it did not, should a decree made sub silentio govern the rights of third persons? Surely not.

Chancellor JAMES afterwards delivered the decree of the court.

Petition for a re-hearing, and to reverse the former decree in this case.

The court have reconsidered this case with much attention, and with a determination,

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that if there should be *sufficient grounds to retract their former opinion, that they would do so, rather than persist in error. But while they consider it as obstinacy not to give up a former opinion, although convinced that it is wrong; they are also fully sensible, that until such conviction does take place, that it would argue a want of firmness to waiver or to change. Under these impressions, we have reconsidered this cause, rejecting at the same time, as far as we have been able to do, all former impressions upon the subject; and we now offer our opinion fully upon the case.

The grounds which the petitioner has offered for consideration, appear to be nearly the same as those which were submitted to us on the former argument. They are four fold.

1st. That he was surety, and not principal in the bond which was given to the defendant, and therefore entitled to the equity which in certain cases has lately arisen in favor of sureties.

2d. That the obligee was guilty of laches, in not putting the bond in suit against the principal, when required by the surety, and the principal having afterwards become insolvent, that therefore the surety has become exonerated.

3d. That the obligee has changed the nature of the original contract, by entering into a new one with the petitioner; and that the latter is bound only on such new contract.

4th. That the former decree given in this case is repugnant to the decree given in the case of the petitioner against Henry M. Rutledge, (Exor. of E. Rutledge.)

Besides, taking the above grounds, the petitioner has urged, that if the opinion of the court should be still against him, that the injunction be continued, until the funds secured to the petitioner by the latter decree can be brought into operation, and the defendant receive payment from them, so far as they may go.

In delivering our present opinion, we will at present waive the first ground taken by

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the court in the decree, *viz: That the petitioner has failed in proving that he was a surety to the bond, and will proceed to examine the question, as if he were acknowledged a surety, which is a stronger ground for the petitioner.

Then upon the 2d. ground of the alleged laches in the defendant, it appears in evidence that the bond was given on the 8th day of April, 1793, payable in five equal annual instalments—that the first instalment consequently became due on the 8th April, 1794, and the last, on the 8th April, 1798, and that defendant might have commenced his action against the principal John Rutledge, as soon as the first instalment became due; that however he did not do so until April, 1800, about two years after the last instalment became due. It further appears that defendant applied to the petitioner for

the first time for payment of the debt, about fourteen months after the last instalment became due; at which time the petitioner required him to put the bond in suit against the principal, and he declined it, but proposed to put it in suit against all three of the obligors, which petitioner in his turn declined. It is on this statement of facts that the charge of laches against the defendant appears to be founded. Now the equity that is contended for, if it arises at all, must arise in favor of one who is bound by a solemn contract under his hand and seal; and we are of opinion, that before he can on this ground exonerate himself from such contract, he ought first to shew that he himself has been vigilent, "vigilantibus non dormientibus leges subveniunt," is a maxim which appears peculiarly to apply to him who is seeking relief from this court. Besides the very nature of a contract, imposes a duty upon the debtor, either to pay when the debt becomes due, or to shew to the creditor some good cause why he should not; but a contract does not impose an equal duty upon the creditor, to require his debt as soon as it is due. Hence it will result, that when a debt becomes due, it then becomes the duty of the debtor to look out for the creditor, either to pay off the debt, or that if he does not mean

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to pay it, that he may entitle *himself to some equity, that may exonerate him from it. But the petitioner having done neither in this case, he it is who has been guilty of the laches, and not the defendant. Upon this kind of reasoning, we apprehend, that that part of the case of Butler v. the Comptroller is founded, where it is said "that it is incumbent on the security, before he can expect relief, to apply to the obligee, and require him to sue the principal." If it is his duty to apply to the obligee, he ought therefore to have applied in a reasonable time, after the first instalment became due; but it appears, that he waited for five years and four months after that period, before he required the obligee to sue the principal; and even then, that he did not look out for the obligee, to claim his equity, but the obligee looked out for him, to demand payment of his debt. Therefore, both on the ground of obligation or duty, and on the authority of the cases cited, it appears that it is the petitioner who was guilty of the laches, and not the obligee; and consequently, that the petitioner is not entitled to the relief prayed upon his second ground. And this point being determined against him as surety, which is the highest ground on which he could stand, vice versa, as in the decree, it now becomes unnecessary to inquire whether he was a principal or not.

We now proceed to the third ground of the petitioner viz.: That defendant has changed the nature of the contract, and therefore has exonerated him from the bond. To establish this ground, the petitioner states in his bill, "that after the application above mentioned from the said William Greenwood, ("that is the application from him to the petitioner for payment of the bond,") and having conversed with Edward Rutledge on the subject, the said Edward and your orator agreed that your orator should pay the said Wm. the nett amount of his crop of that year, after deducting his plantation expenses: and the said Edward promised to pay one thousand pounds, and to assume the balance of the debt, which proposition your orator communicated by letter to the said William, and

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he ac*quiesced therein." Now it is not pretended that the defendant was a party to the agreement between the petitioner, and Mr. Edward Rutledge. Then let us see how he acquiesced in the proposition of the petitioner. The letter of the petitioner of the 7th June, 1799, to which he refers, contains no more than the proposition on his part, but the assent of the defendant is necessary before a new contract can arise.

Then how is this assent to be proved? His silence of fourteen months is not even urged as an assent; and if it were, we do not see how his silence can be construed into such an assent as to do away an existing contract. But it is attempted to prove his assent by his letter of the 22d of August, 1800, and by his answer. We will first turn to the answer. The defendant has stated in it—"that he denies he ever acceded to the proposition contained in the letter of the 7th of June, 1799, any further than agreeing to wait for the £1000 from the said Edward Rutledge, and the nett proceeds of the crop of complainant; and that in so doing he had not the most distant idea or intention of releasing or exonerating any of the obligors to the said bond from their liability to the payment of the said debt, or any part thereof." Now it is contended that it is immaterial what his ideas or intentions were, if he has in fact exonerated the petitioner. But this letter contains no clear and distinct proposition that defendant must look no further to the petitioner than for his crop of that year; and in fairness, the assent of the defendant must depend upon his idea and intention at the time. If it had been proposed to him clearly, that by thus waiting for his money, he must lose his lien on the bond, is it not to be supposed that he would, in an instant, have rejected the proposal? He would have been the merest novice in the world if he had not. Then we have no idea that men should be thus concluded in their rights, without having a full statement of facts laid before them; nor that while they are extending favors they should be used as weapons against them. Proposals of this collateral

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kind are so com*mon from debtors to creditors, and are so often in favor assented to,

that were this court upon such grounds to extend relief, it would impair the obligation of contracts.—But independent of these considerations, the answer appears to contain a full denial of the assent of the defendant, and therefore it must be taken as evidence against the petitioner, until contradicted by the evidence of two witnesses, or of one witness, and circumstances. However no such contradiction appears. But it is said that defendants letter of the 23d August, 1800, is a partial affirmance of the new contract, and that he is not to affirm in part and deny in part. The passage relied upon in that letter is as follows—"By your letter of the 7th of June, 1799, you engage to pay me the nett amount of your crop of that year, deducting plantation expenses. Upwards of fourteen months have elapsed, and I have received no payment, however you may act with regard to that engagement."

Here the counsel for the petitioner has always stopped, and has inferred from this passage alone, that the defendant has made a partial affirmance of the contract. But even this will not bear him out, for the words, "however you may act," evidently import, that the defendant left the petitioner to do as he pleased as to that engagement, while he at the same time, and in the same breath declares in the foregoing part of the letter, "that he must look to him for the debt," and in the subsequent part of it, "that he was now under an absolute necessity of requiring payment of the whole debt from him." Taking the whole of this letter together, it therefore appears to us that it is rather a disagreement than an assent, to any new contract.

On the 4th ground of petitioner, the court will be very short. The defendant was no party to the suit between the petitioner and Henry M. Rutledge; therefore none of the acts of the parties thereto can conclude his rights; the charges in the bill, and the ad-

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missions in the answer *being as to him, res inter alios acta. This we deem a sufficient answer to this ground.

Therefore upon deliberate reconsideration of this case, the court are clearly of opinion that the petitioner is not entitled to the relief prayed for in his bill upon his 2d ground, because he himself was guilty of the laches complained of, and not the defendant: nor upon his third ground, because no new contract has been proved: nor upon his 4th ground, because the decree in the case of the petitioner and H. M. Rutledge cannot bind a third person who was no party to the same. It remains to consider whether the injunction should be continued until the funds secured to the petitioner can be brought into operation. And upon this application, the court are of opinion, that as the petitioner has failed in establishing his grounds, to entitle him to any relief of this court, they cannot now find one principle upon which to decide, that defendant must wait till it would be in the power of petitioner to bring those funds into operation.—We have not determined that defendant is obliged to receive those funds; therefore there cannot be any good reason why he should be delayed, until the monies arising from them can be raised. The petitioner has already had in the case against H. M. Rutledge, the assistance of this court as far as it could go, in bringing in those funds to his assistance: and there we must stop. Wherefore for the several reasons above stated, the court are of opinion that the petition of the complainant be dismissed, and that the former decree in this case be affirmed.

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2 Desaus. *419

*Case LIV.

[Present, Chancellors Rutledge, James and Thompson.]

FRANCIS PEYRE, FLORIDE PEYRE, THOMAS ASHBY, THOMAS H. JERVEY, and Others v. THOMAS KARWON, Administrator of John Ashby, and of Catharine Ashby.

(May, 1806.)

[*Wills* ⇐622.]

A widow bequeathes by general words, the distributive share she was entitled to in her intestate husband's estate, then undivided, and dies. Her husband was entitled, besides his estate in possession to certain negroes bequeathed to him by a relation, after a life estate given to another person. This life estate did not fall in till after the husbands death, nor indeed until after the death of the widow. Nevertheless her general bequest passes her interest in these negroes.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1444; Dec. Dig. ⇐622.]

[*Husband and Wife* ⇐11.]

A husband is entitled exclusively to his wife's estate, though not actually reduced to possession by division, during the coverture.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 51; Dec. Dig. ⇐11.]

Lewis Bocket bequeathed inter alia certain negro slaves to his wife for life, and at her death to John Ashby. John Ashby died intestate, in the year 1793, before Mrs. Bocket, and after the passage of the act abolishing the rights of primogeniture, leaving a widow, Magdelaine Ashby and a daughter Catharine Ashby. Thomas Karwon administered on the estate of John Ashby, and possessed himself thereof. No division of the estate of John Ashby was made in the lifetime of his widow, Mrs. Magdelaine Ashby, who died in the year of our Lord, 1801.

She left a will duly executed, and in force at her death, by which she bequeathed, after a few legacies to other persons, the rest and residue of her estate, including what she was entitled to from her husband's estate, to her daughter Catharine Ashby; but if she died without leaving children, then to her niece Floride Taylor, and her nephew Thomas Ashby, to be equally divided between them.

Catharine Ashby, the daughter, died on the 21st September, in the year 1802, under age, unmarried and intestate, and Thomas Karwon administered on her estate. Floride Taylor, the niece of Magdelaine Ashby, mar-

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ried *the complainant, Thomas H. Jervey, and died in November, 1802, without issue, leaving the complainants her next of kin. But her husband the said Thomas H. Jervey, administered on her estate, and claims with the rest of her property, her proportion of that part of the estate of the late John Ashby, to which Mrs. Magdelaine Ashby was entitled, and which she had bequeathed in case of the death of her daughter Catharine, without leaving issue (an event which has occurred) to her niece, Floride Taylor, and her nephew, Thomas Ashby. A suit was instituted by Thomas Karwon, in the form of a bill of interpleader, for the purpose of obtaining a decision by the court, who were the next of kin entitled to distributive shares of the estate of Catharine Ashby, the daughter, and the court accordingly made their decree therein, in favor of two of the present complainants, Francis Peyre and Floride Peyre. (Vide ante, p. 210 to 214.)

And afterwards another suit was instituted by Francis and Floride Peyre, the nearest relations of the deceased, Mrs. Floride Jervey, claiming a distributive share under the act of February, 1791, of the estate, to which she was entitled, but which had not been actually reduced to possession during the coverture; and denying the exclusive right of the husband to the whole of such estate. But the court decided that the husband was exclusively entitled to the whole. (Vide ante, page 221 to 226.)

On the death of Mrs. Bocket, and since the decrees made in those cases, the defendant Karwon hath possessed himself of the negroes bequeathed by the said Lewis Bocket, to the said John Ashby, which are supposed to be divisible among the legatees of the late Magdelaine Ashby, the widow, and the next of kin, of the late Catharine Ashby, the only child of the said John Ashby; but other claimants set up pretensions thereto. The bill was filed to recover the respective proportions of the complainants in said property.

After hearing argument, Chancellor RUTLEDGE delivered the decree of the court.

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*The complainants bill in this case, prays that the defendant may make a division among them according to their respective rights, of sundry negroes which he has obtained possession of that were left to his intestate John Ashby by L. Bocket, after his widow's death. And the complainants Thos. Ashby and T. H. Jervey claim a proportion of them under the following clause of Magdelaine Ashby's will:—"I give and bequeath all the residue and remainder of the property or proportion of the undivided estate of my deceased husband, whether in lands, negroes, stock, &c. or whatever the same may be in; and all such, or any other property I may be possessed of or entitled unto, in any other manner whatever, unto my daughter M. C. Ashby, to her and the heirs of her body; but should my aforesaid daughter die, leaving no child or children, then and in that case, I do give and bequeath the same to my niece Floride Taylor, and my nephew Thos. Ashby, to be equally divided between them share and share alike, to them and their heirs for ever." The testatrix's daughter M. C. Ashby died an infant, intestate, and unmarried.—The only question for consideration is, whether complainant T. Ashby in his own right, and T. H. Jervey in right of his wife Floride, who is now dead, are entitled under the will of Magdelaine Ashby, to any and what part of the negroes bequeathed to her husband by L. Bocket? This is a plain case. L. Bocket having died in the life time of J. Ashby, the devise to him was clearly a vested interest, and transmissible to his representatives by will or otherwise. J. Ashby dying intestate, his wife (Magdelaine Ashby) of course became entitled to one third part of the negroes bequeathed to him as aforesaid. M. C. Ashby, the daughter, being dead, an infant, intestate and without issue, the complainant T. Ashby and Floride Peyre who married complainant T. H. Jervey, became by virtue of Magdelaine Ashby's bequest, legally entitled to her share of the negroes bequeathed to J. Ashby by L. Bocket. It is therefore ordered and decreed that the defendant do deliver over to complainants T.

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Ashby and T. H. Jervey *respectively, such third part or share of the said negroes; and the remaining two third parts to be distributed among the complainants, according to their interests therein, and that the costs be paid out of the estate.†

Mr. Gallard for complainants.

Mr. Croft for defendant.

† It appears that at the time of this decree, the court was of opinion that the husband surviving his wife, was entitled exclusively of her next of kin to her whole estate, even that part not actually reduced to possession during the coverture, according to the old doctrine established prior to the act of February, 1791, abolishing the rights of primogeniture, and making more equal division of intestate's estate, and therefore decrees to T. H. Jervey, in this case, all that his deceased wife was entitled to in this estate. But the Court of Appeals upon a fuller examination of the provisions of that act, and fuller argument thereon, has since decided that the estate of the wife not actually reduced to possession, and ascertained by division, does not belong exclusively to the husband, but is distributable according to the provisions of the act of February, 1791. See 3d vol. of Chanc. Rep. p. 135, 147, 8, 155. See also 12 Vesey, 497, where it is decided even in England, where the law is more favorable to the husband in this respect, that the possession by the husband as trustee or executor, is not such a reduction into possession as entitles him to the property.

2 Desaus. 422

Case LV.

[Present, Chancellors Rutledge, James and Thompson.]

NICHOLAS CRUGER, and ANN SARAH, His Wife, v. THOMAS HEYWARD, and ELIZA, THOMAS and JAMES HEYWARD, Minors, and ELIZA M. HEYWARD, a Minor.

(May, 1806.)

[*Wills* ⟸587.]

A devise by H. of all his estate, and of all the rest, remainder and residue of his estate, disposes of the contingent interests and remainders which he had in an estate, that did not vest in him during his life. The court will not conjecture whether the testator had it in contemplation to dispose of this contingent estate; but will give effect to the words of the will, according to their plain import.

[Ed. Note.—Cited in Canedy v. Jones, 19 S. C. 301, 45 Am. Rep. 777.

For other cases, see Wills, Cent. Dig. § 1289; Dec. Dig. ⟸587.]

The bill set forth, that complainant Ann, before her intermarriage with complainant, Nicholas Cruger, was the widow of Daniel Heyward, deceased.

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*That Colonel Daniel Heyward, grandfather of the said Daniel, being possessed of a very considerable real and personal estate, made his will on the 7th June, 1776, whereby he devised his Island, called Callewashie, and the slaves, stock, &c. thereon to his son Thomas, in trust for his son Daniel, during his natural life, and at his death, to be divided by his executors among his heirs in the manner therein directed.

That afterwards the said Col. Daniel Heyward made a codicil to his said will, dated 15th July, 1777, whereby he revoked the above devise, and disposed of the said Island Callewashie, precisely as follows:

To his son Benjamin, but in case he die without lawful issue, to his grandson, Daniel Heyward, and his heirs for ever.

That the said Col. Daniel Heyward, shortly after died, leaving the said codicil of force. That the said D. Heyward, the grandson, being possessed of a considerable real and personal estate, made his will on the 20th February, 1796, wherein he devises and bequeaths as follows, to wit:

"Item. It is my will, that until my much loved daughter Elizabeth Mathews Heyward shall be married, or attain the age of 21 years, my dear wife shall have and enjoy the use and profits of all my estate, if she remain as long my widow; and when my said daughter shall be married or attain that age, then the use and profits of all my estate shall be equally divided between my said daughter and wife, as long as she shall continue my widow; and from and immediately after the second marriage or death of my wife, then I give, devise, and bequeath all the rest, remainder and residue of my estate to my said daughter, her heirs, executors, administrators and assigns.

"Item. If I should have no child who shall live to be married, or attain the age of 21 years, then it is my will that my much loved wife shall have the use and profit of my estate as long as she shall continue my widow. Item. If I should leave no child who shall live to be married or attain the age of 21

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years, then upon the second marriage *or death of my wife, I give unto Eliza Thomson the sum of £1000 to be paid by five equal annual instalments; and all the rest, residue, and remainder of my estate, I give, devise, and bequeath to be divided in the following manner, that is to say, one half thereof to my sister Eliza Heyward, and her heirs, &c. and the other half to be equally divided between my brothers Thomas and James Heyward, and their heirs, &c."

That the said Daniel Heyward, in a few days after making his said will, and in the same month of February, 1796, died, leaving it in full force.

That his said daughter Elizabeth M. Heyward, is a minor under the care of her mother. That about seven months after the death of the said Daniel Heyward, the grandson, viz. about the day of September, in the same year 1796, the said Benjamin Heyward died under 21, unmarried, and without issue. That D. Heyward, the grandson, having died before the said Benjamin, who was then a healthy young man, and the said Daniel having but a contingent interest or estate in the said island Callewashie, could not reasonably be presumed to have it in contemplation, or to intend when he made his said will to comprehend the same therein, or to devise it thereby; more especially as there are in the said will no words expressive of any contingent interest or estate in expectancy or remainder; and although he may have made use of the words residue and remainder of my estate, they must be reasonably construed to apply to and be restricted to the estate which was then vested in him, or in his possession; and if the said island Callewashie be considered as undevised by the said will, then the complainant will be entitled to an undivided third part thereof, according to the act for distributing the real estates of intestates. And that complainants have applied to defendant Thomas Heyward for the title deeds and papers relating to the said island Callewashie, but he has refused to deliver the same, although the complainant is entitled to the possession thereof, whether she is considered as a coheiress of

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*that island, or only as executrix of the will of her former husband. That defendant insists the complainants are not entitled to any part of the said island, but that it will fall under the residuary clause of the will

of the said Daniel Heyward the grandson, to defendants children the said Eliza Thomas and James Heyward, upon the said Elizabeth M. Heyward, the daughter of the said Daniel, dying unmarried, and under 21. But complainants state that the said island, upon the death of Benjamin, without issue, was vested in the representatives of Daniel, the grandson, as a part of his estate and undevised by him, and that he must be considered as having died intestate as to that island.

Bill prays that the court would decide whether complainants are not entitled to one undivided third part of the said island Callewashie, and that defendant may discover and deliver to complainants all deeds, titles and papers in his possession relative to said island. Bill prays for a subpœna and for a commission to appoint a guardian for, and to take the answer of Elizabeth M. Heyward, the minor, and for relief.

The answer of Thos. Heyward, admits that defendant's father, Col. Daniel Heyward, being possessed of a considerable estate, real and personal, made his will and codicil as stated by complainants; and that the extracts therefrom, inserted in the bill, are correct, and that he died soon after making the said codicil, leaving his said will and codicil in force.

Answer admits that Daniel Heyward the son of this defendant, and grandson of Col. D. Heyward, being also possessed of a considerable real and personal estate, made his will, of which the extracts in complainants bill are a true copy, and died soon after, leaving the same of force. That the said D. Heyward left alive at the time of his death, an only child named Elizabeth M. Heyward, a minor, now in New-York under her mother's care.

That after the death of the said Daniel Heyward, the grandson, Benjamin the young-

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est son of the said original *testator D. Heyward, to whom he had devised Callewashie, (and upon his death, without lawful issue, he devised it to his said grandson Daniel Heyward, and his heirs forever,) departed this life in the month of Sept. 1796, under 21, unmarried and without issue.

The answer states that defendant cannot admit complainants reasoning, adduced to shew that the said Daniel Heyward having but a contingent interest in the said island Callewashie, dependent on the life of Benjamin Heyward, then a young man, "could not reasonably be presumed to have it in contemplation when he made his said will, or intended to comprehend the same therein, and to devise it thereby; more especially as there are in the said will, no words expressive of any contingent interest or estate in expectancy or remainder." On the contrary, defendant contends that without pretending to conjecture what part of his estate vested or contingent, passed in review of the mind of said D. Heyward, or what rights and interest he had in his contemplation at the time of making said will, (which conjecture would be extremely dubious in any case of a will made in the distress of a last sickness,) the plain and comprehensive words of the will, from which the intent is to be gathered, do pass whatever contingent interest the testator had in the island Callewashie to his daughter E. M. Heyward, and in the event of her decease, unmarried or under 21, to the brothers and sister of the said testator, being the children of defendant; who became thereby entitled (in the order he has prescribed) to all the estate, real and personal, vested and contingent, which the testator himself was entitled to, or was interested in: and defendant is willing to submit to the construction which the court may give to the said will. The answer admits that complainants have applied to defendant for the title deeds and papers relative to the said island Callewashie, and that defendant has delivered the same to his counsel, who are instructed to deliver them up to such person as the court may think has the best right to the same.

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*The answer of Eliza, Thomas and James Heyward, minors, by Thomas Heyward, their father and guardian, states, that defendants are strangers to all the matter contained in the bill, otherwise than they have heard that Col. Daniel Heyward, their grandfather, being possessed of a considerable estate, made such will and codicil as complainants have set forth, and that Daniel Heyward, the grandson of the said Col. D. Heyward, being also possessed of a large estate, made such will as is set forth by complainants, and died at the time mentioned in bill. That defendants have heard that Benjamin Heyward, the youngest son of the said Col. D. Heyward, died under age, unmarried and without issue; and that their brother, the said Daniel Heyward, the grandson, made some provision for defendants in his said will, in the event of Elizabeth M. Heyward, his daughter, dying under age, and unmarried.

That defendants being infants, submitted themselves and all their rights and interests to the care and judgment of the court.

The answer of Eliza M. Heyward states, that she is a stranger to all and singular the matters contained in the bill, and admits that the circumstances stated in bill may be true. The death of the parties, and their estates may be correctly stated. That defendant being an infant, submits her rights to the protection of the court.

The cause came to a hearing, and was argued by Mr. Parker and Mr. Pringle and Mr. Cross for the complainant.

They contended that the contingent interest which Daniel the grandson had in the Callewashie estate, could not have been in his contemplation in devising his estate, and

was not intended to be passed by the words used in his will, and did not pass thereby. That the testator cannot be supposed to have meant to dispose of any other estate than what he had in possession. 3 Term. Rep. 88.

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*The estate in the son Benjamin, under his father's will, was a fee simple conditional. 2 Atk. 170. The interest of Daniel, the grandson, was a mere possibility, a contingency, which could not pass under the words, "all my estate." 6 Vesey, 577, 8.

A contingent interest never has been allowed to pass under a will, but by express words. See Merchant and Twisden, Gilb. Rep. 30. Strong v. Treat. 2 Burr. 8 Term. Rep. 118. 3 P. Wms. 55. 3 Ves. 225. 2 Vesey, 48.

Mr. Ford and Mr. Desaussure, for the defendants Thomas Heyward and his children, by the second marriage, contended, that there was a plain and distinct estate in remainder in the Callewashie property, in Daniel the grandson, to take effect on the death of Benjamin Heyward without lawful issue. That this was such an interest as was devisable by Daniel the grandson; and that the devise of "all his estate," and of the "rest, remainder and residue of his estate," by the grandson Daniel, did carry every estate which he possessed, real and personal, in possession or remainder. And that to go into conjectures whether the testator had in his contemplation this or any particular estate, and not other estates, would introduce extreme uncertainty and endless litigation. That there was but one sound rule of construction in seeking the intent of the testator, which was to examine carefully the words actually used in the will, and to give them their natural and full effect. In this way, the court would proceed on sure grounds, and not upon conjecture. The counsel cited 1 Fonbl. 201. 2 P. Wms. 524. 1 Term. Rep. 411. 1 Burr. 417. Cowp. 363, 808. 4 Term. Rep. 605. 1 Atk. 411.

Mr. Gaillard for the defendant Eliza M. Heyward, argued that it was the intention of the testator that if his wife married again, she should have no part of his estate. She has married again, and cannot support any claim to any part of the estate.

He cited 1 Fonbl. 207, 209. 1 Vesey, 438, 494.

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*Chancellor JAMES afterwards delivered the decree of the court:

The question to be decided by the court in this case, arises under a clause in the codicil to the will of Colonel Daniel Heyward, and a clause in the will of his grandson, Daniel Heyward. These clauses are in substance as follows:

Col. Daniel Heyward devised his Island, called Callewashie, "to his son Benjamin, but in case he die without lawful issue, to his (the testator's) grandson Daniel Heyward, and his heirs forever." The grandson, Daniel Heyward, afterwards made his will as follows:

"It is my will, that until my much loved daughter Elizabeth Mathews Heyward shall be married or attain the age of twenty-one years, my ever dear wife shall have and enjoy the use and profits of all my estate, if she remain as long my widow; and when my said daughter shall be married, or attain that age, then the use and profits of all my estate shall be equally divided between my said daughter and wife as long as she shall continue my widow; and from and immediately after the second, marriage, or death of my wife, then I give, devise and bequeath all the rest, remainder and residue of my estate to my said daughter and her heirs, executors and administrators and assigns."

By the above codicil, Col. Daniel Heyward devised a fee conditional at common law to his son Benjamin, with remainder in fee to his grandson, Daniel Heyward, to vest in possession upon the death of his son Benjamin without lawful issue. The grandfather Daniel, died; next the grandson Daniel died, (leaving alive his wife and one child Elizabeth;) and lastly the son Benjamin also died, unmarried and without leaving lawful issue. The question is therefore whether this remainder (in the Callewashie estate) will pass by the devise, to Elizabeth Mathews Heyward, the daughter of the grandson Daniel Heyward, the mother being married? Or whether Daniel Heyward the grandson shall be decreed to have died

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in*testate as to that part of his estate? The complainants counsel contend that this remainder was so remote that he could not have had it in contemplation at the time of making his will; that it was a mere possibility, and that there should have been express words to pass it. Defendants counsel rely upon the very general words in the will, "all my estate," and "all the rest, remainder and residue of my estate," and contend that they are sufficient to carry the remainder in fee. It is admitted on all hands, that a possibility may be devised, and the cases are clear as to that point. The question therefore is narrowed down to the single point, whether the possibility in this case passed under this will? Now it plainly appears that the testator has used in this devise the most general and comprehensive words that he could possibly have used. Had he descended to particulars and omitted this contingency, then there would have been a doubt; and the maxim of law, "expressio unius est exclusio alterius," might have applied; but he has pursued the most safe way, and made use of the most general expressions, "all my estate," and "all the rest, remainder and residue of my estate." Now that learned lawyer, judge Buller, has said that the word "estate" is the most general word that can be used; for it is genus gen-

eralissimum; and Lord Holt has also laid it down in the case of the Countess of Bridgewater, against the Duke of Bolton, "That the devise of all one's real estate comprehends not only the thing but also the interest in it." And again it is laid down by Judge Blackstone in his commentaries, 2d. vol. page 103, "If a man grants all his estate in Dale, to A. and his heirs, every thing that he possibly can grant shall pass thereby." The words "all my estate," being so general and comprehensive, the next words to be considered are, "all the rest, residue and remainder;" and these being joined in the same sentence with the words "all my estate," must refer to them as their antecedent; and the rule of construction ex antecedentibus et consequentibus fit optima interpretatio," must govern; consequently all

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the estate of the devisor, *after the falling in of the provision made for the wife, while she continued his widow, must pass by the will.

Therefore upon the authority of the cases cited, upon the very comprehensive words used in the will, and the construction of law arising upon the same, the court are of opinion that the remainder in fee did pass thereby.

Wherefore it is decreed that the bill of complainants be dismissed, and that they do pay the costs of this suit.

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2 Desaus. 431

Case LVI.

[Present, Chancellors Rutledge, James and Thompson.]

JOHN COMBE, and Others, Trustees of the Primitive Methodist Church, v. WILLIAM BRAZIER and PHILIP MATHEWS.

(May, 1806.)

[*Charities* ⇐29; *Religious Societies* ⇐21, 27.]

A deed was executed conveying certain lands and buildings to trustees of the Methodist Episcopal Church, and giving power to H. and on his death, to B. to nominate a minister for that congregation. Provided however, that such minister should preach the doctrines of Mr. Wesley, according to certain specified books written by him.

The nomination by B. of a minister, who had been read out of the Methodist Church, and who had been ordained an Episcopal Minister, and had officiated as such; and the delivery and conveyance of the Church and Parsonage to such a minister, and for a sum of money, is not such a nomination or conveyance, as can be supported under the deed; however such minister may pretend to conform to the regulation of preaching Mr. Wesley's doctrines.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 60; Dec. Dig. ⇐29; Religious Societies, Cent. Dig. §§ 145, 180; Dec. Dig. ⇐21, 27.]

The court decreed that the conveyances should be set aside and cancelled.

This bill was filed to set aside a sale and conveyance alleged to have been made by William Brazier, to Philip Mathews, of a church and parsonage house, belonging to the Primitive Methodist Church, and converted into an Episcopal Church, without the consent, and against the will of the congregation.—And to have the deeds of sale and conveyance cancelled, as illegal and void.

The bill of John Combe, Wm. Fair, Samuel Pilsbury, David Rechon, Samuel Nobbs and

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John M'Kee, trustees of *the Primitive Methodist Church, states, that in Feb. 1792, some persons living in Charleston formed themselves into a religious sect named Primitive Methodists, and determined to procure a piece of ground in Charleston to build a church upon, dedicated to the religious use of said sect, proposing to pay therefor by subscription. In pursuance of such design, they agreed to purchase a lot of John Eberly, now deceased; the conveyance of which was to be made to John Gordon, one of said sect, who was to convey the premises for the uses hereinafter mentioned.—That said Eberly for six hundred pounds gave a release dated 15th February, 1792, of the premises to said Gordon in fee simple. And to secure the payment of said money, Gordon gave his bond to Eberly, dated 15th Feb. 1792, payable 15th February, 1798, and a mortgage of the premises; which have been since satisfied out of the funds of said sect, except £100. That said Gordon, by indenture, dated 27th April, 1792, made between himself and Geo. Sinclair Capers, Abraham Seaver, John Combe, Benjamin Darrell, Charles Desel, Wm. Hutchins, Joseph Baker, Wm. Favi and James Mylne, in consideration of 5 shillings, granted unto them and their heirs and assigns for ever, the said Lot, together with one adjoining described in the bill, upon trust that they and their survivors, and the trustees for the time being, should permit the Rev. Mr. Hamett, one of the elders of the Methodist Church in this city, and such others as he should appoint during his life, to enjoy the use of the church, and other buildings intended to be erected on said premises; and that he and such others as he should nominate, were to occupy and preach there; and after the death of Mr. Hamett, the complainants or their survivors, were to permit the Rev. Mr. Brazier, then of Jamaica, (should he survive said Hamett) and such other as he should appoint during his life, to have the same privileges as Mr. Hamett; and after their death, if a body of ministers of their union should exist, a president should be chosen annually: and that complainants and their survivors and trustees for the time

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be*ing, should permit the said president and such other as he might appoint during his presidency, to enjoy the same privileges, provided that no other doctrine should be preached than what is contained in Mr. Wes-

ley's notes upon the new testament, and four vols. of his sermons. That as soon and as often as said trustees should die, or cease to be members of said sect, the rest of them or a majority should fill up their vacancy from other members, in order to keep up the number of five, seven, or eleven for ever. —And that in case the conference of ministers of said Hamett or Brazier's union should cease to appoint a president for two years, then the majority of said trustees, with a majority of the white members, should choose their own minister. In case it should be deemed necessary by said trustees or a majority to raise a sum not above £500. for erecting buildings on said lot, then upon trust to permit said trustees or a majority, to grant the same to such persons as they should think proper, as will appear by the deed, &c. That said trustees and other members did proceed to build on said lot a church and parsonage house, and other out buildings at considerable expense. That by an act of the legislature, passed 21st December, 1793, the said congregation was incorporated under the name of the Primitive Methodists of Trinity Church, Charleston. That said Rev. W. Hamett died about 15th May, 1803: soon after which, the said Philip Mathews endeavoured to obtain possession of said church to officiate therein as minister; but a considerable part of the congregation were adverse thereto, and were determined to prevent his exercising such duties; more especially, as he had been read out of the said congregation; and because it was conceived that according to the trusts of the deed, Mr. Brazier had a right of succeeding Mr. Hamett. That said Brazier, who lived near Augusta, some short time after the death of Mr. Hamett, returned to Charleston, and opposed Mathews, asserting his own right under the said trust deed. In so doing, Mr. Brazier was then supported by a majority of the church; and he was therefore per-

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mitted to *resume the functions of minister to the church, and continued so to do for nine months. That soon after that time some of complainants and others were informed that Mr. Brazier, without communicating on the subject to complainants and others of the congregation, and against the intent of the deed, and the constitution and by laws of said society, for certain pecuniary advantages, entered into contract with Mr. Mathews, to yield up to his use the said church and premises, it being the declared views of said Mathews to convert it into an Episcopal Church, and to draw a living from the rents of the pews, he having procured himself to be ordained a minister of the Episcopal Church. That complainants have been informed that the price to be paid by Mr. Mathews to Mr. Brazier for his own gain for so surrendering, was the sum of $500 in cash, and a bond of his, with the Rev. Thomas Frost as surety, for the payment of $500 annually for six years.—That in pursuance of said contract, Mr. Brazier executed a deed in writing, which after reciting the above deed from Gordon to Complainants, states, that in consequence of indisposition, and incapability of travelling, and inability to perform the trusts in the above deed, and for other good and special considerations, and to the purpose that the above deed of Gordon's should be carried into effect, he the said W. Brazier nominated the Rev. Philip Mathews and the Rev. Thomas Frost, protestant ministers of the Episcopal Church, to take possession of said Trinity Church, and to keep the same in their possession, according to the intent of the aforesaid deed, during the period of the life of said Brazier, and also to have and to hold to their use or the survivor of them, the appurtenances, &c. belonging to said premises: and that also he appointed the aforesaid Mathews and Frost to officiate in, and to have the controul over the church, called St. James, situate on Charleston neck, in such way as they shall think best to promote the word of God: And he assigned over all his right to said premises, to the intent that they might have the

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same power over all the premises, as *he the said Brazier would have if said deed were not made. This deed was dated the 24th March, 1804. Complainants soon after were informed that Mr. Mathews and Mr. Frost meant to convert the church into an Episcopal one, and lease out the pews; all which would be derogatory to the terms of the said trust deed, and to the constitution and by laws of said church. That Mathews has possessed himself of the parsonage house and other buildings. That Brazier soon after receiving the purchase money aforesaid, removed to or near Columbia, (S. C.) relinquishing his clerical functions and practising as a physician. That complainants being desirous of counteracting the above views, communed on the subject, and on recurring to the trust deed, it was found that most or all the trustees were either dead, or had ceased to be members of the said church, or had resigned as trustees, except John Combe; and at a meeting of a number of the members of said society, Combe, with the consent of the members, appointed the present complainants trustees, and a number of the members approved of such nomination.

Complainants say that as a conference of ministers of Hamett's union did not then exist, they apprehend that such appointment of trustees was as regular under the trust deed as existing circumstances would admit; but should there be any irregularity, the complainants hope for the aid of this court in supplying the same.

That Mathews and Mr. Frost, (particularly the former) in furthering the plan of converting said church into an Episcopal Church,

caused an advertisement to be inserted on the 27th June, 1804, that divine service would that day be held at Trinity Church, when suitable prayers would be performed by the Rev. Mr. Mills, and a sermon adapted to the occasion preached by the Rev. Mr. Frost. That on the morning of said day, some of the members caused the doors and windows of the church to be fastened, hoping thereby to divert them from their object; but Mathews caused them to be forced open, and a sermon dedicating the church was preached by the

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Rev. Thomas *Frost. That said Mr. Frost has since died, and Mathews has proceeded to rent said pews, and appoint a vestry and church wardens, and has conformed the church in all respects to an Episcopal one—all which acts are inconsistent with the customs of the Primitive Methodists. Complainants have been informed that Mathews intends making alterations in said church. They apprehend that Mr. Frost and Mathews being ministers of the Episcopal Church, could not consistently with their engagements as such, (and Mr. Frost in addition thereto, consistently with his engagements as rector of St. Philip's,) accede to the appointment of Brazier, more especially as Mr. Frost was never of the persuasion of the Methodists. On the contrary, it is manifest that their intentions are to convert it into an Episcopal Church: all which actings of Brazier and Mathews are in direct violation of the trust deed. Complainants pray that Mathews and Brazier may be compelled to set forth and discover the matters alleged in bill upon their corporal oaths; and, in the mean time that they may be restrained from using said church, and that they may be compelled to account for the profits derived from the rents of the pews, &c. Bill prays for relief.

The answer of P. Mathews admits that certain persons at time and place in bill mentioned, did form themselves into a religious society, and distinguished themselves by the name of the Primitive Methodists. Defendant believes that only one or two were members at that time. That they determined to get a piece of ground in Charleston, for the purpose stated, and that subscriptions should be procured, not only from the members of said society, but generally. But it does not appear from the documents that either of complainants have ever paid, and defendant believes that neither of them has paid any thing towards the church or premises aforesaid. Defendant does not know by whom the purchase of the lot of land was made, but

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believes it was made by the late Rev. *William Hamett and William Brazier, with consent of said society, and for the purposes in deed (referred to) expressed. Admits that conveyance was made as stated and the purchase money was to be paid as the complainants have alleged. Admits the deed, bond and mortgage given as has been stated, but satisfaction was made after defendant took possession of said church, which was between five and six years ago. That for three years of the above period, the defendant officiated as minister, and was superintendent of their conferences, duly appointed according to the rules. That at the time defendant took possession, there was not in the society box, £5. of funds. That through this defendant, collections were received, many pews taken, and by these means defendant paid £350. on the bond aforesaid, including about $500 or $600, which were due to defendant, as minister, which he could have appropriated to his own use, at any time from the box aforesaid, but which he applied in the manner stated. The stewards of said society promising that defendant should be reimbursed with interest, when defendant should wish it; but defendant has not hitherto received any part of it. That the receipts given of the money paid as aforesaid, are to this defendant, and in his name. Admits there is a balance due on said bond. Admits the deed from Gordon to the trustees mentioned; and that the church with the buildings, have been erected on the lands purchased; but whether with and from the funds of said society, defendant knows not; but believes the funds belonging to Mr. Brazier were applied by him to purchase materials for the parsonage house. Defendant believes that William Seiver and William Baker, two of the trustees, were the principal workmen employed on the buildings erected. That they, with Mr. Mylne, another of the trustees, were then and are now members of said church. Defendant admits the conveyance from Mr. Vicars, and that the buildings mentioned were built by money raised by subscription generally. Defendant believes that said church was built chiefly from the

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contribution of Mr. James Smith. *Defendant does not believe that complainants contributed towards the said erection. Admits Mr. Hamett did preach in said church, but without permission; does not believe Mr. Brazier has ever preached there. Defendant has preached there during the life time of Mr. Hamett. Admits that the society was incorporated at the time mentioned, and that Mr. Hamett died at the time stated. This defendant was superior as superintendent to Mr. Hamett. Soon after the death of Mr. Hamett, defendant (wrote as superintendent) to the stewards of said society, to deliver the keys of the church to Mr. Munds, which they were bound to do from the rule.

Mr. Hamett attempted once in a state of intoxication, to read out defendant and Mr. Munds. Defendant did not endeavour to obtain possession of said church in any other way, but the order to deliver the keys to Mr. Munds, nor did defendant endeavour to officiate therein. Defendant did think he could preach there, or appoint some one to do so,

but was advised by a gentleman of the bar, that his right must give way to Mr. Brazier's. Being informed of the rights of Mr. Brazier, defendant relinquished all claims. Defendant believes Mr. Brazier did afterwards officiate; for on application for the money aforesaid, Mr. Brazier with the stewards of said society, gave their notes to this defendant, which still remain unpaid. Defendant knows not of any terms imposed on said Brazier, before he was permitted to preach. Nor does he know if any or what promises were made by Brazier, about the manner of exercising his power, or the objects in whose favour he should exercise it, of appointing under the deed of Gordon, as Mr. Hamett had the right of preaching & appointing to preach during his life time. Defendant conceives Mr. Brazier stood in the same situation as Mr. Hamett. Admits the deed from Mr. Brazier to himself and Mr. Frost; but is ignorant whether with the approbation of said society or not: said Brazier was unable to officiate, and did make the aforesaid deed. That it was agreed to pay Mr. Brazier $500 per an-

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num, for six years, for the *transfer of his right, in which he had a life estate. Admits that he has been ordained an Episcopal Clergyman, but denies he is incompetent to preach in said church. Defendant avers the doctrine now preached to be the same as formerly, as also the prayers. It is true that night meetings are abolished; such meetings being considered unlawful. That defendant has nothing to do with renting of said pews; every right vested in him from Brazier's deed, he transferred to the trustees previous to the filing the bill of complaint, for the purpose of carrying Gordon's deed into execution. Defendant is to officiate in said church, and receive such salary as is allowed by the trustees.

As to the charge of defendant's converting said church into an Episcopalian church, he has been under the control of the congregation, and preaches only the doctrines expressed in the deed of Gordon. Defendant admits that he caused the gates and doors of the church which had been fastened up by complainants, or some other persons, to be opened. Denies that the trustees under Gordon's deed have resigned as such, and have ceased to be members of said congregation. That by the laws of said church, Combe had no right to appoint trustees. He says that a dedication sermon was to be preached by the Rev. Mr. Frost in said church. That a time was appointed for it and notice given to the public. That said sermon was not preached, in consequence of assurances given by Mr. Pringle, that the matters of difference should be brought speedily before this honorable court; but as they were not so brought, Mr. Frost and defendant believing that complainants entertained improper views, a sermon was afterwards preached. Pews have been made, (but not by defendant's order) which is not repugnant to the by-laws of said church. Defendant admits that having taken off the locks put on the church doors by Mr. Pilsbury, and a few others, he performed divine service. There were a few opposed to him who were members when Mr. Brazier officiated. Admits that three or four persons were buried in

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*St. James's Church yard by his permission, for which no charge has been made. Defendant says, that complainants ceased to be members of said church several months before the dedication, while Mr. Munds, a methodist preacher officiated, by absenting themselves, and taking tickets of admission to the society of methodists in Cumberland-street; and since their admission, have taken the sacrament, and attended preaching in said street. The two societies never have been united, and differ in many respects. That he possesses some papers relative to the church, which he is ready to produce; all which matters defendant is ready to prove, and prays to be dismissed with costs.

The answer of William Brazier states, that he arrived in Charleston, in the year 1791, and joined the Reverend William Hamett in forming a religious society, termed Primitive Methodists. That he and Mr. Hamett acted as pastors or preachers to said society. That he opened a subscription for purchasing a lot, and building a church thereon, for said society. That contributions were made generally by the people of Charleston; and particularly by the members of said society; the church was consequently built (now called Trinity Church,) which together with the lot on which it is built, were conveyed agreeable to the deed referred to in complainants bill.

William Hamett was rector of said church until his death, when this defendant took possession of the parsonage house, and became preacher in said church, conceiving he was warranted by the terms of the deed.

This defendant saith that he never departed from the tenets and ordinances of said church, and while incumbent of said church, he preached the doctrines of Mr. Wesley, prescribed in the above said deed. That defendant's and his family's health would not permit him to officiate in Charleston as preacher of said church, longer than nine months, at which time he left it, previously appointing

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the *Rev. Philip Mathews his successor, agreeably to the spirit and intent of said deed. That he was not influenced by pecuniary considerations, in admitting Philip Mathews to the privilege of preaching in said church, as he believed the said Mathews to profess the principles required in the trust deed: that he was formerly preacher to said society. That the said church was indebted to Mathews in the sum of $500, which he had

advanced when rector thereof, and which said church was unable to repay. That said Mathews made some compensation to this defendant for the use of the parsonage house, which was built by his own exertions, and by his assistance, and solely for his use, he being the only incumbent with a family. This defendant received, in part of the compensation, five hundred dollars cash, and a bond for the payment of $3,000, from the Rev. Mr. Frost and Mathews jointly. That this sum was not too large, as the defendant might have leased the parsonage house at 50*l.* per annum, during his life. That as to the charge of Mathews not preaching Wesley's doctrine as required in the deed to be preached by William Hamett and his successors in that church, this defendant saith that there is no difference between Wesley's doctrine and that of the Episcopal Church of England. The book of common prayer has been uniformly read in said church, and all its ordinances administered by the Methodists. That Mathews never at all endeavoured to pervert the doctrine of the said church. This defendant states, that before his appointment of Mathews, the society had been considerably diminished, and that his audiences frequently consisted almost wholly of negroes, and that he consequently feared the interposition of the police of Charleston. That this inconvenience more probably influenced the Rev. P. Mathews in dedicating the church anew, than the motives mentioned in the bill. This defendant knows nothing of the alteration of the pews, or Mathew's profit therefrom.

He admits his deed of conveyance to Mathews, but knows not how said Mathews appro-

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priated the burial *grounds, or what persons have been buried there: not whether he ever intended to convert the said church into an Episcopal one: he further denies all combination and confederacy with said Mathews.

The cause came to a hearing, and the several deeds referred to in the pleadings were produced.

The following testimony was then given:

Mr. John C. Faber testified that payments were made to him as the executor of Ebberly, on the bond given for the land. The payments were chiefly made by the stewards of the church, and in small money, such as would be expected at collections in the church. Mr. Pilsbury paid off the bond in June, 1804. Mr. Mathews made some payments.

Mr. John Beale testified that he subscribed 50*l.* for the Primitive Methodist Church, and only as such. The form of worship is different from that of the Episcopal Church: and he believes the Methodist Church differs from the latter in some doctrinal points. That Mr. Brazier was poor. Witness contributed to pay his passage money to this country.

Major Charles Lining testified that suit has been brought on the bond given by Mr. Mathews and Mr. Frost to Mr. Brazier.

Counsel were instructed on the part of Mr. Frost's estate to resist the payment, on the ground that the bond was given for an illegal consideration. He saw Mr. Mathews attend in the convention of the Episcopal Church as a minister of that church, in Feb. 1805, and he produced his certificate from the vestry for that purpose. (This was also admitted.)

The act of incorporation of this church as a Primitive Methodist Church, was produced. It is dated in the year 1793.

The Rev. Dr. Furman certified that Mr. Brazier had belonged to the Baptist Church.

Joseph Gualtier testified that he joined

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Mr. Hamett's *church as a Primitive Methodist Church, distinct from other churches. The buildings were erected by subscription, and the lots paid for by general contributions. The forms of church government are totally different from the Episcopal Church. There is no vestry, and there are love feasts and band meetings, with other differences. The common prayer book was used once a day, much curtailed. Witness was then a member of the church, and took the sacrament with Mathews. Mr. Mathews, when he officiated, read prayers, psalms, &c. as in St. Michael's Church.

When Mr. Hamett chose to do so, he read out a member of the church. He read out Mr. Mathews and Mr. Munds from the pulpit. Mathews then retired and never came back to the church till he purchased it. Brazier tried to keep Mathews out, till he sold the church to him. The congregation were astonished and offended at the sale of the church. They never consented to it, nor were ever consulted about it.

The original trust deed of 1792 being examined, it appeared that four of the trustees named in it are complainants in this suit. Three have seceded from the church, and three are dead.

Abram M'Kie testified that he knows not if Mr. Mathews was actually cited before he was read out of the church. But he withdrew after being read out, and neither preached nor was afterwards considered a member. Ministers are read out publicly; members at a private meeting. Mr. Mathews was not superintendant when he was read out.

Mr. M'Infuss. The superintendant must, by the rules, be elected annually. Mathews was elected but once superintendant.

Mr. Hamett was president and superintendant when Mathews was read out. Witness was present. As soon as Mr. Hamett returned from Georgetown, Mathews withdrew from the church, and never officiated again, and was not considered by the people of the

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congregation as a *minister of their church.

Mr. Brazier promised that Mathews should not have anything to do with the church.

A declaration was produced, signed by the members of the Primitive Methodist Church, stating that they do not approve of Mathews as a pastor.

It was admitted that Mr. Mathews had become an Episcopal minister, ordained by bishop Madison.

Mr. Pringle, Mr. William L. Smith, and Mr. Desaussure for the complainants, argued that the deed conveyed the property in question to trustees, for the benefit of the church, and not for the advantage of individuals. That to convert this trust into an instrument of private gain, was contrary to the intent and spirit of the deed. That the powers given by the deed are to be construed so as to promote the views and objects of the original parties and not to defeat them. That however unlimited the powers appear to be at first sight, they must be restrained to the objects of the contracting parties. The latter part of the deed shewing those objects will control the former part giving the powers. The proviso will be construed strictly.

That the Primitive Methodists differ in many important particulars from the Episcopalians of the church of England. The acts of incorporation shew a difference. The constitution of the Primitive Methodist church differs widely from the organization and the rules of the Episcopal church of England. The Primitive Methodists have abridged the common prayer book; and indeed it is seldom if ever used.

They have only two degrees of order, elders and deacons. By the canons of the Episcopal Church, there are bishops, priests and deacons; and the common prayer book is never disused. The doctrines are said also to be somewhat different. The Methodists prescribed that Mr. Wesley's doctrines, according to his notes and his four volumes of sermons should alone be preached in their church. The Episcopalians certainly have

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not adopted *these as the sole standard of their belief, and of their doctrines.

The new ordination of Mr. Mathews by an Episcopalian bishop, shews that he was not deemed a regular priest, though ordained according to the Methodistical system. The re-dedication of the church, to the worship of almighty God, by Mr. Frost, shews that the Episcopalians considered there was a real difference.

Then the nomination by Mr. Brazier of Mr. Mathews, to be the minister of this people who had cast him out, and whom he had abandoned, and taken refuge in another church, was not consistent with the deed authorizing the nomination, and must be void. And the delivery of the church and Parsonage to him for a sum of money, for the private emolument of the vendor, who was entrusted with authority for very different purposes, must be considered an act entirely unwarranted by the deed of trust; totally contrary to the intention and objects of the deed; and therefore void.

Mr. Moultrie and Mr. Gaillard, for the defendants, argued, that the deed under consideration must be construed like any other deed; by the words used in it, and not by parol evidence of the intentions of the grantors, contradictory to the words employed in the deed. That by the deed, Mr. Hamett, and afterwards Mr. Brazier, had the right of nominating a minister or preacher to this church. That the sole restriction imposed by the deed was that the minister should preach the doctrines contained in certain enumerated books. That if this were conformed to, it was unimportant under the deed, who or what the individual was. He might be a Roman Catholic.

That it was stated that Mr. Mathews had conformed to these doctrines in preaching; and this satisfied the provisions of the deed.

That the deed gave such power to Mr. Hamett and Mr. Brazier, as amounted to a freehold interest. And provided their nomi-

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nee conformed to the deed in preach*ing Mr. Wesley's doctrines, it was not in the power of the congregation to inquire into the inducements which led to the nomination.

That the Methodists recognized the common prayer book, and had bishops. So that they conformed in these great essentials to the Episcopal church.

Chancellor JAMES afterwards delivered the decree of the court:

In considering this case the court do not deem it necessary to enter into the extensive grounds occupied by the learned counsel on both sides. We are of opinion that the original trust deeds will fully shew what was the intention of the parties to the same, and that after finding out that intention, nothing more is necessary than to compare the second deed from the defendant William Brazier, to Thomas Frost and Philip Mathews, with the original deeds, in order to discover whether it be repugnant or consistent with the same. The grounds taken by the court will therefore be two fold.

1st. To consider the intention of the parties to the original deeds.

2d. To examine whether the deed from William Brazier to Thomas Frost and Philip Mathews be consistent with that intention.

And 1st. The deed from John Gordon, and that from William Hamett to the trustees, appear to be for like considerations, and much in the same words; therefore to shorten this decree, they may well be considered, as to construction, in the same point of view. From these it appears that the intention of the original parties was to associate themselves together for the worship of

God, and to hear the truths of the gospel expounded; but nevertheless with this express reservation throughout, that they were to hear these truths expounded agreeably to the doctrines of their own sect.

Now it is not material that there are but slight shades of difference between the

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different sects of protestant *christians; it is enough for us to know that such differences do exist; and perhaps for wise purposes, since they would all become supine, were they all of the same persuasion. But to forward these views of the parties to the original deeds, it was also their intention that lots should be purchased for a church and a parsonage; and that buildings should be erected on the same.

And it is very material here to observe that the original parties to the deeds, were not actuated in their views by pecuniary considerations; since the consideration money expressed on the face of both the deeds, is only five shillings; and the trustees or a majority of them were to raise a sum of money not exceeding five hundred pounds sterling for the purpose of erecting buildings on the said lots. They were to raise a sum of money. In what way? By contribution among themselves, and by donations from abroad, which was all very fair, for they had no funds from which which they could otherwise draw. Then they were to spend, not to make money by entering into these engagements.

The consideration of the original deeds, and of the views of the original parties to the same, not being of a pecuniary nature, we will next inquire whether it could ever be intended by them, that William Brazier was to make his appointment for pecuniary considerations? On this point the deeds are silent, and what is to be collected from them is by implication and general usage in similar cases. The words of the second deed are, that he, (Wm. Brazier,) shall from time to time appoint during his natural life. And from these words, it is strongly urged that he may appoint in any manner that he pleases, either for money or not. But if the original grantors, and the members of the church were not, as we have seen, actuated by pecuniary considerations, can it be reasonably supposed that they ever intended that their minister should be so actuated? They were not themselves stimulated by the love of money! How then could they have it in contemplation that their clergyman, that reverend expound-

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er of *God's holy word, who was to lead them in the way to salvation, that he should be actuated by the love of money? The thing is absurd.

Let us next examine whether the deed from William Brazier to Thos. Frost and Philip Mathews has, notwithstanding, been made for a pecuniary consideration? After reciting the original deed from John Gordon, the latter deed goes on as follows, "that he, the said William Brazier, named in the aforesaid deed, being unable from indisposition to perform and execute the trusts reposed in him by the same, and also for good and pious causes and considerations, him thereunto moving," &c.

Now the only consideration expressed in this deed is, one similar to what is expressed in the other deeds, viz. for certain pious considerations. But in looking over the answer of Wm. Brazier, we find that all the considerations were not expressed in the deed. He has there admitted that he received five hundred dollars in hand, and that three thousand dollars more were secured by the joint bond of the late Mr. Frost and the said Mr. Mathews; a sum he says by no means too large for the use and benefit of the parsonage house, as he could have leased the same for fifty pounds a year. Then the ostensible reason which is given for receiving a pecuniary consideration is for the use of the parsonage house. This parsonage house he says would rent for £50. a year. Now seven years is considered in law as the length of a life; therefore in seven years this rent of the parsonage house would only amount to £350.; but he received $3,500, which is a sum nearly three times as great as the rent of the house would amount to upon his own shewing.

Then there can hardly remain a doubt but that there was a pecuniary consideration kept out of view in the deed, and which was to be given for the sale of the church. Besides Wm. Brazier had only the use of these lands while the legal estate remained in the trustees, and he could not properly dispose of them without their consent.

We also apprehend that the exertions he

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speaks of, were *made, and the assistance given, upon the expectation of his being repaid by the congregation, and not out of the glebe lands.

We think it now sufficiently appears, that the second deed from William Brazier to Thomas Frost and Philip Mathews, was made for a pecuniary consideration; and we have seen before that the original parties to the trust deeds were not actuated by pecuniary motives: therefore we conclude that the second trust deed is inconsistent with the original trust deeds. But there is still another consideration upon which this deed must fail. After those clauses in the original deeds containing the powers to Wm. Hamett and Wm. Brazier, during their lives respectively, to preach, &c. there is a proviso, as follows—"Provided always that the said persons shall not preach any other doctrine than is contained in the late reverend John Wesley's notes upon the new testament, and four volumes of his sermons, as essential to salvation."

Now it appears plainly that the words, "the

said persons shall not preach, &c." refer not to Wm. Hamett and Wm. Brazier alone, but also to every person which either of them might appoint to preach, so that the person appointed was not to preach any other doctrines than those specified in the proviso.

But says Philip Mathews, I conformed to that proviso, for I preached some of those very sermons. This is mere evasion. We find that he had before that time joined the Episcopalians, and sat with them in convention. How then could the Methodists any longer consider him as of their persuasion, or receive him as their minister? For we know that none of the sects of christians will borrow their clergy from another sect. Besides the Rev. Mr. Frost was united with Mr. Mathews in this appointment, and they proceeded to dedicate the church which was not in conformity to the rules of the Methodists. They also read all the prayers of the Episcopal Church, and not those selected by Mr. Wesley, which was also contrary to rule. These were indeed small deviations, but small

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as they are, *they shew the intention to convert the church into an Episcopal one, contrary to the proviso: and smaller matters than these, when connected with religion, have caused discord and bloodshed in the world. But we have it in evidence that Mr. Frost preached in the church. He was, we are informed and know, avowedly and zealously, an Episcopalian. Then is it for a moment to be supposed that he would preach the doctrines of Mr. Wesley? That is very improbable indeed.

Upon the whole of the circumstances of this case, we are therefore of opinion that the intentions of the parties to the original deeds were not pecuniary—that they could never have intended that Wm. Brazier should make his appointment from pecuniary motives: that nevertheless it appears he has done so; and also that the persons so appointed by him have broken the proviso contained in the original deed. The second deed therefore from William Brazier to Thomas Frost and Philip Mathews is void.

Wherefore it is ordered and decreed, that this second deed be delivered up to be cancelled, and that the defendants do pay the costs of this suit. But as it has been urged by the defendants that certain sums of money are bona fide due to them from the congregation, let it be referred to the master to settle all accounts between them.†

† The ground on which the court appears to have decreed, seems to have been that here was a power coupled with a trust, and that the appointment of a minister of the gospel who did not bona fide answer the description intended in the deed, and for money for the benefit of the person entrusted with the nomination, was not such an execution of the power as could be supported. Therefore the deed of appointment and conveyance was void.

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*Case LVII.

[Present, Chancellors Rutledge and James.]

WALTER EWING, a Minor, by His Next Friend, v. JAMES EWING, Executor of Adam Ewing.

(November, 1806.)

[*Wills* ⇐524.]

The intention of the testator is to be collected from his whole will. And though a clause in one part of his will may appear, if taken singly, to exclude a child born after the execution of his will, and before his death; yet another clause, which, by its generality and by its provisions includes such child, shall prevail, and let him into a share of the estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1126; Dec. Dig. ⇐524.]

The object of this bill was to obtain the opinion of the court on a clause in the will of the late Mr. Adam Ewing, deceased.

The bill stated, that Adam Ewing, the testator, was formerly a merchant resident in Charleston, and died on the October, 1796, leaving the following children, viz. Robert, who is now of age; Agnes, (Mr. Johnston's wife,) nearly of age; Jane, who will be 21 in August; Margaret, 18 years old; Elizabeth, 17 years old, and Walter, now 15 years of age.

That the testator, had previously, viz. on the 2d. April, 1792, made his last will and testament, and devised his property as follows, viz: To his wife Jane, all the money, goods, wares, &c. coming to him from her father's and mother's estate. That in consequence of an agreement entered into the 17th March, Robert Ewing, as attorney for Walter Ewing Maclore of Glasgow, engages to pay his (the testator's) heirs, executors and administrators, for his share and interest, in the concerns of Walter Ewing, & co. of Glasgow, and Robert and Adam Ewing of Charleston, the sum of £3683 14s. sterling, with legal interest from the 1st July; which said sum he (the testator) orders to be kept entire and undiminished until his children, whom he particularly names, and such child as his wife may then be pregnant with, shall respectively attain 21 years or be married; and that the annual interest thereof, (except a small annuity otherwise disposed of) should

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be paid to his *wife Jane, for her maintenance, and the education of his children: and that if any of his children attain 21 years, or be married, they shall be entitled to a proportionate share of the aforesaid sum; they securing to the testator's wife the interest of their said share, if she demand it. He also devises all his other property to be equally divided among his children, and nominates Robert Ewing of Charleston, his brother James Ewing of Greenock and his wife Jane, his executors and executrix. The will is signed by two witnesses, and dated the 2d April, 1792.

The bill further states, that the testator's

will being subscribed but by two witnesses, was inoperative for the disposition of his real estate, but was valid as to the bequests of the personal estate.

That the said Walter Ewing, one of the testator's children, being born in his father's lifetime, some considerable time after the making of the will, (his mother not being pregnant with him at the time of its execution) it was doubted whether he was entitled under the will to any share or proportion of the personal estate, though he was of the real estate of his father.

The object of this bill is to clear up that doubt, and to establish his right to an equal proportion of the personal estate, with his brothers and sisters.

The answer of the defendants admits all the facts stated in the bill, and submits to the court, whether the complainant, Walter Ewing was entitled to any, and what part of his fathers personal estate, under his last will and testament.

Mr. Ford argued this case for the complainants. It appears on the face of this will that the testator was inops concilii. Therefore the most liberal exposition is to be made so as to meet his substantial intentions; those purposes which every father is supposed to have in view, and which this testator has strongly disclosed on the face of his will, viz. to provide equally for his children. See the case of Brook v. Ashby, 3 Burr. Lord M's.

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opinion. The *will was written by the testator's own hand, and the decision there went on the intent collected from analogy, and from the whole will; and that the testator intended the same estate to the after born sons as he had given to the prior born.

There is a strong feature manifest on the face of this will, viz. to provide for the children he then had, and such as he expected to be born. The child he expected when he made his will was born, but died, and another was born afterwards, who is the present plaintiff. He does not indeed come under the literal description, "the child my wife may now be pregnant with," but he comes within the spirit and scope of the provision.

He speaks in other parts of his will of his children generally, and those general words would doubtless include the plaintiff. Now it would be absurd so to construe the will as to include the plaintiff in the provisions made out of the income of the estate for support, and exclude him from a share of the said capital for a portion. It would be sacrificing the natural intention of the testator to a critical adherence to his words. This would reverse the sound rules of construction.

Again, he does not allot specifically an aliquot part of his estate to the children, as they were at the time of making his will, or as they were to be at the time of his death, but as they should be at the time of the children's coming of age, in succession, and the aliquot share was to depend on the number that should "then be alive." This therefore refers plainly to a state of the family, which opens the door to construe this will according to the natural intent of an affectionate father, instead of the constrained operation of the words he used; and to admit his equal offspring to an equal share of his parental bounty.

It cannot be believed that a testator in providing for unborn children could intend to leave after born children unprovided for.

The very solicitude displayed precludes the intendment. The law may easily ingraft up-

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on this manifest solici*tude for unborn offspring, an equal regard to after begotten children.

In making such a construction, it would, (as the case actually is) leave the other children with precisely the same share of the estate as that which the testator contemplated. He requires that his children then living should let in a child expected to be born, to share with them. The child was born and died, and the plaintiff born after, stands but in the place the other would have occupied, had he not died, and that under the literal provisions of the will.

The law has saved to posthumous children, the provisions made for children, both by deed and will.

By deed or marriage settlement, it is done by the 10th and 11th W. 3, c. 16.

By will—8th sec. of act of 1789, (Public Laws, p. 191.)

Now where a father by his will makes no provision for a child whereof his wife may be encient at the time of his death, the law presuming he would have provided for such child, had the case been in his mind, attributes that intention or purpose to his will, and ingrafts the name of that child in the will.

This institution of the law is bottomed on the very principle of nature, under which we now contend for the plaintiff: That a parent will not disinherit his offspring.

And the constructive inference is stronger under this will than that on which the law is founded: for here the testator has said enough to evince that such disinherison was never his intention. He has given a key to unlock the purposes and true intent of his will.

So that in following out the presumption of the statute law, we give the court in this will a less equivocal ground on which to raise the intendment, than that on which the law proceeded.

The law goes on the natural presumption only.

We have all the natural presumption in our favor, and also a manifest solicitude of the testator disclosed on the face of his will, not to leave any of his unborn children unprovided for.

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*This certainly amounts to "a strong probable implication," and it needs not to be "a necessary implication," so ruled by the court of king's bench, in the case of Bendale and Bendale. 5 Burr. 2608, where a probable implication only in the case of a will, carried an estate for life.

But the case of White v. Barber, in 5 Burr. 2703, comes up in principle fully, and in its features nearly to this case. It was a case out of Chancery. The testator Presgrave, had but one child when he made his will; but after the making of it, and before his death, he had two other sons born, and died without altering his will, leaving three children alive. He had through the course of his will carefully provided for the case of his wife, being encient with one or more children at the time of his decease—but this case did not happen.

The judges of B. R. certified their opinion that the provision made by the testator being for children that were to be born after the making of his will, he certainly intended to comprehend all the children that should be born of his then wife, whether before or after his decease, and therefore notwithstanding the defect of expression in his will, the children born before the testator's death will be entitled from the testator's manifest intent, to take a share of his estate.

The executors submitted the case to the court without argument.

Chancellor RUTLEDGE afterwards delivered the decree of the court.

The testator made his last will and testament, and died some years afterwards, leaving it in full force. The complainant Walter Ewing was not born at the time of making the will, but was born before his father's death.

The clause of the will we observe was written with his own hand. Nothing is so clear, as that the construction must be agreeable to the intention of the testator, collected from his will. The obvious and manifest in-

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tention of the tes*tator in this case throughout his will, is to make an equal distribution of his estate amongst all his children. It is true that in the first part of the clause under consideration, he directs the money therein mentioned, to be kept entire and undivided until his children therein particularly named, and the child or children his wife might then be pregnant with, should respectively attain the age of 21 years, or be married; and by a rigid construction of the words, if not afterwards explained, the complainant might possibly be excluded from a share of that money, he not being the child that testator's wife was then pregnant with, but born some years after. But in the subsequent part of the clause the testator fixes the period when a distribution is to be made, and he thus completely explains his intention by declaring that the money shall be divided according to the number of his children, who may then be alive, share and share alike. By which latter words the ambiguity of the former is clearly removed, and the complainant must indubitably be let in for an equal share of that money, with the rest of the testators children; and is consequently entitled to maintenance and education in common with them.

It is therefore ordered and decreed, that the executors (when a division of the money shall be made) do include the complainant in such division, and retain in their hands an equal share thereof for the use and benefit of complainant.

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2 Desaus. 456

Case LVIII.

[Present, Chancellors Rutledge, James and Thompson.]

JONATHAN COIT, Administrator of Thomas Craven, v. JOHN OWEN, surviving Executor of Philip Hawkins, and Others.

(May, 1807.)

[*Equity* ⇐72.]

An old decree deciding that the property held by P. H. which had been purchased with the funds of a copartnership, of which he was

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a *member, should be subjected in the first instance to the payment of the copartnership debts, in preference to the private debts of P. H. shall not be questioned in a new suit by the private creditors of P. H. but shall be carried into execution.

[Ed. Note.—Cited in Price v. White, Bailey, Eq. 265.

For other cases, see Equity, Cent. Dig. § 219; Dec. Dig. ⇐72.]

A limited time given to a creditor abroad to bring forward proofs to substantiate an old demand, though much time had already elapsed. Notice to be given. The assets in defendants hands to be applied, after the time limited, to the payment of the demands of complainant and the other creditors of P. H.

[Ed. Note.—Cited in Price v. White, Bailey, Eq. 265.]

The bill was filed to obtain an account of the estate of Philip Hawkins, and the payment of a debt due by him to the complainant on a note of hand, on which a judgment had been obtained in the year 1789, which had never been satisfied. The defendant admitted the judgment, but stated that the judgment was subject to a plea of plene administravit, and that part of the private estate of Philip Hawkins had been subjected by a decree of this court, to aid in paying the copartnership debts due by the concern of Hawkins, Petrie & Co. of which the said P. Hawkins was a member, on the ground that the funds of the copartnership were not sufficient to pay its debts, and that great part of the private estate of the said P. Hawkins

had been purchased and paid for with the funds of the copartnership formerly in his hands; and that the remainder of the funds of the private estate of the said P. Hawkins were not sufficient to pay all his private debts, especially if a large demand from abroad of a Mr. De Neufville, which had been made, should be established. The defendant admitted a balance in his hands, subject to the payment of P. Hawkins's private debts, which was subject to the order of the court.

At the hearing of the case, some attempt was made by Mr. Winstanly and Mr. Pringle, the counsel for the complainant, to go into the question whether Philip Hawkins had really employed the copartnership funds in the purchase of his private estate; and if he had, whether the court could follow the property so purchased, and make it liable to the

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copartnership debts in preference to P. *Hawkins's private debts. It was also contended that the demand of De Neufville was of very old standing, had never been proved, and ought not now to be regarded in the application of the assets of P. Hawkins to the payment of debts.

Mr. Desaussure and Mr. Wm. L. Smith contended that the court had a right to follow these funds; and that having done so, and subjected them by its decree to the payment of the copartnership debts, it was now too late to question it. It would be mischievous to unsettle what had been done; and would put all titles in jeopardy.

That with respect to the claim of De Neufville, it was from abroad, and the troubles in Europe had probably prevented its prosecution. That at all events it was the executor's duty to bring it to the view of the court, and to request a notice to De Neufville.

Chancellor JAMES afterwards delivered the decree of the court:

Complainant states in his bill that Philip Hawkins, in his life time, was indebted to the intestate Thomas Craven, in the sum of 7772 pieces of eight and four rials, by his promissory note, dated the 6th of November, 1781.—That the said Philip Hawkins died in 1781, having first made his will, and appointed defendant John Owen, and John L. Gervais, since deceased, his executors; and that the said Philip Hawkins, at his death, left a considerable private estate, besides copartnership funds, as one of the copartners of Hawkins, Petrie and company. That the said Thomas Craven obtained a judgment on the said note in 1789, against the executors of Philip Hawkins, which has not yet been satisfied. Complainant therefore prays that the defendant may account with him as administrator of the said Thomas Craven, now deceased, and discover what assets of the said Philip Hawkins came into his hands to be administered

Defendant admits the said judgment, subject to the plea of plene administravit. He

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also admits the said copartner*ship did exist, but does not admit that the funds thereof were sufficient to pay the debts: and that under the belief the same would be insufficient, a bill was filed by the executors to subject the private estate of the said Philip Hawkins to the payment of the copartnership debts, on the ground that the private estate had been purchased with the copartnership funds previous to a settlement of the debts. That a decree was made upon the said bill on the 20th December, 1787, which directed that the estate of the said Philip Hawkins should be sold agreeably to the instalment law, and that the executors should retain so much of the monies arising therefrom as would satisfy the copartnership debts. That the real estate of Philip Hawkins has been sold according to said decree, and the proceeds are accounted for in the answer.

That the executor received from Henry Laurens, jun. part of the funded stock and choses in action of Hawkins, Petrie & Company, which he also accounts for, but does not admit that the same was sufficient to pay the debts of the concern. Also, defendant admits that he is indebted to the said estate of Philip Hawkins £1111 9*s*. 2*d*. for which he states he is ready to account.

Upon this bill and answer, the court are clearly of opinion that they cannot at this day, and with the present parties before them, either reverse or in any manner alter the decree of 1787. After such a lapse of time, and without all the proper parties before us, it is to be presumed that every thing done by the court at that day was done regularly, and that the decree was made upon the fullest evidence of the point upon which the court decided, viz. that the private estate of Philip Hawkins was purchased with the copartnership funds before a settlement of the debts of the concern. Nothing would more shake the title to property in this country, or render its tenure more uncertain than thus by a side wind to overturn a decree of this court. But as the defendant John Owen, has made it appear that the copartnership debts are now settled, and that there is still a part of the private estate

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of Philip Hawkins unadmi*nistered; let the complainant come in with the other creditors for his proportion of the monies, stock, debts, &c. still in the hands of the executor to be administered: but no part of the monies paid under the decree of 1787, is to be taken into the estimate since that was paid under a good authority. As to the debt of De Neufville, which has not as yet been properly claimed, let the executor John Owen write to such persons as are best qualified to give him information upon that subject: and if no claim is brought forward proper-

ly before the next court, then let the proportion of complainant be further increased, so much as the leaving of this debt out of the calculation hereafter, will increase the fund for each creditor.

Costs to be paid out of the estate.

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2 Desaus. 460

Case LIX.

[Present. Chancellors Rutledge, James and Thompson.]

JOSEPH PEACE, Assignee of James Kiernan, v. THOMAS P. SPIERIN and Others.

(May, 1807.)

[*Husband and Wife* ⟸18.]

L. was indebted to several persons, and being about to marry S. she conveyed a lot of land and valuable buildings, (which she had bought and mortgaged back to G.) to a trustee for the use of herself and her intended husband, for life; and on the death of either, one moiety to be subject to his or her last will; and the other moiety to the last will of the survivor; and in default of such last will, or other legal appointment, to their respective lawful heirs.

The marriage took effect, and L. and S. mortgaged the premises to K. to secure the payment of money borrowed by S. avowedly to pay the debt to G. but which was not so applied.

The sale of the lot and premises under the judgment, and execution of one of the creditors, to whom she owed money dum sola, is good and valid, though the judgment was not obtained until after the deed of settlement, and the marriage.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 120; Dec. Dig. ⟸18.]

[*Husband and Wife* ⟸31; *Powers* ⟸19.]

The mortgage made by L. and her husband S. to K. was a sufficient appointment under her power reserved in the deed of marriage settlement, and made the land liable to K.

[Ed. Note.—Cited in Desell's Ex'rs v. Casey, 3 Desaus, 85; Manning v. Screven, 56 S. C. 84, 33 S. E. 22.

For other cases, see Husband and Wife, Cent. Dig. § 185; Dec. Dig. ⟸31; Powers, Cent. Dig. § 45; Dec. Dig. ⟸19.]

If any surplus money remained after payment of these debts, in their legal order, decreed to be paid over to the children of L.

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*The bill states, that Mrs. Elizabeth Lahiffe, then a widow, purchased from Mr. John Geyer and his wife, a house and lot of land at the corner of King and Queen streets, in Charleston, which they conveyed to her in fee simple; and she to secure payment of the purchase money, (£1,100) gave her bond and executed a mortgage of the premises, in September, 1794.

That the said Elizabeth being about to marry Thomas P. Spierin, a deed was executed on the 6th January, 1797, by which the said premises were conveyed to a trustee, in trust for the use of the said Thomas P. Spierin, and the said Elizabeth, during their joint lives, and on the death of either of them, one moiety to be subject to his or her last will, and the other moiety to the last will of the survivor; and in default of such last will or other legal appointment, to their respective right heirs.

That the marriage took effect, and the deed became operative. That the said Spierin and wife not being able to pay the debt to Mr. Geyer, when it fell due, he obtained judgment on the bond; and they applied to James Kiernan to assist them with funds, to enable them to make payment, and he did furnish funds for that express purpose, and Spierin and his wife executed a mortgage on the 28th April, 1798, to secure the payment of the bond of said Spierin of same date, conditioned to pay Kiernan £546 being the sum advanced to said Spierin and wife.

That these advances were made by Kiernan expressly to relieve the said lot from said mortgage, was acknowledged by Spierin and wife, who in a bill filed by them against Mr. Geyer, stated that they obtained the money from Kiernan, and transferred it to Geyer for that express purpose. And the assistance was effectual, and did relieve the lot from the pressure of the mortgage, and Spierin and wife long received the rents.

That Wm. M'Clure & Co. obtained a judgment against Spierin and wife, on the 21st April, 1798; and P. Duncan, another judgment against them on the 28th October, 1799. That Kiernan not being repaid the money

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he had *advanced, brought suit on the bond, and obtained judgment on the 24th February, 1800; and he hath since (on 28th Oct. 1800) assigned the said bond and mortgage and judgment aforesaid to the complainant, Joseph Peace.

That said Kiernan hath also obtained another judgment against the said Spierin and wife, on the 17th November, 1801, which he hath since assigned to Patrick Duncan.

That Elizabeth Spierin hath since departed this life in the summer of 1804, without making any other appointment under her marriage settlement, than that which she made by the mortgage aforesaid, which has been assigned to complainant; and she left alive her said husband, and two children by her former husband Mr. Lahiffe. That after the death of the said Elizabeth, the sheriff of Charleston district, who had previously levied on the said house and lot, at the suit of M'Clure & Co. sold the same; and refuses to pay over the money (which he retains in his hands) to the complainant on his bond and mortgage, alleging that the other judgment creditors claim a priority; and that the heirs of the said Elizabeth, (to wit: her said husband Thomas Spierin and her two children) claim a right, as her heirs, to that moiety to which she was entitled under the marriage settlement, and which she had not disposed of by will or by any other legal appointment; and that the mortgage thereof to Kiernan, was not valid by reason of her coverture.

Complainant prays relief, and payment out of the sale of said house and lot.

The defendant Thomas P. Spierin admits the facts stated generally in complainants bill; but says that there is a small balance still due to Mr. Geyer, who is entitled to a preference to all the creditors. He admits that Kiernan did assist him with money, and other funds, the object of which was to pay off the debt due on the mortgage to Mr. Geyer; but the same was not so applied, owing to circumstances beyond defendant's control.

The defendant insists that the sale by the

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sheriff on *M'Clure's judgment and execution was irregular and void on several accounts; and more especially as the heirs of his late wife, Mrs. Elizabeth Spierin, are entitled to a moiety of said premises under the marriage settlement, anterior to any of the incumbrances, except the mortgage to Mr. Geyer, and she had not made any legal appointment under her power to do so; the said mortgage to Kiernan not coming within the description of an appointment contemplated by the deed of settlement.

The defendants, John Lahiffe, and his sister, Mrs. Hunter, (children of the late Mrs. E. Spieren) admit the facts stated by complainant generally. But insist that by the said deed of marriage settlement, their mother secured to herself one half of the said lot of land and premises, and that she reserved no power of making contracts to bind her moiety, or in any way of acting as a feme sole; and that she died possessed of her moiety, according to the terms of the settlement, and without disposing of the same by will or otherwise, leaving alive her husband T. Spierin, and these defendants who are entitled to her moiety of said premises.

That complainant's demand is founded on a contract made by T. Spierin and his wife during her coverture, and they submit that the same is void as to their mother.

That the lot and premises have been sold by the sheriff, under an execution of the M'Clures, for a debt of his mother whilst sole, though the judgment was not obtained till after her marriage with T. Spierin. They submit whether their mother's moiety secured to her and her heirs under the marriage settlement, was by law liable to the small balance due on said judgment.

That the said Spierin sold some of the negroes of these defendants in their minority, and applied the proceeds to the payment of the mortgage to Mr. Geyer; and they submit that in equity, they stand in the place of Geyer as mortgagee to the amount so applied.

The defendants insist that the balances due to M'Clure & Duncan, ought to be paid

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out of Thomas P. Spierin's *part of the premises, without affecting the part of the other heirs.

The defendant P. Duncan, admitted the facts charged generally, and submits his rights to the protection of the court.

The sheriff admits the sale of the lot and premises, and under the execution of M'Clure, and that the money is in his hands, subject to the order of the court, among the disputing claimants.

The cause came to a hearing, and Mr. Charles Stewart testified that the parties applied to have a mortgage of the lot and premises drawn to T. Kiernan to secure him for the money and funds advanced by him to Spierin—understood there was a prior mortgage to Mr. Geyer, and that when that should be settled, Kiernan was to come in on the mortgage to him. Witness could not say which of the parties told him. He does not know that the money was actually advanced to pay Geyer.

Mr. John Geyer testified that in the year 1798, he recovered a judgment against Spierin on a private debt of his own—and it was satisfied by the sheriff's sale of two small houses in King-street. He bought them for £190. 17s. 10d. but he allowed £400. for them on that debt of Spierin, which was then £700. These houses were subject to a prior incumbrance, held by Mr. Bremar, to the amount of £138. Spierin gave no instructions as to the appropriations of the money which he paid to witness, to whom he was indebted.

Mr. Cheves for the complainant, argued that this mortgage is a good appointment under the settlement.

The words in the settlement are "to the use, benefit and purposes of the said Thomas P. Speirin, and the said Elizabeth Lahiff, during their joint lives, and at the death of either of them, one moiety thereof, or half part, to be subject to their last will and testament, and the other half part to the last will and testament of the survivor, and in default of such will and testament or other legal ap-

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pointment, *the moiety thereof to their respective right heirs." The last words apply to both the moieties, for otherwise as to the moiety of the person first dying, there would be no limitation over. And from the operation of the words "their respective," which can have no other reference, the words, "or other legal appointment," can not mean any mode of appointment, by the legal operation of which a feme covert can dispose of real estate according to general law, for such a provision would be nugatory, as it would necessarily result. The word "other," refers to the mode of appointment preceding for the nature of the "legal appointment" intended, and that is found to be one which, according to the general law, would not be valid; yet it is called a legal appointment. The words legal appointment, mean an appointment legally permissible, not legally operative, according to the general law. The settlement will therefore read "in default of such will and

testament, or other appointment legally permissible."

Is the mortgage then a good appointment?

The case of Probart v. Morgan, 1 Atk. 440, establishes the rule in the words of the Lord Chancellor: That "if a man have a power to charge an estate, it is not necessary in the execution of it, he should refer to the deed out of which the power arises, for, in a Court of Equity, it is enough that his intent appears, and if in the execution he sufficiently describes the estate, he had a power to charge, the estate is certainly bound, especially where the person charging is a purchaser of the power."

Exparte Caswell. 1 Atk. p. 559. This case confirms the rule, and there is no case at all impugning either. The Lord Chancellor says—"though a man may execute a power without reciting or taking the least notice of the power, yet it is necessary he should mention the estate which he disposes of, and must do such an act as shews he takes notice of the thing he has a power to dispose of."

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*These cases prove that there is no technical form of words necessary, but

1st. That the property shall be named.

2d. That words of disposition and appointment should be used.

The first is rendered necessary by the rule in Clere's case, 6 Co. 17b. "That a general disposition will not dispose of what the party has only a power to dispose of, unless it is necessary to satisfy the words of the disposition."

But the generality of this rule is restrained, where the power is coupled with an interest, as in Probart v. Morgan, where it is said, "especially where the person charging is a purchaser of the power," in which the distinction is implied.

And so in Hale v. Margerum, 3 Ves. jun. 300, where it is determined, that where a bequest was not a mere power, but an absolute gift, a general disposition of "all her estate, &c." was a good appointment.

So in Standen v. Standen, 2 Ves. jun. 594, which is a leading case, confirmed on appeal to the house of lords, where the lord chancellor distinguishes it from the case of mere appointments, and decrees that the property passed under a general disposition of her estate, because it was her estate, and because she had more therefore than a mere appointment.

But the taking the strict technical rule of Clere's case, there is here no doubt.

1st. It is that a general disposition is not good, &c.; but here the disposition is particular and specific.

2d. It is where the party has only a power to dispose—here the party has an absolute estate.

3d. It is only where it is not necessary to satisfy the words of disposition—here it is necessary.

In Parker v. Kett, 12 Mod. p. 469—"when one has an authority, and does an act which can be good no other way but by virtue of that

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authority, it shall *be understood to have been done by virtue of his authority."

Here the act will not be good any other way.

In Andrews v. Emmot, 2 Bro. C. C. 300—the lord chancellor says, "I admit it is not necessary for the purpose of executing a power that it should be recited in express terms, or that it should be by a technical deed—it is only necessary that the power be executed."

What are the objections here?

1st. That the power is not referred to: but it is sufficient that the thing be mentioned; that is only where the power is naked.

2d. That this is not a will: but it need not be by technical deed—it is only necessary that the power be executed.

3d. That it is by way of mortgage, which is not an absolute conveyance: But this need not be—an appointment depending on any lawful contingency would be valid; so therefore a mortgage.

It can not be the worse of being for a valuable consideration.

There can be no other objection imagined, and all those suggested or stated appear to be fallacious.

Standen v. Standen, is in point. It is to his wife for life, and after her decease, as to one moiety, to such person or persons, as she by deed or writing or will, with two or more witnesses, may appoint, and for want of appointment, over. This power decreed to be executed by a residuary devise in a will.

2d. Whether complainant is entitled to stand in the place of the mortgagee? In equity he ought. This court can enforce it, because in strictness the judgment creditors cannot claim until the mortgagee reconvey; and the court will only allow this on condition.

Smithson v. Thompson, 1 Atk. 520—"where a first incumbrancer, by judgment, has likewise a mortgage, though there is another judgment prior to the mortgage, the court will not direct a sale in favor of the second

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judg*ment creditor, unless he will pay off the principal and interest, both of the mortgage and judgment. 3 Ves. jun. 582, Burn v. Burn.

"Agreement for a mortgage, a specific lien against creditors." Here the mortgage, tho' irregular, is a good agreement for a mortgage, and good against judgment creditors.

3d. Whether equity will make Mrs. Spierin's moiety pay her debts so as to leave his share to pay the complainant.

This is equitable and reasonable. Lanoy v.

Athol, 2 Atk. 446. "The Dutchess has two funds, real and personal assets to answer her demands; the plaintiff has only one. Is it not then the constant equity of this court that if a creditor has two funds he shall have his satisfaction out of that fund upon which another creditor has no lien? Suppose a person who has two real estates mortgages both to one person, and afterwards only one estate to a second mortgagee who had no notice of the first; the court in order to relieve the second mortgagee, have directed the first to take his satisfaction out of that estate only which is not in mortgage to the second mortgagee, if that is sufficient to satisfy the first mortgagee, in order to make room for the second mortgagee, even though the estates descend to different persons."

The next question is, whether the sale of this lot was legal?

1st. The legal estate was in the husband and wife and therefore bound by the judgment. 2 Black. Com. 335. "By this equitable train of decisions in the courts of law, the power of the Court of Chancery over landed property was greatly curtailed and diminished. But one or two technical scruples, which the judges found it hard to get over, restored it with tenfold increase. They held in the first place, "that no use can be limited on a use," and that when a man bargains and sells his lands for money, which raises a use

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by implication to the bargainee, the li*mitation of a further use to another person, is repugnant, and therefore void."

"And therefore on a feoffment to A. & his heirs, to the use of B. and his heirs, in trust for C. and his heirs, they held that the statute only executed the first use, and that the second was a mere nullity. 2 Fonbl. 16."

"Where lands are limited to the use of A. in trust to permit B. to receive the rents and profits, for the statute can only execute the first use."

If the use was not executed under the statute, then the judgments did not bind; the interest being joint and indivisible during their lives, and then the moiety of Spierin was exclusively bound by the mortgage.

And so in like manner, and for the same reason, Mrs. Spierin's, if valid as an appointment.

Mr. Griggs for Spierin, and Mrs. Spierin's children, argued that the property was disincumbered before the death of Mrs. Spierin. Consequently the right of her children attached. 1 Powell, 59, 60, and 1 Vern. 141.

The advances made by Kiernan were not chiefly in cash, but in property sold doubtless for his own benefit; and no evidence that the amount was appropriated to pay off Geyer's debt. The intention of the deed was to limit the estate after the expiration of her life estate. She reserved no power of entering into contracts. She had no power to give a bond, and the court will not presume a power to give a bond, or confess judgment, or grant a mortgage. It is true that in the execution of a power, there is no necessity to refer to and express the power. But a mortgage is not a proper execution of the power of appointment. It could never have been contemplated. See 1 Powell on Cont. 59, 61; and 1 Vern. 141, 182.

Mr. Simons for defendants, argued that there was no proof of any application of the funds advanced by Kiernan to Spierin to pay off the debt of Geyer. As there were children at the time of the marriage, their rights

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*were secured by the settlement. There was no power reserved for Mrs. Spierin to mortgage. The appointment should have been of the character of that expressed in the deed of settlement.

The intent of the settlement was to secure the wife from the controul and influence of the husband. 1 P. Wms. 741. 2 P. Wms. 505. 3 Atk. 156. The appointment is by both, although it is a rule that the power of appointment cannot be delegated.

The appointment by will or other instrument of that nature, must be agreeably to the statute of frauds. Dormer v. Thurland and others. 2 P. Wms. 505, appointment by will without a seal is void. See 3 Atk. 156. It is clear that in consequence of the mortgage they held but an equity, and the statute could not execute the uses. See 7 Term Rep. 652.

The settlement was a lien on the specific property, before the creditors obtained any.

Chancellor RUTLEDGE afterwards delivered the decree of the court.

In this case the court see no reason for setting aside the sale made by the sheriff; the execution under which the sale was made being regularly obtained against Spierin and wife, for a debt contracted by her before marriage, and for which the property she then possessed was liable, (her husband having none) although secured by marriage settlement between her and Spierin. The mortgage in which she joined with Spierin to Kiernan must be considered a legal appointment of her moiety of the lot, &c. secured to her by settlement, although it might not be such an appointment perhaps as was contemplated when the settlement was executed. Independent of the mortgage, the settlement gave the husband a moiety of the lot, and as she is said to have died without a will, he would have become entitled to one third of her moiety, & her children (the Lahiffes) to the other two thirds. But as there are judgments against Spierin and wife, for her

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debts contract*ed before marriage, and a balance due to Geyer on the original purchase money of the lot, those debts must be satisfied in the first instance, out of the monies

arising from the sale made by the sheriff; and the remainder of the money must be applied to the payment of complainant's debt and the costs of this suit: Provided, that if there shall be any balance remaining of the two thirds of the moiety secured to Spierin's wife, after payment of the debts, the same shall be paid over to her children, the Lahiffes. Refer it to the master to ascertain what is due on the respective debts.

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2 Desaus. 471

Case LX.

[Present, Chancellors Rutledge, James and Thompson.]

The Executors of THOMAS and BARNARD RICHARDSON v. VIOLETTA WYATT, Executrix of John Wyatt, Deceased.

(May, 1807.)

[*Partnership* ⇐338.]

It is not a correct principle, that one partner shall be chargeable with all the earnings of the concern, without evidence that he had received them; whilst he is credited only with such sums as he proves he has paid away; especially where the other copartners had equal access to the books and equal management of the affairs. The partners are chargeable only with what they have respectively received.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 799; Dec. Dig. ⇐338.]

[*Partnership* ⇐303.]

The bad debts must be borne equally by the whole concern during the lives of the partners; and the executors of a deceased partner forbidding payments to the executor of the last surviving partner, the bad debts shall fall on the concern.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 700; Dec. Dig. ⇐303.]

[*Partnership* ⇐84.]

The partner who kept and supported the house allowed board out of the copartnership funds for the journeymen and apprentices, as reported by the master.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 132; Dec. Dig. ⇐84.]

[*Evidence* ⇐410.]

Parol evidence of the sum brought into the copartnership funds by one of the partners, not allowed, after a great lapse of time (24 years) to prevail against the entry in the books of a much smaller sum credited him on that account.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1850; Dec. Dig. ⇐410.]

[*Dower* ⇐17.]

The widow of one of the deceased copartners is not entitled to dower in the lands and houses purchased with the copartnership funds, and held in the names of all the copartners, or on their behalf.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 62, 76; Dec. Dig. ⇐17.]

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*This was a bill filed by the complainants to obtain a settlement of accounts, and of the concerns and transactions of two copartnerships between the late Thomas and Barnard Richardson, and the late John Wyatt, who had carried on business togther for many years, as carpenters.

The case was referred to the master, to examine and report upon the accounts; and after a long and laborious examination, he made a report as follows:

It having been referred to me by an interlocutory order of the honorable court, to investigate the merits of the bill and answer in the above suit, and to report on the same, I accordingly report that I have attentively examined into the several matters thereby referred; that many witnesses have been examined on both sides, and voluminous documents and accounts exhibited in evidence, both by complainants and defendants: that the accounts relate principally to two concerns, that of Richardson, Wyatt and Richardson, which existed from the 30th June, 1781, to 14th August 1791, when Thomas Richardson departed this life; and that of Wyatt & Richardson, which existed from the last mentioned period, until 7th January, 1797, when Barnard Richardson died. That I have over ruled and rejected many claims and items in the accounts of both complainants and defendants, and finally, according to the several principles and directions which I have from time to time determined and made in the suit, after hearing counsel on both sides, it appears to me that the estate of the said John Wyatt should be made chargeable for all the earnings of the copartnership as far as they can be ascertained, in as much as he appears to have had the principal control over the copartnership funds, and was considered the head of the concern, and had more immediately the direction and superintendance of the books and clerks who kept them, (except for a period of about 16 months, from the evacuation of the town, to April, 1784, during which period he resided at St. Augustine, and for that space of time I have charged such earnings to Barnard Richardson,) and credited them re-

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spectively in *like manner, for all monies laid out for materials, and otherwise for expenditures, on account of such earnings.—On the other hand, I have made a liberal allowance to Mr. John Wyatt's estate for the board of a number of journeymen and apprentices who resided in his family and were well treated; and also for the board of the said Thomas and Barnard Richardson; and a further allowance for journeymen's wages, which must be presumed to have been paid out of the earnings; to which I have also directed to be added or credited to him, and the copartnership charged with the rent of a building, being the private property of the said John Wyatt, and which was used for a workshop, and a part of it for a counting house. I have also charged the said John Wyatt's estate with all the debts of the concern which appear to have been good subsequent to the death of the said Barnard, many of which there is reason to believe

were collected by Mr. Wyatt, and for the remainder, legal measures should have been taken by him as surviving copartner to have gotten in, or secured them. I further report that from the best view which I have been able to take of the business of the concern, the result is, that there appears to be a balance due from the estate of the said John Wyatt to the representatives of Thomas Richardson, of £1713 14*s.* 1*d.*; and also a balance due by said estate to the representatives of Barnard Richardson of £979 10*s.* 5*d.* as stated in the accounts accompanying this report, subject however to be diminished by the charge made on account of the said Wyatt for the feeding of two horses for many years, and the use of a cart for the benefit of the said concern, which I have allowed on further consideration since the said balance was made up in the following proportions; the sum of £367 to be debited to the said Thomas Richardson to the 14th of August, 1791, when he died; and £147 6*s.* 2*d.* to the said Barnard, to the 7th January, 1797, being his reasonable proportion for the feeding of the said two horses; the other, having in my judgment, belonged to the said Barnard. I further report that the said

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Thomas and Barnard *appear entitled to one third part each of certain bonds taken at the sale of part of the real estate of the said concern mentioned in the pleadings, to the amount of £1023 6*s.* 8*d.* which were placed in the hands of Messrs. Desaussure and Ford for recovery, by consent of parties, or to so much thereof as has been so recovered. The said Thomas and Barnard Richardson also appeared entitled to a like proportion of £803 10*s.* 9*d.* being so much paid out of the partnership funds to John Champneys, a creditor of the concern, more than was due to him, and for which he is therefore indebted to them: besides also, two glebe lots of land, valued at £148 which were sold for arrears of ground rent, and purchased in by Alexander Shirras, one of the attornies on the part of the complainants, for £76 18*s.* 4*d.* including charges, but which he was to return to said concern on repayment of that sum); besides three brick tenements, and the land whereon they stand, in Champney's street, with back buildings for kitchens, purchased at the general sales of the said concerns by Thomas Hunter, deceased, but no titles given, as he never complied with the terms of sale. These tenements have been for many years wholly unproductive, having been occupied by persons who have paid no rent; to which tenements and lands, the assignees of Hunter, who was declared a bankrupt before his death, pretend a claim, but on which I deem it improper to give an opinion, and submit it to the court. Also, a claim of £257 2*s.* 8*d.* and interest, which complainants make on defendant for loss sustained on two brick stores and lots whereon they stand in Champneys street, bought by Thomas Hunter for £610 but which he contended were purchased by him as agent, as well of the complainants as defendant, and which were afterwards sold under execution by the sheriff of Charleston district for £352 17*s.* 4*d.* whereby the aforesaid loss resulted, on which I have given no opinion, but submit it to the court. I likewise submit whether any, and what compensation should be allowed by the concern to Mr. Wyatt for a house in Charleston, which

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appears to have been built by the *said John Wyatt for his wife, and was sold by the sheriff under execution, chiefly to pay debts due by the concern; all which I submit, &c.

To this report exceptions were filed by the complainants and defendants.

Exceptions on the part of the complainants to the Master's report.

1st. That the master has credited the estate of John Wyatt with all sums paid on account of materials for the concern, and for all sums paid to journeymen, whether apparent in the books or not, without any evidence that the same were paid by Wyatt or his executor, unless it appeared that the same were actually paid by the Richardsons out of their private funds.

2d. That the master allowed £35 per annum for the boarding of journeymen, which was the highest general price allowed in cases of single boarders, whereas in this case, where Wyatt boarded the Richardsons, all their journeymen and all their apprentices, it was unreasonable to allow the highest price.

3d. That the enormous sum of £35 was also allowed by the master for the boarding of apprentices, whereas the sum of £20 appeared to be more usual according to the evidence, and would have been a full allowance.

4th. That the master permitted the defendant to go into conjectural verbal evidence of journeymen and apprentices, having worked and boarded with Wyatt, in order to charge the concern; when it appeared clearly in evidence, that there was a "Time Book," which was left at the death of Barnard Richardson in the possession of Wyatt, and of the loss of which no evidence was given or suggested.

5th. That the sum of £80 per annum is an extravagant charge for a small shed which was used as a counting house and work shop, and a piece of marsh land which would have been otherwise unoccupied and unproductive, and for which the concern could not afford

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to give so *high a price, and which therefore ought not to have been allowed by the master.

6th. Not insisted upon.

7th. That for the apprentice fees to amount of £135 and upwards, credit has not been giv-

en for one cent, although the whole was probably and the greater part certainly received.

8th. That the master ought to have allowed interest on the respective balances due to the representatives of Thomas and Barnard Richardson, from the times at which they resulted as due to them.

9th. Not insisted on.

10th. Because the master rejected the charge of £246 4s. 1d. apparent in a book of Barnard Richardson, for monies advanced by him at a particular period, on the ground that his book was not legal evidence, though much of the testimony on which the defendants claims were allowed, was not legally admissible testimony.

11th. That tho' the strongest testimony was given, that the Richardsons were men of property when they entered into copartnership with Wyatt, and though an express acknowledgment of Wyatt, that they had put into the concern, the sum of £1400 was proved, the master did not allow any thing, or a very inconsiderable sum on this account, although not a vestige of their original private estate remained at their death.

12th. That the report is generally injurious to the claims and interests of the complainants, because among many other things, there are allowed therein charges by John Wyatt, against the concern to a large amount, of which there is no evidence in the books, though too, these books were kept by or under the direction of Wyatt; because it appears from the will of Barnard Richardson, made when on his death bed, at a time when there is usually no dissembling, that he had many claims of which no evidence can be discovered, the said Barnard Richardson having died in the house of Wyatt, and no papers, not even a memorandum book be-

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longing to him having been *found, from which to gain any information relative to his estate; because several important books of the concern, which were proved to have existed, are not produced, and though no evidence of their loss is given, yet inferior testimony has been received; because the Richardsons and Wyatt carried on a successful and extensive business during sixteen years, and though they possessed a good estate when they began, the result of this suit is all that their representatives will be able to discover. And that according to the master's report, will not much exceed the ordinary gains of journeymen for the same period. And if their original property be included, will not nearly equal them.

13th. Not urged.

14th. That the allowance for feeding of two horses, and the use of a cart mentioned in the report, is in amount exorbitant, and that no part thereof is warranted by the evidence in the case.

Exceptions on the part of the defendant.

1st. General, and not insisted on.

2d. That the said report states a balance against the defendant, which was not obtained by evidence, but by the assumption of certain principles which are not correct generally, and for the adoption of which there does not exist sufficient proofs or reasons in this particular case, to wit: It is assumed that John Wyatt, one of the copartners in the concern of Wyatt & Richardson, is chargeable, and he has been actually charged in the accounts, with all the earnings which appeared on the books of the concern to have been made by the company on two alleged grounds. 1st. That he, John Wyatt, was the book keeper and cashier of the copartnership. 2d. That he actually received the money charged in the books of the concern.

The assumption and application of these principles is excepted to; because it is not warranted by the general mode of doing business among partners, nor is it warranted by any rule of law or justice, that one partner should be made chargeable with all the

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earnings of the concern *generally; and there is no proof of any circumstances existing in this case to justify it. This amounts to making one copartner the guarantee of the debts due to the concern, so that it might happen that the partner so charged, might ultimately be a loser, even in the case of a successful copartnership. As a general principle therefore, this ground is not tenable, nor did the evidence support the allegation, that John Wyatt was the sole book keeper and cash receiver. It appeared in testimony that clerks were generally employed by the concern, who were under the direction of all the partners, who do not appear by any evidence to have surrendered their power and rights.

The clerks and the other partners actually received monies due to the concern at sundry times, and there is reason to believe that one of the Richardson's most generally received the rents due: and there is no evidence that the monies so received were paid over to John Wyatt. Besides, it was the practice of the concern to settle debts due to them by discounting debts due by the concern: and this was done sometimes by one partner and sometimes by another. Many cases doubtless occurred not known to Mr. Wyatt.

And if it had been proved that Mr. John Wyatt had been the exclusive book-keeper and cash receiver of the concern, it does not follow that he is chargeable in mass with all the debts due to the concern. He ought not to be made responsible for more than he has received, and what he has received is a matter for proof, to be made out by proof from the books themselves, or from other sources: yet he has been charged with all the debts due to the concern, and made liable for the debts of every debtor to the copart-

nership, where his representatives could not prove that he had not received the money, or could not prove the debtor insolvent. The debts so charged to John Wyatt, on presumption, without proof, are enormous; and if they were struck out, and he made liable for no more than was proved he had received, it would totally change the face of the accounts, and destroy the balance in question.

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The *master therefore did wrong to adopt and apply the principles in question, because the accountants who did so were in error, and the present accountant doubts the correctness of this mode of charging one partner—more especially as the books themselves shew that many accounts stand open against many of the debtors of the concern, and if these have been paid, there is no evidence to whom paid.

3d. That the master has also debited Mr. John Wyatt in account for the earnings of the concern, in cases where the books do not show any earnings. But he is charged on some proofs of work done by the concern for sundry persons, and some loose estimates of the value of such work, without proof that he received the money, or that it was ever paid at all; or how much was really due.

4th. That this principle of the responsibility of one partner to the others, is carried to an extreme in another particular, to wit, that even in cases where he has not received the monies charged in the books as due to the concern, it is pretended that he is liable as surviving copartner to the concern, on the presumption that the money was not recovered by his neglect, without any proofs as to the particular debts.

5th. That part of the masters report is also excepted to, in which he cuts off a large part of the charge for the horses owned by Mr. Wyatt and employed in the service of the company, and for feeding the horses employed in the service of the company.

6th. That the master allowed too small a sum for the salary, boarding, lodging and washing, of clerks employed in the service of the concern. The charge made was one hundred and four pounds, seven shillings and six pence per annum. But the master allowed only 75*l.* per annum, which is too small an allowance for the salary, boarding, lodging and washing, of the most ordinary clerks.

7th. That if the masters report should be established wherein he puts to the debit of John Wyatt, all the earning of the copartnership, his report in another respect is exceptionable. For he reports that Barnard

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and Thomas *Richardson are entitled to two third parts of the money and bonds arising from the sales of part of the real estate held by the concern, and also for two third parts of the real estate still held.

This is excepted to, because it is clear that property purchased and paid for by the copartnership, must have been paid for out of the earnings of the concern. It is not pretended, or proved that it was paid for in any other way, and if all the earnings of the concerns are put to the debit of John Wyatt, (without proof of his having received them) it is obvious that the Richardsons ought not to have any share in the property purchased and paid for out of these earnings. It would be giving them double compensation.

8th. The master's report is defective in not allowing a credit for the value of the dower of Mrs. Wyatt in the real estate of the concern (so far as relates to her husband's proportion) as she renounced her dower therein to the manifest benefit of the concern, and she never has been compensated. This exception will become unnecessary if the exception immediately preceding should be sustained.

9th. That John Wyatt's representatives ought to be allowed a reasonable compensation for his services, as he was the principal acting copartner, in managing the affairs of the concern; especially as it is attempted to make him and them liable for the debts of the concern which have not been collected.

The master overruled the exceptions on both sides, and adhered to and confirmed his report.

On the coming on of the report and exceptions, a few of the exceptions were given up on both sides; the remainder of them were argued very fully by Mr. Cheves and Mr. Pringle, for the complainants, and by Mr. Bailey and Messrs. Desaussure and Ford, for the defendant.

Chancellor RUTLEDGE afterwards delivered the decree of the court, on the principal points made by the report and exceptions.

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*From the very great difficulty which the master has encountered in the investigation of the accounts of sixteen years copartnership, occasioned by the confused manner of keeping the books now existing, and the loss or destruction of others, it seems to be agreed on all hands, that it will be impossible to do complete justice between the parties.

We have considered the master's report, and the evidence accompanying it; and we do not think from the evidence adduced, that he is warranted in assuming the principle, that it was proper to debit the defendants testator with the whole earnings of the partnership, and to credit him for such sums only as could be proved to have been paid by him; because it does not appear that Wyatt had the sole and exclusive direction and management of the books. There is no evidence of any agreement to that effect, and we cannot presume that there was, in order to make him so generally chargeable. And

it is not denied that the books were open to the inspection and view of the other copartners until they died; for they lived with Mr. Wyatt during the whole copartnership, and died at his house. It is presumable therefore that the business was conducted to their mutual satisfaction.

In the confused state in which this case stands, the more equitable principle would be, for the master to charge defendants testator only with such earnings as are entered in the books, or which may be proved by other evidence were received by him, and to adopt the same rule with respect to B. Richardson's account. The bad debts must be the loss of the copartnership, until B. Richardsons death, as it was equally his duty with Wyatt (for any thing that appears to the contrary) to look after the debts; and we must believe that Wyatt was as little inclined to lose a debt as the others were. It is hardly presumable that any debts were lost through Wyatt's negligence, after B. Richardson's death, he having survived Richardson but eight or nine months. If any have been lost since Wyatt's death, the com-

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plainants are as culpable *as the defendant, they having been in a state of hostility with her ever since Wyatt's death, & forbade the payment of any of the debts to her. The allowance for boarding the clerks, and rent of the land ought to stand; also the allowance for feeding of 2 horses employed for the use of the concern. With respect to the £1400 said to have been brought into the copartnership by the Richardsons, the testimony of Mr. Allison is positive that Wyatt told him so more than once. The witness supposes that B. Richardson was worth £500 or £600 in Pennsylvania. On the other hand, the evidence of Mr. Kyser, who knew the Richardsons for several years, is as positive that they could not have had that sum; and from the very singular circumstance which he positively swears to, that all the copartners in the concern, he was certain could not at any one time have lent one hundred dollars to any one, we are rather inclined to believe that after a lapse of 23 or 24 years, Allison's memory has failed him, and that the £400 which Richardson has credit for in the books, is the real sum that Wyatt mentioned; especially too as Mrs. Lingard swore that when the Richardsons came to live with Wyatt, they were scarcely half cloathed.

As to the apprentice fees there is no evidence at all on that point to warrant a division of them among the copartners; no credit therefore is to be given in account for them.

The defendant, Mrs. Wyatt is not entitled to dower in the lands of the partnership.

2 Desaus. 482

Case LXI.

[Present, Chancellors Rutledge, James and Thompson.]

BENJAMIN and CHARLES WEBB v. MARY BELLINGER, Executrix of Edmund Bellinger, Executor of Benjamin Webb, Deceased.

(May, 1807.)

[*Executors and Administrators* ⇐118.]

The court at a first hearing decreed, that the executor not having rendered satisfactory accounts, should be charged with 10*l.* per annum for each laborer of the estate, excluding

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three years of the war, *when the enemy invaded the country, and little could be made, and less preserved.

The executor not chargeable for the loss of slaves who deserted during the war, or were otherwise missing; nor for suffering the machines to go to ruin, and other acts, which sounded in damages.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 472; Dec. Dig. ⇐ 118.]

[*Executors and Administrators* ⇐118.]

On a re-hearing, the court reversed the first part of the decree, on the ground, that although the executor's accounts were not entirely satisfactory, the charge of 10*l.* per hand would make too great a difference between the amount which that rule would produce against the executor, and the amount he actually made on the plantation as stated in his accounts, which would be improper, as the executor's accounts had not been falsified, or satisfactory proof given of gross negligence, or of the executors wasting the assets.

[Ed. Note.—Cited in Pope v. Mathews, 18 S. C. 448.

For other cases, see Executors and Administrators, Cent. Dig. §§ 472–482; Dec. Dig. ⇐ 118.]

The complainants filed their bill in this case originally against Edmund Bellinger, executor of Benjamin Webb, deceased.

Their bill stated that complainants are the sons, devisees, and legatees of Benjamin Webb, deceased: that their father being possessed of a considerable real and personal estate, made his will, dated 13th December, 1775, thereby devising and bequeathing in substance, as follows: to his wife, Ann Webb, her jewels, and all his furniture, (except silver plate) an annuity chargeable on his estate, some smaller bequests, and twenty-three negroes, with their issue, for ever; with the liberty of planting on his lands with her negroes during her widowhood; all which are in lieu of dower, and of every other claim. To his son Benjamin, all the silver plate, and the gold watch that was his mother's. To his son Charles, his gold watch.—To his two sons, he gives the residue of his estate as tenants in common to be equally divided when his eldest son is of age; with other provisions for other children, if any should be born, which did not occur. That the shares be respectively improved to the utmost, and that his sons be educated respectively out of the profits of his estate until of

age, and if any of the children should die before attaining 21 years, or day of marriage, their shares to go to the survivors. That the

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executors are authorized to take up *money at interest, or to encumber the estate for the payment of his debts, if he owes any at his death.

The testator, Benjamin Webb, appointed his wife Ann, during her widowhood, executrix, and Charles Pinckney, Thomas Hutchinson, W. Logan, and Edmund Bellinger, jun. executors. The testator died in February, 1776, leaving his will of force, and having no other issue than complainants. That Charles Pinckney proved the will on 15th February, 1776, and qualified: that Edmund Bellinger qualified in May following: that Charles Pinckney died in October, 1782, and never intermeddled with the planting interest: that Edmund Bellinger had the entire management of the planting interest from the death of testator, until February, 1789, when he delivered the estate to Benjamin Webb, and to Daniel D'Oyley, as guardian of the son Charles. That an appraisement of the personal estate, made in November, 1776, amounts to £74,684. old currency. That complainants have applied frequently to Edmund Bellinger for an account of their father's estate, and have been refused.

The bill charges gross mismanagement and misconduct on the part of the executor: an actual diminution of the negroes of the estate, and a deterioration of the estate in other respects. The bill prays for an account and settlement; and such other relief as can be given.

The defendant put in the following answer. The answer admits that Benjamin Webb made his will, and thereby devised his estate as set forth in bill: that he appointed the executors named in the bill, and died at the time set forth, without altering his will. That Charles Pinckney qualified and appraised the estate as set forth. That defendant qualified and took the direction of the planting interest as set forth. That defendant used his best exertions to render the estate productive during his administration, and employed the proceeds for the benefit of the estate, as will fully appear by his account filed: in which account current, credit is giv-

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en for every article disposed *of by defendant, except the following quantities of rice, to wit: one hundred and twenty barrels of rice shipped to England for Benjamin Webb, one of the complainants; twenty-five barrels of rice delivered to Norris & White, to pay bill in favor of said Benjamin Webb; twenty-three barrels sold (but never paid for) to the following persons: Charles Cope, commissary of troops in Georgia; Andrew Fitzsimons and David Duncan, four barrels delivered to Benjamin Webb; and for the following parcels of rice sent to Charles Pinckney, one of the executors, (for which perhaps he has accounted, or ought to be accounted for by his executors) 96 barrels in February, 1778; 99 barrels in April, 1778, and 61 barrels in Sept. 1779.

Defendant does not doubt the correctness of the appraisement, but cannot declare that it is just, since he qualified some time after Charles Pinckney. That all the negroes who came to his hands, who did not die nor runaway, were delivered by him to the legatees. That the camp fever was carried into the plantation by the negroes of the estate, and that many ranaway during the revolution; but he does not recollect how many; none of them were sold. That defendant conceived himself fortunate in retaining what he did, when he considers the devastation which took place during the war. That defendant having hired overseers, does not conceive himself liable for the deficiencies of crops, but believes that under his care better crops were made than by testator. This opinion is grounded on a statement of what the testator made for four years before his death, when he directed his own affairs in peaceable times, and before the widow's share had been taken away: that no blame can fall on defendant if the expectations of complainant are not realized. Defendant denies that he ever refused to account, but that he shewed complainants his books, gave them copies of accounts, and that there is a balance due to defendants by the estate. Answer concludes as usual.

Before the cause could be brought to a

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hearing, Ed*mund Bellinger, the executor departed this life, whereupon a bill of revivor was filed by the complainants against Mary Bellinger, the widow and qualified executrix of the last will and testament of the said Edmund Bellinger; and the bill prayed for the same relief as in the original bill.

The defendant Mary Bellinger, admitted the bill filed against her late husband and testator, and his answer thereto; and his death, and her qualification, as executrix of his last will; and she prays that the answer of her late husband may be taken as her own, adding thereto the additional account therewith filed.

The cause was afterwards referred to the master, who having examined the accounts, and the witnesses produced on both sides, and having heard the counsel at his chambers, made the following report to the court:

That the late Benjamin Webb, Esq. father of the complainants, was in his lifetime seized and possessed of a considerable real and personal estate, in this state, and departed this life on or about the 18th day of February, 1776, leaving alive a widow and two sons, to whom he devised and bequeathed his real and personal estate in such manner and proportions as will appear by his last will & testament bearing date the 13th day of De-

cember, 1775, which he left in full force and virtue at his death, a copy whereof is filed as an exhibit in this case.

That the said Benjamin Webb appointed several persons executors of his last will and testament, of whom only Colonel Charles Pinckney and Edmund Bellinger, qualified thereon, the former on the 15th day of November, 1776, and the latter on or about the 15th day of May, 1777. That the said Colonel Charles Pinckney resided generally in Charleston, and died on the 22d of September, 1782, and Edmund Bellinger resided usually on his plantation on Ashepoo, opposite to and in sight of the plantation of his testator.

That notwithstanding the said Edmund Bellinger did not qualify as executor of the said will until the 15th of May, 1777, he act-

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ed upon the estate of the testator in *some particulars, and had some direction and superintendance over the same, and hired out some of the negroes of the estate, and kept a memorandum book in his own hand writing, in which many charges relative to the estate were made as early as the month of March, 1776, which was within one month of the testator's death. And the exhibit filed with the answer of the said E. Bellinger, commences his account on the 18th May, 1776: but it does not appear by any evidence adduced, that he sold any of the crops until he qualified, and he appears to have continued in the management of the estate of the said Benj. Webb, until he delivered up the same, one moiety to one of the testator's sons, Benjamin, in the month of January, 1788, and the other moiety to Daniel D'Oyley, for the testator's younger son Charles Webb, in the month of February, 1789. That an inventory was made of the personal estate of the said Benjamin Webb by Col. Charles Pinckney, on the 16th November, 1776: whereby it appears that the same consisted of a full gang of negroes, to wit: two drivers, eight house servants, sixteen tradesmen, fifteen sawyers, and others of all descriptions, amounting in the whole to one hundred and seventy two persons; and also of furniture, horses, cattle, and various other articles, amounting in value to the sum of £74,684. of the then currency, exclusive of many debts which must have been then due to the estate, and including a crop of rice, of corn and peas: and the late Mr. E. Bellinger, the other executor, states in his answer, filed in his life time, to a bill then pending, that he had no reason to doubt the correctness of the inventory. That Mrs. Webb, the widow of the testator, was an executrix, and resided on the estate until she married in April, 1777; but she never qualified as executrix. That at the time of the surrender of the estate by the said E. Bellinger to the heirs, the negroes of the estate then amounted to one hundred and thirty-two persons, whereof there were six tradesmen, two house servants, four sawyers, and

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two drivers, who were appraised *at the sum of £48,209. old currency, making a difference in the two appraisements of £26,475. currency. But that it also appeared in evidence, that from 1794 to 1798, negroes in the parish of St. Bartholomew's (of which Col. Doyley was tax collector) rather diminished than increased. That to account for the diminution of the number of the negroes of the estate, the defendant went into proof, that a number of the negroes ranaway, or were taken off by the British troops, during the war, and that although some of them returned, a number died of the camp fever, which was introduced by those who returned; and I am of opinion that losses were undoubtedly sustained from these causes. But the extent could not be ascertained from the testimony. That the debts of the testator at the time of his death, amounted to £37,649. 6s. 5d. currency, including the demands of the executors themselves, upon the estate, which however are denied and contested by complainants. That by the will of the testator, his widow, Mrs. Ann Webb, was entitled to twenty-three negroes bequeathed to her absolutely in lieu and bar of her dower. And also to a residence on the plantation and a right of cultivating the lands of the estate with her negroes, and to an annuity of £400. during her widowhood, and no longer; all the rest and residue of the estate being devised and bequeathed to the complainants, equally to be divided between them.

That Mrs. Ann Webb, the widow, intermarried in the month of April, 1777, with Joseph Glover, Esq., who then drew off from the estate, the negroes which his wife was entitled to. Whereupon she ceased to have any further right or claims upon the estate.

That upon examining the circumstances of the estate in question, it appears to have been situated on Ashepoo river, upon which the following crops were made several years preceding the death of the testator, which are stated for the purpose of enabling the court to form a comparison with the crops afterwards accounted for:

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*In the year 1769, there were made

	358	barrels of Rice.
70,	327	ditto.
71,	254	ditto.
72,	249	ditto.
73,	283	ditto.
74,	193	ditto.

That the master has not been able to ascertain with precision the amount of the crops of the estate generally, or in each particular year, but that on this subject he begs leave to refer the court to the following documents, together with the answer:

1st. The accounts of the defendant's testator, filed with his answer to the original bill in this case.

And 2d. An exhibit which the defendant now offers, containing various additions, and including such part of the crops as are alleged to have passed into the hands of Col. Pinckney, the executor of the defendant's testator.

It was insisted upon by the complainants, that on account of the alleged defectiveness and imperfection of the accounts, that the master ought to allow certain compensation to the heirs of the estate of the late Mr. B. Webb, proportioned to the number of working negroes of the estate, as had been heretofore allowed in sundry cases, where the accounts of the executors or administrators have been defective or imperfect. But the defendant insisted no such allowance ought to be made as they alleged that the accounts of the administration of the executor Mr. E. Bellinger, were sufficiently full, fair and satisfactory under the circumstances of the case, and that no such allowance as was claimed by complainants had ever been made by the court, except in cases of gross defectiveness and imperfection: and I submit to the court upon the whole of the case whether any such extra allowance ought to be made, which when decided, will enable me to make up a final report on the account. That it is impossible for me under the present circumstances to state an account to the court, or to make up a full and final report upon the accounts of the executor, because the special

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order and di*rection of the court itself is requisite on various points of the cause as well as those brought to the view of the court by this report, as those formerly reserved by the court. And I submit to the court the propriety of appointing accountants for the purpose of making up the account whenever the court by its special orders and directions on the disputed points shall enable a statement to be made.

I beg leave also to submit to the court the evidence of many witnesses, who were examined by both parties, in my presence, and reduced to writing by the counsel who agreed therein, which evidence applies to the questions that were immediately before me, and also to the points reserved by the court.

The cause came to a hearing, and the following testimony was given before the court.

Mr. Tunno testified, that he sold Mr. Edmund Bellinger, in December, 1785, twenty-eight negro slaves, at £80 each, amounting to £2240, payable in 1, 2 and 3 years, all of which, with interest has been since paid, but about £200 which is still due.

Mr. Monies, testified that Mr. Williman purchased on the 14th March, 1803, for £3000 the plantation which had formerly belonged to Mr. Benjamin Webb, deceased, at Ashepoo. It had been sold 5 or 6 years before by the witness, as attorney of Mrs. Hartley, a creditor of Webb's estate, for the same price to another person, who not being able to pay for it, a second sale was made, and Mr. Williman became the purchaser, on a credit of 1, 2 and 3 years.

Mr. Josiah Smith testified, that he and Capt. Hutchinson managed the estate of Mr. Austen for many years; rice and provisions were the objects of culture, from 1764 to 1790. There were at an average, about 40 effective labourers, out of from 67 to 77 slaves on the plantation. They made on an average, 280 barrels of rice per annum, besides their provisions. The estate of Austen was not plundered by the British troops

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during the war, nor did *any of them runaway to the British. The estate belonging to persons resident in England, it was protected as British property. In 1781 or 1782, some rice and corn were used by American troops, but it was paid for. The slaves of that plantation have encreased; but a few of the encrease were purchased. Webb's lands were on the north side of the river, above and below the bridge where the main road crosses the river, and is chiefly tide land. Austen's lands were adjacent to Webb's, but lower down the river. It consisted of 50 acres of tide land, and 210 acres of Inland swamp.

Mr. Carrol testified, that he was agent for Mrs. Hartley from 1794 to 1796. He managed for her some of the lands of the estate of Webb, which she had purchased; the Inland swamp. He made no crops the first two years with twenty workers. Sandy Run, which emptied into the upper part of this plantation, threw its waters on it in such a manner that they could not be drained off. The tide ebbed and flowed up to this land. Yet it was very difficult to drain.

Mr. Cato Fields testified that he knew the lands of the estate of Webb, planted by the executor. His knowledge however is general. He has never been over them. He does not think them in general safe, though part of them may be so. He knows of several crops lost on them, by the seasons. Mr. Bellinger built a Schooner for himself on the lands of the estate. Mr. Bellinger's house was burnt about ten years before, (in 1797.)

Mrs. Hartley. Mr. Bellinger built a Schooner on the estate's land. It was said to be for the joint use of the estate and himself. She understood the vessel was sunk by the British. The vessel was said to have a cargo of rice on board, whose she does not know, and never returned. The slaves of the estate and of the executor both worked on lands of the estate.

Mrs. Townsend testified that Mr. Bellinger's house was burnt, she thinks in 1795. She lived in the neighbourhood, and saw the

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ruins soon after. Mr. Bellinger *was absent from home. She believes none of his family were at home. His daughters were with witness.

Mr. Watson, accountant, testified that among the papers of the estate, was a bundle, nearly reduced to powder; as far as they could be deciphered, they appeared to relate to the estate of Webb, and to consist of receipts, bills, &c. &c.

A great deal of other testimony was taken in the cause, chiefly in writing, and before the master, on the reference to him. This was referred to generally in the arguments of the counsel, and by the court in its decree.

Mr. Desaussure, Mr. Parker and Mr. Pringle, for the complainants, argued that the lands were of a good quality, and productive; and that good crops were made by the testator in his lifetime. That the crops made by the executor were much inferior to those made by the testator, as well as those made on the adjacent estate of Austen, whose lands were not better, and indeed having less of tide swamp for cultivation.

The evidence of Mr. Godfrey, Mr. Bates, Mr. Kenny, Mr. W. Pinckney, Mr. Girardeau, Mr. George Bellinger and Col. Doyley, were referred to, as to the productiveness of the lands of Webb's estate.

The comparison of the crops made by the testator (as shewn by the sales extracted from his factor's books) and those made by the executor, as stated in his accounts, shewed, as the council contended, such a dissimilarity, and inferiority, as could be explained only by the supposition of great negligence, and laches on the part of the executor. That none of the debts of the estate were paid; and great sales, both of real and personal property of the estate of Webb, have been obliged to be made to extricate it from debt; whilst the executor who had a much smaller estate in the same neighborhood, with fewer slaves and worse lands, made actually, as appears by the evidence, much larger crops, and has been able to increase his personal estate considerably by purchases.

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*That the injuries done to the crops during the war, extended only to the years 1779 and 1780, and never were total: and that the loss of slaves by desertion to the enemy, and by deaths, (though some was admitted) was not stated with the smallest pretensions, or even attempts at accuracy—and could not account for the great diminution of the number of slaves after so many years of peace, of health, and of consequent increase.

That the charge of gross neglect was supported, and even extended by the proof; that the executor was in the habit of drawing off the slaves of the estate from their regular labor at improper and critical seasons, for purposes of no value to the estate: and sometimes as was charged for his own purposes; so that if the labor was returned by the executor as alleged, it could not redeem the injury done to the crop of the estate.

That the rice machines of the estate were allowed by the executor to go wholly to ruin, though there were six or seven carpenters among the slaves. This increased the labor of the slaves, made them more feeble, and kept them employed in getting out the crop for market, which ought to have been prepared by the machinery, and prevented his improving the lands by their labor, by ditching and banking.

That the executor offered in payment for his own debts some part of the crops of the estate, as appeared by his letters of the 3d February, 1786; 5th September, 1786; the 7th February, 1787; and 5th March, 1788; although the estate was in debt, and paying interest on its debts.

That the executor employed the sawyers of the estate on his own lands, and it is presumable for his own use, as no credits are given for their labor, and but small credits are allowed the estate for lumber, which was formerly a source of great revenue to the estate. That the income of the estate was almost wholly applicable to the purpose of paying the debts, as little or nothing was expended on the maintenance or education of the complainants, till a very short time before the estate was delivered up by the

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exe*cutor, as appeared by the testimony of Col. Doyley, and other witnesses.

That inferior and worthless overseers were employed by the executor, who did not remedy his own neglects.

From these facts, the counsel contended that it appeared there had been great neglect, and mismanagement by the executor; and that his accounts were not sufficient exact, full or proper, and that therefore the court would assume as a standard for the responsibility of the executor, a rule sometimes adopted in such cases, by fixing the number of laboring slaves, and allowing the heirs a proper annual compensation by way of hire to be paid by the executor. The court had done this in the case of Mayrant v. Davis, executor of Neilson, and Lowndes and wife v. Read, as well as in other cases.

That with respect to the neglect of the executor, and the injuries resulting from it to the estate, it was completely in the power of the court to examine into it, and give relief. If this should not be done, the heirs would be remediless. There was no action at law which could give them redress. There are no cases shewing such relief given at law.

Mr. Cheves for defendant, argued, that the quality of the lands of the estate was inferior; or at least that the culture of rice was not so understood and practised in the time of the executor, as to give to lands flowed by the tides, the decisive advantage it has since obtained by new discoveries in the culture of rice.

That the quality of the soil of Austen's estate was superior, or it was more man-

ageable as appeared by the evidence of intelligent witnesses.

That the laboring power or productive force of the estate was greatly diminished in the hands of the executor by the death of many of the slaves by the camp fever, introduced into the plantation by the soldiery, and by the desertion to the enemy of a very great number of the slaves who were never recovered. He had thus a very inferior force to work the lands to that employed by the

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testator.—*Besides, the widow drew off the slaves bequeathed to her, which greatly weakened the gang. And there were some slaves of old Mrs. Webb who worked on the plantation in the testator's lifetime. All these things made any comparison between the crops of the testator, and of the executor, an unfair test of the management of the latter. But that in reality the difference was not very great, (after the proper allowances) as to the quantity of rice made for market; and there was no difference at all in the annual average value of the productive labor of the slaves actually employed by the two different parties.

That the enemy were so perfectly masters of the sea coast during part of the year 1779, the whole of 1780, and part of 1781, and they so ravaged and plundered the plantations, that no crops could be expected to be made in those years. It was as much as could be done to make provisions. The evidence is clear that the British troops frequented this plantation, and drew supplies from it.

That with respect to the laches attributed to the executor, in suffering the rice machines to go to ruin, and in neglecting to make good crops, these could not be matters of account. That these are questions of damage founded on the case, and not even on an implied assumpsit; it was improper therefore to refer such questions to the master; they are difficult and important, and the court itself sometimes will not determine them, but will send them to a jury.

The court took time to consider, and afterwards Chancellor JAMES delivered the decree of the court:

Complainants in their original bill, which has been revived in the usual form, have called upon Edmund Bellinger, deceased, as one of the executors of Benjamin Webb, deceased, the father of complainants, for an account of all his transactions with the said estate, for an account of the profits of the real and personal estate, and for all the property contained in the inventory returned by the executor to the ordinary's office. Defendant, in his answer, has accounted for

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the crops which he made from the year *1777, when he first took upon himself the management of the estate as a qualified executor, until the year 1779. But in the years 1779, 1780, and 1781, he renders no account of crops, stating as a reason therefor the well known unsettled state of the country during those three years, when this state had become the seat of the revolutionary war.—From the year 1782 till the time of his delivering up one moiety of the estate to the complainant Benjamin Webb, which was in January, 1788, and the other moiety to Charles Webb, which was in February, 1789, the defendant accounts for certain crops which are those complained of, and for lumber sold. As to the property contained in the inventory, more especially the negroes, defendant accounts for the deficiency of their number when delivered up to the heirs, compared with that contained in the inventory, by stating in his answer—"that many of the estate's negroes died of the camp fever, and many of them ran away to the British: but how many of each, he cannot recollect; but that none of them were ever sold, and that he thought himself fortunate in keeping what negroes remained."

Such being the substance of the bill and answer, the accounts were referred to the master, who reports that he is at a loss for any principle upon which he is to settle them, and prays the court to establish such as may be his guide. In fixing such principles for the master, the court have agreed to place out of the question certain minor charges, made by the complainants, such as letting the rice machines go to ruin, &c. as sounding in damages alone, and to take into consideration only the alleged deficiency in the crops, and in the number of negroes delivered up to the heirs. And first, as to the deficiency in the crops. Upon this charge the complainants gave evidence of the crops made by the testator Benjamin Webb, for the six years preceding his death; and of the crops made on a plantation in the neighbourhood by the executors of Austin; and from a comparison of these, with the crops of the estate, made by Edmund Bellinger, endeavour-

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ed to draw an in*ference that the executor Bellinger was guilty of such gross negligence, as to make him liable either for the alleged deficiency, or for the hire of the negroes. But the evidence in neither view affords a satisfactory guide to the court. In the first place, the crops of the testator Benjamin Webb appear to have decreased annually, which cannot well be accounted for, but for some deterioration in the lands planted under the culture of that day; and if so, this cause of the decrease of crops must have increased annually, while the lands were worked by Edmund Bellinger, since no improvements were made in his time.

Next, as to the second ground of comparison, it appears from the evidence that the estate of Austin did not lie in such an exposed situation as that of Webb, the former being three miles off, and the latter lying on the main road leading from Charleston to Savannah, which was much frequented by

the hostile armies. That the lands of the estate of Austin were inland swamp, which in those days of the infancy of rice culture, was deemed much better, and indeed produced more than the tide lands of Ashepoo, of which the estate of Webb consisted: and that John Moultrie, who was well known to be disaffected to the American cause, and to possess much influence among the British, was interested in the estate of Austin, and that this estate was consequently highly favored by the enemy. Such was the evidence offered upon this ground. But to have made the comparison satisfactory, testimony ought to have been adduced to shew what crops were made on lands situated in a similar manner with those of Webb, as to soil, the pitch of the tide and exposure to the depredations of the enemy; but in this instance an estate appears to have been selected, differing from the one with which it is compared, in all these essential circumstances. Besides, if evidence had been produced to shew what kind of crops the defendant Bellinger made for himself, it would have afforded a pretty good rule of decision, since so far as these were good, he might have been charged with neglect in not doing so well for the estate as

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for himself; and *so far as they were bad, he might have been exculpated.—Some general testimony has been gone into to shew that he was a very bad planter, but this has not descended to particulars so as to shew what was made for himself in each year, and thus to afford a certain rule by which we could compare his own crops with those made by the estate. Under this view of the case, the court are left in a state of uncertainty; for while on the one hand we profess ourselves not to be satisfied with the comparisons offered to us, on the other we are not altogether content with the crops which have been made by Mr. Bellinger. Therefore being thus situated, we think it will be more safe to resort to the general rule formerly adopted in the case of Mayrant v. Davis, executor of Nelson, [1 Desaus. 202,] and to allow the complainant negro hire. But in the calculation of this, we cannot think it equitable to charge defendant with such hire, during the years 1779, 1780, and 1781. In the first year it has been proved that the plantation was very much disturbed, and that sixty four negroes went away in one night, during the month of May, which is a very critical time for the making of a rice crop. In the second year, it is notorious that the British overrun the whole of the lower country, and in the third year they were still in possession of it; and we find that nothing was allowed for that year, in the case of Mayrant v. the executor of Nelson, and we do not see why the same rule should not apply in this case. Moreover, these were years of general confusion and calamity, in which, if any thing had been made, there does not appear any evidence to shew that it could have been disposed of in market; and in which, all but the particular friends of the British thought themselves fortunate if they could raise provisions, and save their negroes from being carried off; but even in that many of our citizens entirely failed. For all these reasons, we are of opinion that it would be rigorous to charge the defendant with negro hire in those three years.

The second ground of consideration is, the alleged deficiency in the number of negroes between those named in the inventory, and

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those delivered up to the *heirs. To this charge the defendant Bellinger has answered as we have seen above—"that he thought himself fortunate in keeping what negroes remained," &c. and Mrs. Townsend has stated in her evidence, "that she knows of herself that many of the negroes of the estate went off with the British, and that she heard her mother often count them over, and say that sixty-four had gone." This testimony, when coupled with the answer, is satisfactory to the court; and under all these circumstances, we are of opinion that the complainants should be contented with what negroes were delivered up to them.

Let the accounts therefore be referred to the master to ascertain the negro hire from the year 1782, inclusive, till the year that Edmund Bellinger delivered up the estate to the complainants respectively; charging the defendant with such hire at the rate of £10 per hand for the number of working hands employed in each year, taking that number at sixty workers, unless defendant can shew that they were fewer on the plantation. But the years 1779, 1780, and 1781, are not to be included. Let him also deduct from the amount of the negro hire, the monies credited to the estate by the executor Bellinger, for the annual sales of crops, and other matters, as stated in the accounts produced by the defendant.

The defendant being dissatisfied with this decree, Mr. Cheves presented a petition for a rehearing.

The humble petition of Mary Bellinger, the defendant in the above cause, sheweth:

That your petitioner finds herself greatly aggrieved by a decretal order of this honorable court, made in this case in April term last; whereby it is decreed that your petitioner shall account as executrix of her testator, who was executor of Benjamin Webb, deceased, for the hire of the negroes of the estate of the said Benjamin Webb, from the year 1782, inclusive, at the rate of £10 per working hand per annum, taking the number of working hands at sixty, unless your peti-

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tioner could shew that there were *fewer on the plantation; whereby your petitioner's testator will be obliged to pay in addition to

the crops actually made for those years, £886 8s. 8d, and in addition thereto, according to the principle of Mayrant v. executor of Nelson, a sum in interest equal to £2,070 making together the sum of £2956 8s. 8d. which will be in a great degree ruinous to the estate of her testator, her children and herself, and which is greater than the whole value of the personal estate of the said Benjamin Webb, his debts deducted, when the same was appraised. Your petitioner therefore cannot doubt but that your honors will indulge your petitioner in an inquiry into the grounds of this decree, in its principle of great importance, in its amount great, and in its relation to your petitioner and her children, all in all.

Your honors will be pleased to observe that the transactions which form the subject of consideration in this case commenced at a period when the majority of your honors now in the fullness of years and wisdom, were yet in early youth. That the country has in the mean time suffered the effects of a calamitous war, and the ten fold evils of a civil contest, in which public records have suffered, but wherein in scarce any instance have private documents been wholly preserved. That her testator who was the actor in these transactions, was sorely afflicted by diseases for many years before his death, and unable to attend actively to business; and that he has many years since paid the debt of nature, leaving his children in infancy, and your petitioner always utterly unacquainted with accounts and unfit for business, wholly ignorant of this case, her testator having in his lifetime suffered the loss of many papers by the destruction of his dwelling house by fire. And finally that under these numerous circumstances of disadvantage, your petitioner is called to this rigorous account. But from this detail your petitioner does not mean to contend that the complainant shall be denied a fraction of the claims which he can establish according to law, or that the rules of law or of evidence should be relaxed or varied in relation to her

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case: but it will strongly, no *doubt impress on your honors minds the propriety and necessity of giving her the protection of those rules, the rules of right reason, and the only sure indices of truth.

Your petitioner has been advised that the principle on which the complainants have endeavoured to charge the estate of her testator is in the language of their counsel, for gross negligence in the management of the estate. Now your petitioner humbly submits to your honors that your honors have not even suggested the existence of such negligence. But on the contrary, your honors have been pleased to say only, that you "are not altogether content with the crops which have been made by Mr. Bellinger," from which it is clear that your honors did not mean to charge the defendant's testator with "gross negligence," which would be utterly inconsistent with the well considered expressions in the above sentence and in divers others in the said decretal order. But if these words be expressive of your honors opinion, which your petitioner cannot doubt, as they are confirmed by the whole tenour of the decree, and not delivered through inadvertence which there is no reason to believe, it will most clearly follow, that the grounds of "gross negligence" is not only not admitted, but denied by your honors. Your petitioner is also advised that there is great reason to doubt whether it is not departing from the principle of the decision of Mayrant v. Ex'ors of Nelson, to predicate the liability of her testator on any species of negligence in the management of the estate; the principle of that decision being as your petitioner has understood, and as the decree itself seems to prove, the failure of the executor to account with reasonable accuracy for the actual crops of the estate, and not the insufficiency of the crops, which seems to be a matter not in the nature of account, but sounding in damages, as much as the omission of any agent, public or private, to do his duty with fidelity, and with such skill and ability as the law requires.

But your petitioner is further advised that admitting the correctness of the principle,

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still the complainants ac*cording to the rules of evidence as well as the plainest dictates of common sense & common justice, having founded their claim on "gross negligence," were bound to prove it. And that it was not at all incumbent on the defendant to discharge herself till evidence sufficient to satisfy the mind of the court and to authorize a decree, had been adduced by the complainants. Now if the evidence be adverted to, it will be seen that none such does exist; and the exposition thereof by your honors in the said decree has demonstrated the fact.

The most favourable view for the complainant, of the testimony, admits of no stronger inferences than that Mr. Bellinger wanted ordinary judgment and skill, and failed of reasonable success; while even these grounds are controverted, and as your petitioner thinks, fully disproved as to their influence on the crops of the estate, by very strong testimony; for it appears from the testimony of all the witnesses, that as the Ashepoo lands were then cultivated, it was not practicable on them to make a good crop, and the crops of Mr. Webb himself appear to have diminished every year, which as your honors remark, is an evidence of the increasing deterioration of the lands.

That even these crops were not equal to those for which your petitioner's testator has accounted, nor nearly equal, though adduced

to prove neglect in your petitioner's testator: that after the management had passed into the hands of Col. Doyley, (taking the price of rice to be the same always, as the rise or fall of the markets could not increase the produce of the land,) the crops were not nearly as great as those made by your petitioner's testator; and even at the high prices at which some of the latter crops sold, not equal in pecuniary amount. Thus then it clearly appears that there is not the shadow of pretence to say that there existed gross negligence, and that the weight of evidence is against the charges of a want of ordinary skill and judgment, and reasonable success. And so your honors have declared when you say, (stating forcibly, and not less justly than

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forcibly, the inapplicability and *insufficiency of the complainants proof,) that the complainants endeavour to draw an inference from the testimony, that the executor was guilty of "such gross neglect as to make him liable for the alleged deficiency (in the crops) or for the hire of the negroes, but that the evidence in neither view affords a satisfactory guide to the court." These are the words of the decree. Now if the evidence be shortly stated, which shall be done without gloss or coloring, so far as it relates to the crops actually made by Mr. Webb in his lifetime, by your petitioner's testator, & by Col. Doyley afterwards, it will appear that your petitioners testator made greater crops than were ever made, according to any testimony before the court, on the lands of the estate.

In this view, for the conclusive and incontrovertible reasons given by the court, the years 1779, 1780, and 1781 are omitted. Statement No. 1, hereunto annexed will shew that Mr. Webb made during six successive years but $26 31 cents per hand—while it will appear by reference to statement No. 2, that your petitioner's testator made during eight successive years, (excluding 1779, 1780, and 1781, as aforesaid) 37 dolls. 18 cents, or nearly fifty per cent. more. Statement No. 3, gives a view of the years to which the decree relates—which, though it excludes two of the largest crops, yields 32 3-4 dollars per hand; and by reference to statement No. 4, it will appear that for two years under the management of Colonel Doyley, there was made but $22 53 cents per hand, taking the rice at a fixed price, and by the actual sales, only $21 57 cents or nearly 75 per cent. less than the crops made by your petitioner's testator. And by the same statement, it will appear that with part of the negroes under the management of Col. Doyley, there was made during four successive years, taking the rice at a fixed price, only, thirty-one dollars per hand, less by one sixth than the crops of your petitioner's testator: and taking the result according to the high and therefore unusual prices of rice, there was made no more than $37 7 cents, per hand, which

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*is less than the crops of your petitioner's testator. Your petitioner would then inquire how, according to justice, law or evidence, her testator is to be charged with gross negligence, when it appears with mathematical certainty that he did more than was effected by the zeal of personal interest, or the exertions of devoted friendship? Why under these circumstances, severe and ruinous penalties are to be imposed upon her testator's estate, herself and her children? Nay more, why she shall be obliged to suffer these penalties, not only without proof, but against evidence. The issue is, "gross negligence, or not? It is legally incumbent on the complainants to prove their case satisfactorily: but your honors have said, and by the best reasoning proved, what has been otherwise demonstrated, that there is no satisfactory evidence on the subject?—Will it not then inevitably follow that the decree ought not to charge your petitioner's testator? Your petitioner therefore prays your honors to grant a rehearing of the said cause.

It is the course of the court to hear the argument on the merits, on the motion for the rehearing.

November, 1808.

The cause was argued on the motion for a rehearing before Chancellors RUTLEDGE and JAMES.

Mr. Cheves and Mr. Gaillard for the petitioner, Defendant in the suit, urged the arguments used at the former hearing with renewed force and ingenuity, and added other arguments. They contended that the accounts filed by the executor had not been falsified, and ought to be relied upon as made by the person chosen and confided in by the testator, and sanctioned by his oath, until shewn to be false or imperfect by full testimony. That so far from the accounts being falsified, it appeared that the executor had given credit to the estate for all that had been made on the plantation, and that by the comparison of the crops accounted for by the executor, compared with those made by the testator himself in tranquil times, and with

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his own *perpetual superintendance, the executor had done better, or at least as well as the testator; as appeared by the comparative statements produced to the court.

That with respect to the supine neglect charged against the executor, it was not so made out in proof as should induce the court to depart from the accounts, which was the only regular mode of settlement, and to assume an arbitrary rule, charging the executors with a fixed annual sum for each worker, without any proof that so much had been made. But that in fact such charge

of negligence sounded in damages, which were not within the jurisdiction of the court; but was triable at law, where other defences, and even the statute of limitations could have been set up in defence. That in the case of Mayrant v. the Executor of Nelson, no accounts were kept, and the court was obliged to resort to an arbitrary rule.

Mr. Desaussure and Mr. Parker argued for the defendants, and contended that the gross negligence in the management of the estate was sufficiently made out by Col. Doyley's testimony. And that where it appeared to the court that gross negligence had existed, so that much less had been made, than might be expected from reasonable diligence, there the court had a right to give redress in some way or other. And there appeared to be no other way so correct as the rule adopted by the court in the case of Mayrant v. the Executor of Nelson, and in other subsequent cases, to fix on a reasonable sum, such as might be considered the average product of the labourer, in the cultivation of the soil, and to charge the executor with that. And that there was really no substantial difference between cases where no accounts were kept and filed by the executor, and where they were so imperfect that no reliance could be placed on them. In either case, the court ought in justice to the children of the testator, to resort to the other standard, which was a fair and moderate one. That the objection that complainant rested altogether on his allegation of gross laches in the

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management of the estate, which *sounded in damages, was unfounded; for though this was urged and relied on, yet the complainant insisted on the incorrectness of the accounts, and the presumption that everything was not accounted for, arising from the executors offers of the rice of the estate in payment of his own debts, and from other circumstances which were proved.

That this sort of neglect in accounting did not sound in damages so as to require an issue at law, for wherever an executor acted improperly, this court could make him accountable and liable.

Suppose he sold negroes or other property of the estate, and gave no credit for the price, surely, though it might be said this sounded in damages, this court could give relief. Suppose he neglected to sue and recover good debts due to the estate, he could be made accountable for this gross negligence; and so in a thousand other instances. Nor could the legatees of Mr. Webb have maintained a suit at law against the executor. There is no example of such suit brought or sustained at law. The utmost that could be done, where this court could not give redress, would be to direct an issue, but retain the cause.

The accounts actually filed by this executor were imperfect, for correction and additions had been made during the examination. The court had therefore done right in abandoning them, as not sufficiently accurate to be relied upon; and in resorting to a reasonable standard of productive field labour, and charging the executor with that sum. That this imperfection in the accounts did not result from the loss of papers relative to the estate, for though the executrix proved the burning of the house of testator, yet he himself, when he filed his answer, before his death, made no pretence or allegation of the loss of any papers.

That with respect to the comparison so ingeniously made by the defendants counsel, between the sums made by the testator Mr. Webb, and the executor, it was the result of the higher prices got for rice by the executor after the revolutionary war, than those obtained by the testator before the war. That the price obtained was not the

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true *standard, but the quantity of rice made by each on the same lands and with nearly the same labourers. That by this standard the difference was clearly and greatly against the executor. Besides, the testator made much by lumber; the executor nothing.

Chancellor JAMES afterwards delivered the decree of the court.

On the Petition for a rehearing, in the interlocutory order made in this case upon which a rehearing is now prayed, it is stated among other matters, that upon the charge of gross neglect made by complainants against Edmund Bellinger, deceased, the complainants gave evidence of the crops made by the testator, Benjamin Webb, deceased, for six years preceding his death, and of the crops made on a plantation in the neighbourhood by the executors of Austin; and from a comparison of these with the crops made by Edmund Bellinger for the estate of Webb, endeavoured to draw an inference that Bellinger, the executor, was guilty of such gross negligence as to make him liable either for the alleged deficiency, or for the hire of the negroes. But the evidence in neither view affords a satisfactory guide to the court. After making some observations upon the evidence both of the complainants and defendant, it is further stated in the said decretal order, "that under this view of the case, the court are left in a state of uncertainty, for while on the one hand, we profess ourselves not to be satisfied with the comparison offered to us, on the other, we are not altogether content with the crops which have been made by Mr. Bellinger. Therefore being thus situated, we think it will be most safe to resort to the general rule, formerly adopted in the case of Mayrant against

the executor of Nelson, and to allow the complainant negro hire." Now, as the case was made out at the close of the former argument, the court was led to think there would be little difference between the sum usually allowed for negro hire, and the sum arising

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from the crops made by Mr. Bellin*ger. And as the evidence on the part of complainants was by no means conclusive, and the crops made by the executor were very ordinary, it was deemed most safe to resort to the rule before recited.

At the former hearing, though the counsel for the defendant exercised much ingenuity, yet they did not enter into such clear calculations as at present. And this case depends much upon the clearness of calculation. Those statements now offered, and which are admitted by complainants counsel to be generally correct, have enabled the court to form a more correct opinion in the case. At present it appears that the amount of negro hire will be considerably more than the proceeds of the crops made by Mr. Bellinger; and although the court are not yet contented with those crops, still they think that before complainants ought to recover any more than the amount of them, they ought to shew either that the executor wasted the estate, or that his accounts were false, or else that he was guilty of gross negligence.

But it has not been attempted to falsify the accounts, neither has a devastavit nor gross negligence been proved. Complainants have proved Mr. Bellinger to have been a bad planter; but he was chosen by Mr. Webb to be his executor, who could hardly be ignorant of that circumstance, for they were near neighbours. He might have preferred his moral to his agricultural qualifications; but this is of little moment, he was the object of his choice, the person appointed by himself to manage. And if he did that uprightly, but yet without exercising superior judgment, this court will not interfere so as to mulct his representatives. Were executors to be rigorously proceeded against, no good man would accept the office. None but the cunning or the bad man, who conceived that he had dexterity enough to defraud or to evade the law, would qualify and act as such. The court should therefore be careful not to make executors responsible, except for wasting the property of testator,

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false accounts, or *gross negligence. But neither of these have been proved to the satisfaction of the court in this case.

Therefore let the former order be reversed. And as the master hath not yet reported on the accounts, let it be referred back to him to state them, and to report upon the same.

2 Desaus. 509

Case LXII.

[Present, Chancellors Rutledge, James and Thompson.]

The Representatives of WILLIAM WRAGG v. The COMPTROLLER-GENERAL and Others, Creditors of A. Irvine.

(May, 1807.)

[*Vendor and Purchaser* ⟸251.]

A vendor selling lands, and conveying them in fee and taking a bond for the purchase money, without taking a mortgage, has no implied lien on the land, so as to give him any preference over the other creditors of the purchaser.

[Ed. Note.—Cited in McCorkle v. Montgomery, 11 Rich. Eq. 132, 133; Morse v. Adams, 2 S. C. 58; Lavender v. Daniel & Harmon, 58 S. C. 134, 36 S. E. 546.

For other cases, see Vendor and Purchaser, Cent. Dig. § 624; Dec. Dig. ⟸251.]

[*War* ⟸29.]

And the act confiscating the property of the purchaser gave no preference to the vendor, who had not taken a mortgage. None of the subsequent acts on the subject of confiscated estates, have made any difference among creditors, but put them on the same footing, or left them to their legal priorities.

[Ed. Note.—For other cases, see War, Cent. Dig. § 191; Dec. Dig. ⟸29.]

† The object of the complainant's bill was to obtain the benefit of an equitable lien, which they insisted they were entitled to, on a tract of land sold by their ancestor Mr. Wm. Wragg, now deceased, to Mr. Andrew Irvine.

The complainant's bill sets forth that Wm.

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Wragg did, *in 1773, sell and convey to An-

† The doctrine of equitable liens has been a subject of considerable discussion and difference of opinion at different times.

One of these equities is, where a man borrows money, and deposits the whole or a part of the title deeds of his land, with the lender, this has been held to be manifestly for the purpose of securing the repayment of the money, though no mortgage be actually given. It is said that equity, regarding the intention of the parties, will raise an agreement which it will enforce, that the land shall stand as a pledge for the debt. In Hales v. Vanderchem, 2 Vern. 617, it was decided, that though agreements, since the statute of frauds, are not to be part parol, and part in writing, yet a deposit for a

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performance of a writ*ten agreement, without there being any writing declaring the deposit to be a security, is not within the purview of the statute.

In Russell v. Russell—1 Bro. C. C. 269, the pledge of a lease was carried into effect in favor of the lender of money, even against the assignees of the pledger, who had become bankrupt; notwithstanding the objection was taken, that it was charging land without writing, contrary to the 4th clause of the statute of frauds; an issue was directed by the lords commissioners to try whether the lease was deposited as a security for the money advanced, and the jury found that it was so deposited: Whereupon Lord Thurlow, (who had resumed the seals) ordered the land to be sold, and the plaintiff to be paid his money. And so in Featherstone v. Fenwick, (May, 1784) and Harford v. Carpenter, Lord Thurlow held that the deposit of

drew Irvine, a certain barony on Savannah river, in this state, for which he took the bonds of said Andrew Irvine, payable at a future day: that said bonds remained unpaid in 1782, in which year the general assembly of this state confiscated all the property of said Andrew Irvine; but declared the same subject to the payment of his debts. In 1794, the commissioners of the treasury issued to the representatives of said William Wragg certain certificates on account of Irvine's bonds, which certificates are now in the possession of the complainants unpaid, and certain other certificates to the agents or representatives of Shirley & Price, being for a debt due them on open account by said Irvine; which certificates are now in the possession of, or are claimed by John Ward, Thomas W. Bacot, and Anne Price.

That the commissioners of forfeited estates, pursuant to the confiscation act, sold the barony in 1782, as the property of said Irvine, to sundry purchasers for indents:

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some *of whom paid the indents due by them into the treasury; but others refused or neglected to pay, and became insolvent: Wherefore it became necessary to resell the lands purchased by them: that sundry tracts were accordingly resold in July last by the comptroller-general; but the proceeds arising from the sale being the whole of the funds applicable to the payment of said Irvine's debt to said Wm. Wragg, will not pay more than two thirds thereof, even should the whole be exclusively applied to that debt.

That the late purchasers of said lands, with the consent of complainants, who have offered to give receipts on their certificates for the amount of said sales, have applied to the comptroller-general for titles to the land so purchased, until which, they cannot be required by complainants to pay their purchase money: but the comptroller-general and the other defendants object to, and refuse the delivering titles unto the said purchasers, unless they, or complainants in their behalf, first deposit in the treasury such

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*a portion of the proceeds of said sales as shall satisfy the specie certificates issued to the representatives of Shirley & Price; the comptroller-general moreover threatening to resell the land: the said defendants pretending that said sale was made for the benefit of all Irvine's creditors, as well on open account as on specialty: Whereas complainants contend that their claim stands on a different footing, and is paramount to that of Shirley & Price, inasmuch as complainants demand arises out of the sale of the lands which belonged to their father, and over which said Andrew Irvine never exercised any ownership, and now constitute the only fund applicable to the payment of Irvine's debt, and was moreover secured by the specialty of said Irvine: Whereas the claim of the representatives of Shirley & Price arises on open account only, and it is not just they should be paid from sales of

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deeds entitled the holder to have a mortgage, and to have his lien effectuated; for although there is no special agreement to assign, the deposit affords a presumption that such was the intent. (See 1 Bro. C. C. 270, in note.)

In the case ex parte Wetherall, 11 Ves. 398, the Lord Chancellor Eldon decreed that the deposit of part of the title deeds, with written evidence, by which it appeared that the party covenanted that the object was to create a security upon the premises, should be an equitable mortgage. Here we see that the lord chancellor puts the lien on the ground of the written evidence, that the party had agreed to give

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*securities, and actually deposited the title deeds for that purpose.—(Page 401.)

In the next case, ex parte Haigh, 11 Ves. 403, Lord Chancellor Eldon decided that an equitable mortgage took place upon the mere deposit of a lease, without any writing to shew the object of it. But he said he disapproved of it, and that he did it on the authority of Lord Chancellor Thurlow, in the case of Russell v. Russell, 1 Bro. C. C. 269, which he said was a decision greatly to be lamented. He added that this decision, that a mere deposit of deeds, should be considered as evidence of an agreement to make a mortgage, had led to a discussion upon the truth and probability of evidence, which it was the object of the statute of frauds to prevent.

In the case, ex parte Finden, (11th Jan. 1805,) Lord Chancellor Eldon had also disapproved of Lord Thurlow's decision in Russell v. Russell, as breaking in on the statute of frauds; and he declared that a deposit of deeds should not be considered a mortgage, but in a clear case. In the case of Norris v. Wilkinson, 12 Vesey, 192, the master of the rolls, Sir Wm. Grant, disapproved of the decisions which had established, that the mere deposit of deeds should constitute a mortgage or equitable lien, if it required parol evidence to explain the intent of the deposit, for that was contrary to the statute; but he held himself bound to go as far as the cases had gone, but not to extend them. Where the deeds are deposited at the

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same time that the mo*ney is advanced, it is obvious that the purpose must be to secure the repayment. But if the deeds are deposited to have a mortgage drawn, it will not be a lien if the party dies meanwhile: this was for another object; that is, to have a regular mortgage; and the death of the party intervening, shall not give the effect of creating a mortgage from a deposit of deeds, which was made not as a security, but to have a mortgage drawn.

In Mountford, ex parte, 14 Vesey, 605, 6, the lord chancellor recognized the doctrine of an equitable mortgage by a deposit of deeds; but said the court would examine the terms. And in Langston, ex parte, 17 Vesey, he again supported the equitable mortgage by deposit of deeds; even covering subsequent advances that were made on that security. In Combe, ex parte, 17 Vesey, 369, the lord chancellor stated that this equitable mortgage, by deposit of deeds, was not favored, especially when contradicting a written instrument.

If one agrees for a valuable consideration to convey lands to J. S. and afterwards confesses judgment to J. S. if the money paid by J. N. be adequate to the value of the land, it binds the land in equity, and defeats the judgment. Finch v. Earl of Winchelsea, 1 P. Wms. 277, by Lord Cowper.

Another equitable lien is, where the owner of lands sell them, and delivers the possession of the estate to the purchasers, without receiving the purchase money, which was the case before

lands which belonged to complainants father, while there remain due to complainants for the same by said Irvine, $15,000 or $16,000,

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and the *whole nett amount of sales will not exceed $10,000.

Bill prays the court to decree and adjudge the whole proceeds of sales to be applied—in the first instance, exclusively to the complainants demand, and to direct the comptroller-general to make titles to the purchasers on complainants executing proper receipts and discharges for the nett amount of sales, without depositing any part in the treasury for the representatives of Shirley & Price, and that the comptroller-general be enjoined from proceeding in a resale of said lands, or such other relief as the court may deem consistent with equity and good conscience, &c.

The defendants put in answers to the following effect.—The answer of the comptroller-general sets forth that he believes the lands in bill mentioned were a part of a barony which was purchased in 1773, by A. Irvine from W. Wragg, father of complainants, & for which said A. Irvine gave the bonds on which the specie certificates were is-

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*sued, which are now held by complainants, and that the debt due to Shirley & Price by Irvine, was on open account. But he does not conceive himself authorized to comply with complainants requisitions, as the legislature have appropriated the funds in question to the payment of all the creditors of Andrew Irvine, without regard to the nature of their several and respective claims; and the certificates issued to Shirley & Price are of the same tenor as those held by complainants; and that from the nature of those certificates, which may be considered as the obligations of the state, defendant is bound to pay out of those funds a due proportion to the representatives of Shirley & Price, unless otherwise directed by the court.

The answer of John Ward sets forth, that he neither admits or denies the facts set forth in bill, save as follows: That his father Joshua Ward, was formerly a co-attorney, (together with Nathaniel Russell) of

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Shirley; and on the *death of his father, defendant found the specie certificate in bill mentioned among his papers; that the same is still in defendant's possession, but he has no interest therein, the said Shirley, having left, as he believes, representatives residing in England.

The answer of Thomas W. Bacot sets forth, that he neither admits or denies the facts in bill, save as follows:

That a specie certificate as there mentioned, was issued from the treasury to Thomas

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the court, in the *text. In such case, equity will give the vendor a lien on the land for the money, although there was no special agreement for the purpose, and whether the land be actually conveyed or not. And so the vendee has a lien on the estate, for the purchase money paid, if by any means titles cannot be made to him, even though he took another security for the money advanced. See Sugden's law of vendors, 352. Chapman v. Tanner, 1 Vern. 267. Pollexfen v. Moor, 3 Atk. 272. Mr. Sugden goes on to state the doctrine, with its modifications and exceptions with great clearness, p. 352, to 356. And the Lord Chancellor Eldon, reviewed the whole doctrine, and all the cases, with so much ability, in the case of Mackreth v. Simmons, reported in 15 Vesey, 329, that I would beg leave to refer the reader to that case. But as that book is in few hands, the following statement may be useful. The Lord Chancellor supposes this equity is derived from the civil law, as to goods, by which the lien of the vendor, is so strong, that (with certain excepted cases) the goods may be taken out of the possession of the individual who had obtained actual or constructive possession of them, to secure the payment of the purchase money. The Lord Chancellor considered the doctrine of such equitable lien, to have been settled very early in this court, and never to have been shaken but by Lord Chancellor Apsley, in the case of Fawell v. Heelis; Amb. 724. 1 Bro. C. C. 3d. Ed. 422.—(Note.)

The Lord Chancellor said, that the settled

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doctrine (notwithstand*ing the case of Fawell & Heelis) is that where the vendor conveys, without more, though the consideration is upon the face of the instrument expressed to be paid, and even by a receipt endorsed on the back, if it is the simple case of a conveyance, the money or part of it, however, not being paid, a lien shall prevail, upon the doctrine of this court, (which has the effect of contract, though perhaps no actual contract has taken place) as between the vendor and vendee, and persons claiming as volunteers, (12 Vesey, p. 337.) And in a subsequent passage, (p. 343,) he stated that it was too late to raise a doubt upon the question of the lien between the vendor and vendee. He then proceeded to examine the cases as to the question whether the lien would prevail against third persons, with notice of the situation of vendor and vendee. The earliest case was that of Hearn v. Botlers, Cary. 25; imperfectly reported. Then Chapman v. Tanner, 1 Vern. 267, which is also imperfectly reported. But the declaration of the court, what was the natural equity, shews strongly how the law upon the subject was understood.

The next case was Bond and Kent, 2 Vern. 281, which turned on special circumstances; admitting however that without these special circumstances, there would have been a lien. In Gibbons v. Baddall, 2 Eq. Cas. Abr. Tit. Purchaser, 682, Note, it is expressly stated, that the lien remained, though a note was given for part of the purchase money. In Pollexfen v.

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Moor, 3 Atk. 272, Lord Hardwicke affirms *the lien of the vendor, upon the estate, for the remainder of the purchase money, considering the vendee, a trustee as to the money, for the vendor. But he adds that "this equity will not extend to a third person." Lord Eldon says, if that expression is to be understood, as asserting that this equity would not extend to a third person, who had notice that the money was not paid, Lord Hardwicke's subsequent decisions contradict that. The cases of Harrison v. Southcoate, 2 Ves. sen. 389, 393, and Walker v. Prestwick, 2 Ves. 622, both decided by Lord Hardwicke, admitted the doctrine.

In Burgess v. Wheate, 1 Blacks. Rep. 123, the master of the rolls, Sir Thomas Clarke, lays down the rule both as to vendor and vendee, thus—"When a conveyance is made premature-

Nicholls, executor of Wm. Price, and that defendant, as attorney of said Nicholls, received the same from him, to be applied to payment of a debt due by the estate of Price. That defendant is still in possession thereof, but has no interest whatever therein.

The answer of Ann Price sets forth, that she neither admits or denies the facts in bill, save as follows:

That a specie certificate as therein mention-

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ed, was is*sued from the treasury to Thomas Nicholls, as executor of Wm. Price, the defendant's husband, and which certificate defendant claims as her property, as the widow and representative of said Wm. Price; and she denies the prior right of complainants, but insists that the fund is to be distributed in equal proportions to all the creditors of Irvine, and submits her rights to the protection of the court.

The cause came to a hearing:

Mr. Lee, the comptroller-general, stated to the court by consent of the counsel on both sides, that the bond of Mr. Andrew Irvine was executed and delivered by him to the late Mr. Wm. Wragg, for the price of a tract of land or barony, sold by Mr. Wragg to him. That the debt of Irvine to Shirly & Price, was an open account. That the commissioners of confiscated estates having sold the land of Irvine, as confiscated, the legislature had ordered that certificates should be given to the creditors of Irvine, to be paid out of the sales of that estate; but had

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made no *distinction between bond creditors and creditors on open account: and the treasury officers had given certificates without distinction.

The lands of Irvine which were sold, and produced the fund in the treasury, were those sold to him by Mr. Wragg, and not paid for.

Mr. W. L. Smith for complainants, contended, that on the sale of the land, in the year 1773, by Mr. Wragg to Mr. Irvine, without receiving payment of the price, an equitable lien attached on the land, in the hands of the purchaser, and all claiming under him, except bona fide purchasers for valuable consideration, without notice of the non payment of the purchase money. That this equitable lien is an ancient and well settled doctrine, founded on a long series of decided cases, and in natural justice.—See 1 Vern. 267, 2 Eq. Cas. abr. 682. 2 P. Wms, 291, 496. 3 P. Wms. 307. 2 Ves. sen. 622. 3 Atk. 272, and 1 Bro. C. C. 420.

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*That any alteration attempted to be made in the rights or situation of the parties by

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ly, before the money is paid, the money is considered as a lien on that estate in the hands of the vendee: so where money is paid prematurely, the money would be considered a lien on the estate in the hands of the vendor for the personal representative of the purchaser."

Tardiff v. Scrugham, cited in Ambl. 725, 6—1 Bro. C. C. 423, before Lord Camden, in 1769, is material, for it is represented as a case in which the lien was held to attach upon the two moieties of the estate. In Powell v. ——, Lord Camden is said to have determined in favor of the lien; but there is no accurate report of the case. In Fawell v. Heelis, Ambl. 724, 1 Bro. C. C. 422, n. Lord Chancellor Bathurst's opinion, was certainly that the

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bonds taken by the vendor *furnished evidence that credit was not given to the land, and therefore there was no lien.

In Becket v. Cordly, 1 Bro. C. C. 353, 8, Lord Thurlow asserted the general doctrine as familiar; but distinguished the case then before him, and held that under the circumstances the lien was discharged.

In Blackburn v. Gregson, 1 Bro. C. C. 420, Lord Kenyon took the doctrine to be perfectly clear; and Lord Loughborough expressed a clear opinion that the lien existed, though he did not decide the case. In Smith v. Hibband, 2 Dickens, 730, it was insisted that the payment of part of the purchase money was evidence that he meant to trust to the personal security. But it was held clear that the money contracted to be paid was a specific lien on the premises. The opinion of Lord Chancellor Eldon, in Austen v. Halsey, 6 Vesey, 475, 483, is only a dictum; but it is in favor of the lien, unless it evidently appeared that the lien, by implication, was not intended to be reserved. In the case of Elliott v. Edwards, 3 Bos. and P. 181, the master of the rolls, Lord Alvanley, states, that if a man having purchased an estate, conveys it before the purchase money has been paid, the court of equity will compel the person to whom the estate was conveyed, to pay that money: Provided he knew at the time he took the conveyance that it had not been paid. In the case of Nairn & Prouze, 6 Ves. 752, Sir Wm. Grant, the master of the rolls,

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decided that the vendor *having taken a security for the money, payable at a future time, amounted in that case to a waiver of the implied lien, which he admitted would otherwise prevail. The Lord Chancellor Eldon in commenting on this case, (15 Vesey, 348, 9.) does not seem to be entirely satisfied with it. He admits with the master of the rolls that the nature of the security taken, may amount to satisfactory evidence that a lien was not intended to be reserved; but he states that even a mortgage of another estate, taken as a security by the vendor, is not conclusive ground for the inference that a lien was not intended.

In the case of Hughes v. Kearney, 1 Schoales & Lefroy, 132, Lord Redesdale states the doctrine to be, that the purchase money unpaid is prima facie a lien on the lands sold: and if a security is taken for that money, it lies on the vendee to shew that the vendor agreed to rest on that security, and to discharge the lands: and a note or bills are considered not as a security, but as a mode of payment.

As a result of these cases, Lord Eldon states, that generally speaking, there is such a lien; and that where there would be a lien between the vendor and vendee, the vendor will have the lien against a third person, who had notice that the money was not paid. These two points he considered clearly settled; and the chancellor said that if he had not found authority, that the lien would attach upon a third person having notice, he should not have had any difficulty in deciding that, upon principle, as he

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could not perceive any difference be*tween this species of lien, and other equities, by which third persons having notice, are bound.

Lord Eldon then proceeded to decide on the circumstances of the case of Mackreth v. Simmons, which was before him, and had led him

any subsequent law, would be ex post facto, and void. But that in fact no such attempt had been made: for if the acts of the legislature were carefully examined, it would be found that it was not intended to change the condition, or alter the rights of the parties. That the confiscation law of February, 1782, expressly reserved the rights of creditors. That none of the subsequent acts of 1783, or of March, 1784, March, 1785, or March, 1786, on the subject of confiscated estates, indicated any intention to vary the rights of the creditors. Nor did the restoring acts mean or express any intention to alter the relative rights of creditors. The equitable lien then, originally existing, continued in full force; and the officers of the treasury, in delivering certificates to the creditors, could not, by their neglecting to distinguish the grades of the claims of the different creditors, affect or take away the lien on the land, or its effects, on the amount of sales of the land. It must have been sold subject to all the rights of third persons, and the funds in the treasury arising from the sale, were subject to this equity.

Mr. Desaussure for the defendants, argued, that the equitable lien contended for, was of a very evanescent kind, and was destroyed by slight circumstances. That the vendor taking a bond from the purchaser, put an

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end *to the equity, as it shewed that he did not rely on the implied equitable lien on the land, but on the personal responsibility of the purchaser, as was done in this case.—That there was a good deal of diversity of opinion among the chancellors about the extent and duration of this implied equitable lien; but most of the cases considered the taking a bond or note, a renunciation of the equity; and that the case of Fawell v. Heelis, decided by Lord Chancellor Apsley in June, 1773, see Ambler, 724, was directly in point, that the vendor taking a bond for the consideration money of the land sold, has no lien against the creditors of the vendee: and it was quite proper that it should be so; else this implied lien would frequently and unexpectedly rise up against creditors; who could never be secure against such secret liens, which were altogether adverse to the policy of our law, which required mortgages and evidences of liens on property to be recorded.

Chancellor RUTLEDGE afterwards delivered the decree of the court:

In this case it was contended for complainants that the obligee had an equitable lien on the lands in bill mentioned, no part of the purchase money having been paid, and to that point several cases were cited, which when examined are found generally not to apply. The case in Vernon‡ was between vendor and the assignee of the vendee, who had become bankrupt. The court determined the vendor had a natural equity, and that the land should stand charged with so much of the debt as was unpaid. The cases in 2 Eq. Ca. Ab. 682, & 3 P. Wms. 307, were between the vendor and third persons, who had purchased from vendee, and had notice of the equitable incumbrance on the land. The purchase money not being paid it was held that was sufficient notice for them to withhold payment. The cases of Coppin v. Coppin, 2 P. Wms. 291, and Pollexfen v. Moor, in 3

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Atk. 272, do not apply, *and the question is not determined in Blackburne v. Gregory, 1 Brown, 420, for that case was decided on another point. But in the case of Fawell v. Heelis, as reported in 1 Brown, p. 421, in a note, see also Ambler, 724, the point is determined that the vendor having taken bonds for the purchase money, had no lien.

In England it is well known, that land is not liable to the payment of debts, but in cases where the heir is specially bound; his right being peculiarly favoured and guarded. But in this country we all know that real and personal estate are equally liable to the payment of debts, and the plaintiff may make his election out of what property he will have his debt satisfied. It is therefore absurd to talk of a bond creditor having an equitable lien on land he has sold, unless he has taken care to secure that lien by a mortgage, since whilst the debtor is alive, and indebted even on simple contract, if he is sued and judgment is obtained against him, any property he is possessed of, may be seized and sold to satisfy the judgment, if it is not secured by mortgage or otherwise. This has been the law of this country for at least 60 years past. After the debtor's death, the law then directs the order in which his debts are to be paid by his executors, and then for the first time a discrimination is made between creditors by specialty, and those on simple contract. As the complainants then are not entitled to relief on the principle of an equitable lien in preference to other creditors, the next question is, whether the confiscation acts give them a preference? The act of 1782, confiscates the real estate of Mr. Irvine, as a British subject. He is not banished by that law, because

into an examination of the decided cases; and he decreed that for part of the purchase money, the vendor had taken such securities as amounted to satisfactory evidence that he relied on them, and not on the land: but that for the remainder, he should have a lien on the land.

This note has been drawn out to great length, because the subject has not been much discussed in this country; and the argument before the court in the principal case in the text, does not seem to have been so full as to have brought the whole doctrine to the view of the court. What may be the result of another examination of the subject before the Court of Appeals, cannot be foreseen, as it has never been before that court.

‡1 Vern. 167, Chapman v. Turner.

he had never resided in this country. The act of 1783 declares that the creditors of confiscated estates by bond, bill, notes, or open account indiscriminately, where the estates are fully and clearly equal to the demands upon them, shall be paid their debts: Provided that nothing therein contained shall entitle any creditor to more than his proportion, where the estate is insufficient for the payment of its debts. The land in question,

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it is admit*ted, has not sold for a sum sufficient to pay all the debts; therefore under that law, the complainants debt cannot be fully satisfied; but complainants have taken to their aid, the act of 1784, for restoring to certain persons mentioned in list No. 1, thereto annexed, their estates, &c. Unfortunately for complainant, Mr. Irvine's name is not mentioned in the list, and therefore he could not, if alive have availed himself of the benefit of that law; and if he could, the estate is nevertheless liable to an amercement, which the comptroller will deduct on a settlement with the creditors. Nor can complainants be benefited by the ordinance of 1784, because they have neither a mortgage or judgment to bind the land.

It was further urged that the legislature intended to have given up the property altogether to Mr. Irvine's representatives, and that one branch of the legislature had actually passed a resolution to that effect. Whatever may have been the intention of the legislature, it can only be known to the court, when it has been enacted into a law. Such a law has not been passed, and a resolution cannot repeal a positive law of the land.

The court are of opinion that the confiscation act of 1783, being unrepealed, the complainants can only be paid their demand in proportion with the other creditors of Mr. Irvine.

Costs to be paid out of the purchase money of the land.

See 1 Schoals and Lefroy, 132.

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Case LXIII.

[Present, Chancellors Rutledge and James.]

THOMAS COCHRAN, Jun. Devisee and Legatee of T. Cochran, Sen., v. SUSANNAH COCHRAN, Executrix of Thomas Cochran, Sen., Deceased.

(October, 1807.)

[*Executors and Administrators* ⟸308.]

An executrix paying a legacy before the time fixed by the will, and being obliged to pay out of the assets of the estate, a note of the

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lega*tee, on which her testator had been endorser, shall be obliged to repay the legacy, with interest to the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1263; Dec. Dig. ⟸308.]

[*Wills* ⟸820.]

A testator providing by will for his wife, and desiring her to give a home and subsistence to her daughter by her former marriage, (to whom testator also gave a legacy,) the widow and executrix is not at liberty to charge the estate of testator with such subsistence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2118; Dec. Dig. ⟸820.]

[*Life Estates* ⟸18.]

The widow to whom the dwelling house is devised for life, is bound to pay one third of the taxes, and the estate is chargeable with the other two thirds.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 39; Dec. Dig. ⟸18.]

[*Life Estates*, ⟸17.]

[A widow, to whom her husband had devised an estate for life, was held chargeable with one-third of the repairs upon the property during her life.]

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 37; Dec. Dig. ⟸17.]

Thomas Cochran, the elder, made and executed his last will and testament, and departed this life, leaving the same in full force. He bequeathed inter alia, a legacy of £150. to his stepson Robert Hawie, to be paid after all the testator's debts were paid.

He also bequeathed a pecuniary legacy to his stepdaughter Miss S. Hawie, and then expressed a wish and desire that his wife, (who was the mother of Miss Hawie, by her her first husband) would afford her daughter Sarah a decent home and subsistence with her, until certain events might occur. The testator provided amply for his wife by his will, and among other things, devised his dwelling house to her during her life, and left her executrix. After his death, she proved the will, qualified thereon, and possessed herself of the estate of the testator.

The complainant being entitled to certain estates and legacies under the will, filed the bill for an account.

It appeared on the examination of the accounts, that the widow and executrix had paid the legacy of £150. to her son Robert Hawie, before the testator's debts were paid: and she had been compelled to pay out of the funds of the estate, certain notes of the said Robert Hawie, to one of the banks on which the testator had been endorser, and which said Hawie was not able to pay. It was contended that she was liable to repay that legacy, with interest, as prematurely and improperly paid by her.

The executrix had also charged the estate a certain sum for the board of her daughter, Miss Hawie, under that clause in the will desiring the widow to afford her daughter Sarah a home and subsistence. This charge

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was con*tested, and it was insisted the executrix being provided for by the testator, his desire to give her a home and subsistence was to be complied with out of that provision, and not out of testator's estate generally.

The widow also charged the taxes on the house devised to her for life, to the estate. It was contended that she as tenant for life, was bound to pay some portion of the taxes, as well as the repairs.

Chancellor RUTLEDGE delivered the decree of the court.

The legacy to R. Hawie of £150. not being payable till after all the debts due by the testator were satisfied, the same was improperly paid by the defendant: It is therefore ordered and decreed, that she do account for that sum, with interest from the time it was so paid; more especially as she has been compelled to pay out of the funds of the estate the notes of the said R. Hawie, due to the National Bank, which her testator had endorsed. Although the testator may have intended that Miss S. Hawie should be maintained out of his estate, yet there are no words in the will sufficiently indicative of such intention to authorize the court to sanction such charge, the testator having only expressed his wish and desire (at the end of the clause in which he has given Miss Hawie a legacy,) that his widow would afford her daughter Sarah a decent and comfortable home and subsistence with her, until certain events occurred. The charge therefore for board, &c. ought not to be allowed.

Decreed that one third of the taxes and repairs of the house defendant occupies, be paid by her, and the other two thirds out of the estate.

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2 Desaus. *524

*Case LXIV.

[Present, Chancellors Rutledge and James.]

JAMES R. PRINGLE and Elizabeth, His Wife, v. SUSANNAH M'PHERSON, Executrix, Colonel JAMES E. M'PHERSON, and HENRY W. DESAUSSURE, Executors of General John M'Pherson, Deceased, and Others.

(November, 1807.)

[*Wills* ⟸107, 197.]

The addition of words to a last will and testament, by interlineation, in the testator's hand writing, after the execution of the same, but at what time unknown, by which a bequest of personal property is enlarged, is valid and operative.

[Ed. Note.—Cited in Johnson v. Brailsford, 2 Nott & McC. 278, 10 Am. Dec. 601.

For other cases, see Wills, Cent. Dig. §§ 246, 495; Dec. Dig. ⟸107, 197.]

[*Wills* ⟸565.]

A bequest of certain slaves by name, and their families, restricted to their wives and children, residing in the same house with them, and not extended to grandchildren.

[Ed. Note.—Cited in Drayton v. Grimke, 1 Hill, Eq. 227.

For other cases, see Wills, Cent. Dig. § 1233; Dec. Dig. ⟸565.]

[*Wills* ⟸866.]

The testator having purchased lands, after the execution of his will, they must be divided according to the statute of 1791, as in case of intestacy.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2200–2203; Dec. Dig. ⟸866.]

[*Executors and Administrators* ⟸92.]

The testator having made contracts for building machines on some of the plantations, which he had previously devised specifically, the same must be compleated and paid for out of the residuary estate, after exhausting the funds directed to be applied to pay debts.

[Ed. Note.—Cited in Haleyburton v. Kershaw, 3 Desaus. 116.

For other cases, see Executors and Administrators, Cent. Dig. § 403; Dec. Dig. ⟸92.]

[*Wills* ⟸107.]

The question whether certain obliterations of a clause devising real estate, amounted to a revocation of such devise, sent down to be tried at law, on an issue, devisavit vel non. And on a special verdict the judgment of the court below was, that the obliterations did not, under the circumstances of the case, amount to a revocation.

[Ed. Note.—Cited in Johnson v. Brailsford, 2 Nott & McC. 278, 10 Am. Dec. 601; Means v. Moore, Harp. 318.

For other cases, see Wills, Cent. Dig. § 246; Dec. Dig. ⟸107.]

This was an amicable bill, filed to obtain the judgment of the court, on the construction of the last will and testament of the late General John M'Pherson.

General M'Pherson made and executed his last will and testament on the 21st day of June, in the year 1803, with two codicils thereto, on the 22d June, 1803, immediately preceding his departure from Charleston, on a voyage to Europe.

He deposited his will, sealed up in an envelope, with one of the executors, named therein, for safe custody, and on his return home, the will was restored to him, in the same state, sealed up as he had left it; and he kept it in his own custody, till he sailed

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for the northward, in Au*gust, 1806, with his daughter Elizabeth, in the ship Rose in Bloom.

On the voyage, the ship was overset in a gale of wind, and many of the passengers were drowned—among them, Gen. M'Pherson perished. His daughter and the other survivors were picked up from the wreck the subsequent day, and carried into New-York.

On the intelligence of Gen. M'Pherson's death, his will was sought for, and found at his residence, in Prince William's Parish, in a pocket book, in his own private desk.

Certain obliterations and interlineations which were discovered to have been made in the will, rendered it indispensable that the opinion of the court should be taken on the questions which grew out of this state of facts, and on some other points. Accordingly Mr. J. R. Pringle, who had married Miss E. M'Pherson, filed a bill, to bring the whole subject before the court.

The bill set forth that the complainant Elizabeth, was the eldest daughter of the deceased Gen. John M'Pherson. That on the

21st of June, 1803, he made his last will and testament: and on the 22d. two codicils thereto. That he died on the 24th August, 1806, leaving a large estate, real and personal, part of which was acquired subsequent to the execution of said will. That his will was found in his desk after his death; and that a whole clause, wherein he bequeathed to his daughter Elizabeth, 300 acres of land, part of his valuable Ponpon plantation on Edisto river, was obliterated; yet was quite legible: and there was a subsequent clause in his will devising all his Ponpon plantation to his two daughters Nancy and Susan, with the exception of the aforesaid 300 acres; and the said exception was in like manner obliterated. That the time of the obliteration is unknown; but it was certainly subsequent to making the said will and codicils. The testator probably thought this obliteration sufficient to revoke his devise of the said 300 acres of land to his daughter Eliza-

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*beth, and to give it to his younger daughters: but complainants allege that such obliteration must be abortive, as subsequent thereto there was no re-execution of the will, for the said last obliteration was not an independent irrelative act, but was connected with, and referred to the other obliteration. That the testator must have intended to have substituted some other property for the 300 acres of land, and until this could be determined, had postponed the re-execution of his said will, more especially as he had a strong affection for his eldest daughter Elizabeth.—The bill further charges that Mrs. Susannah M'Pherson, the widow of the testator, James E. M'Pherson, and Henry William Desaussure, proved the will, and qualified as executors, and received account sales of the crops of rice, cotton, &c. That complainants have applied to them to come to a settlement and division of the estate, that they might have and enjoy what they were entitled to under said will; but they, though willing to comply, allege that there are matters relative to the will and the estate, which require a determination of this honorable court before they can make such settlement and division. That beside, the doubt and uncertainty of the will, relative to the 300 acres of land aforesaid, there are other obstacles: that the testator bequeathed to his son James, "100 negroes, to be drawn by lot, &c.; in which number 100 should be particularly included the nurse Murriah and her children, and her sisters and their children, and the drivers Ben, Cato, and their families." That the words, "in addition to the one hundred," are found to be interlined and added to and after the word "families;" but the time they were interlined is not known. That the executors are uncertain of the legal effect of those words so added by interlineation.

That the testator had by a written contract, agreed with a millwright to build a rice mill and cotton machine, on a plantation devised to his daughter Elizabeth, in the place of one standing at the time of executing his will, but since destroyed by fire: that he

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had also ver*bally agreed with a workman to build a rice machine on his Ponpon plantation, had provided lumber, and had allowed the workman to live or settle on part of the land for the purpose. That the executrix and executor are at a loss how far they may be authorized to carry the above contracts into execution, and out of what fund the expense is to be defrayed.

That the same uncertainty occurs with respect to a tract of land in Barnwell district, which the testator in his lifetime had purchased at sheriff's sale, having previously agreed with W. L. Smith, to whom the proceeds were to be paid upon a certain time of payment or credit. They are also uncertain out of what fund the testator's debts are to be paid. The complainants pray that the executrix and executors, &c. may answer; and that the court would decree an account and division of the real and personal estate; that they may allot unto them whatever of said estate they may be entitled to. That an issue at law may be directed to ascertain their right in and to the said 300 acres of land, and that they may have all such further relief as they are entitled to.

The defendants in their answer admitted the facts generally as set forth in the bill as to the execution of the will, and the death of Gen. John M'Pherson. And the defendant Col. James E. M'Pherson, particularly admitted that after the death of Gen. M'Pherson, he went with a respectable witness, to the residence of his late kinsman, in the country, and made search for his last will and testament; and that the same was found in a pocket book in a locked desk, with the seal, and signature of the testator, and the signature of the three subscribing witnesses, entire in all respects, as originally executed, except that there was an obliteration by scratching with a pen, of a clause which originally devised three hundred acres of land on Ponpon, to the testator's daughter Elizabeth; and an addition by interlineation, believed to be in the hand writing of the late

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Gen. M'Pherson, in a bequest of personal *estate to the testator's son James. The defendants admitted that they had proved the will, and qualified thereon as executors; and admitting the other facts charged, submitted the case and the various questions growing out of the facts, to the judgment of the court.

The clauses in question were as follow:

The testator "devised to his daughter Elizabeth, three hundred acres, being part of his Newton tract of land, whereof 100 to be tide swamp, one hundred supposed back swamp, and one hundred acres of upland, the whole

quantity to be taken from the north east end of the said tract."

In another clause, he "gives and devises to his daughters Nancy and Susan, as tenants in common, and their respective heirs, &c. all his Ponpon plantations, except the three hundred acres therein before devised to his daughter Elizabeth."

When the will was found, after the death of General M'Pherson, the whole of the first above recited clause was obliterated by scratching with the pen over every word of it, but in such manner as to leave it distinctly legible; and in the clause devising all his Ponpon plantations to his two daughters, Nancy and Susan, as above recited, the words "except the three hundred acres hereinbefore devised to his daughter Elizabeth," were also in the same manner obliterated, but legible.

The testator in another clause of his said will bequeathed "to his son James, one hundred of his negro slaves, to be drawn by lot in families from among those usually residing on the plantation Cotton Hall, and its dependencies; in which number, one hundred shall be particularly included, the nurse Murriah, and her children, and her sisters and their children, and the drivers Ben, Cato, and their families." To which was added, by interlineation, the following words in the testator's hand writing, "in addition to the one hundred:" but when these words were added, is not known—nor is it known when the obliteration abovementioned were made, or that any person but himself had any access to the desk in the interval between the making the will, and the testator's death.

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It was *agreed however, that the words added, are in his own hand writing.

It was also agreed that the question arising out of the obliterations of the clauses in the will, relating to the real estate devised to the daughter Elizabeth, should be sent down to be tried by a jury, under the issue devisavit vel non; and it was accordingly so sent down. †

† The issue of devisavit vel non was made up, and sent to be tried in Colleton district, where the land lay. The jury found a special verdict, stating the facts that the late General John M'Pherson had made and duly executed his last will and testament on the 22d June, 1803, with two codicils, on the 23d June, 1803, in the presence of three witnesses. That after his death, the same was found at his late residence, in his private locked desk, to which it was not known that any other person had access. That it was whole and unaltered in all respects, except that there was an addition of a few words to the bequest of slaves to the testator's son James, which was believed to be in the hand writing of the testator, [which formed the subject of the above discussion in the Court of Chancery] and except the obliteration above mentioned of a clause in the will, devising a tract of three hundred acres of land on Ponpon to the testator's daughter Elizabeth: and another obliteration of the exception of the said 300 acres out of the devise of all the testator's Ponpon lands, to his two daughters Nancy and Susan. The obliterations were done by scratching over the words of the devise with a pen and ink, but in such a manner as to leave the words perfectly legible: that the time when the obliteration was made, or by whom made, was not known with certainty; but the presumption was, and of that opinion the jury was, that the obliteration was made by the

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*testator himself sometime after the execution of the will. The jury submitted the question of law, whether such obliteration amounted to a revocation of such devise of the land, to the judgment of the court.

The Court of Equity being desirous to have the opinion of the judges of the Court of Common Pleas thereon, the verdict and the case made thereby was argued before that court.

Mr. Pringle on the part of Mr. James R. Pringle, and Mrs. Elizabeth Pringle, (late Miss E. M'Pherson.) He admitted that consistently with the statute of frauds, and the act of the legislature of this state respecting wills, there may be a revocation of a will, or of a particular clause of a will by the mere act of the party, without any witnesses, as by tearing, cancelling, destroying or obliterating, if done with the intent to revoke; and if such obliteration be of part of the will, the other parts of the will may remain good. He also admitted that the circumstances of the present case af-

The rest of the case came to a hearing in this court.

Mr. Pringle argued on the part of the complainants.

The testator gives and bequeaths to his son James, one hundred of his negro slaves, to be drawn by lot from families from those usually residing on his plantation, called Cotton Hall, and its dependencies, in which number one hundred shall be particularly included nurse Murriah and her children, and her sisters and their children, and the drivers Ben, Cato, and their families: the following words are in the testators hand writing, but not known when added: "in addition to the one hundred." What relation or construction are these words so added to

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have? It must be here *particularly remarked, that the above named negroes, with their children and families, are very numerous, and will therefore materially increase the extent of the legacy and in a disproportionate degree to what at first appeared the intent of the testator with respect to the shares of his other children, and particularly will diminish the number of the residue of the negroes left to his widow and two younger children. The words so added make such a repugnancy and inconsistency in this clause, that it is hardly possible to discover with any degree of precision and certainty the testators meaning, in respect to the relation and effect of those words. If he had struck out the words "particularly included," there would have been no doubt on the subject. But he has let them remain, and it is not to be taken for granted he did so inadvertently or through oversight. Will a court then strike them out on account of the uncertainty and repugnancy they occasion? I apprehend not. A court may sometimes exercise this discretion of strik-

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ing out words in a *will, that create ambiguity and repugnancy, but it is only when it is to favour or support the manifest and reasonable intent of the testator. But where circumstances warrant, the court will rather retain, give some effect to, and reconcile words apparently repugnant and inconsistent by giving them what appears a just and reasonable application and reference. Circumstances here seem to invoke and justify such an interposition and mode of construction. I think it may with effect be contended that the testator by letting the words "particularly including," remain, he intended they should have some import and effect. A reasonable import and effect may be given to them by referring and applying them to Murriah and her children and her sisters and their children; and that these he meant to include in the hundred; and the words, "in addition to the one hundred," should only be referred to, and apply to the drivers, Ben, Cato and their families. As to the word family, it is susceptible of two different significations. In its more comprehensive meaning, it embraces all those who descend from a common ancestor—a race, a tribe or gen-

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eration. *In its more limited sense, it is restricted agreeable to its etymology, to those who live in one house. It is probable the testator intended to use it in this sense, to prevent the separation of husband and wife and their young children, living in the house with them, and needing their care.

The testator had by a written contract and on certain terms, agreed with a mill wright, to build a rice mill and cotton machine on his plantation, Laureum, devised to his daughter Elizabeth, in the place of one which was standing at the time of executing the will, but since destroyed by fire.

Is this to be finished, and at the general expense of the estate?

The contract being in writing, and the terms certain, is obligatory on the estate, and must be on its part carried into execution, and must be paid for in the same manner as the other debts of the testator.

He had also verbally agreed with a workman to build a rice machine on his Ponpon plantation, had provided lumber, and had allowed the workman he had so agreed with,

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*to live or settle on part of the land, for the above purpose. Full parole evidence is adduced as to the agreement and precise terms of it.

The contract in this case not having been in writing and the acts preparatory to the execution of it above stated being altogether

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ford sufficient presumptive evidence that the obliterations were made by the testator himself, with intent to revoke the devise to his daughter Elizabeth, accompanied with the further intent to make a new gift of that which he so intended to take away, to his two daughters Nancy and Susan, which intent he probably conceived he had effected by obliterating the exception in the clause, by which he devised "all his Ponpon plantations" to them. The question then arises whether such obliterations did pro-

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duce the effects which the testator *supposed and intended. He contended not. If the effect of the obliteration of the exception were to pass to the two younger daughters Nancy and Susan, the 300 acres of land, it would in this respect operate as a new gift, of what before they had no interest in, the plantations having been devised to them in the first instance, as much exclusively of the 300 acres, as if they had formed no part thereof, but had composed a distinct tract therefrom. But such new gift made subsequent to the execution of the will, and being of real estate, could not be legally valid and effectual, the will not having been legally reexecuted according to the requisites of the statute, or of the act of the legislature, in such case made and provided. Vide the case of Strong v. Simpson, 3 Bos. and Puller: and Gastrel v. Smith, 4 Easts's Reports 419.

A succeeding question then arises whether the 300 acres not passing to the two daughters Nancy and Susan, are to be considered as not having been particularly disposed of by the will, and are subject to go according to the residuary clause; or whether upon the failure of the testator's intent to make a new gift thereof to his daughters Nancy and Susan, the devise to his daughter Elizabeth was inefficiently revoked? There is certainly some doubt on the subject. If the obliteration had been a self-subsisting independent irrelative act, it

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would seem to be *clear that the 300 acres, in consequence of the obliteration of the clause devising the same to the testator's daughter Elizabeth, and of the inefficiency of the substituted gift to the two younger daughters, would be subject to be disposed of according to the residuary clause of the will. But it appears in the foregoing view to have been a dependent relative revocation, the obliteration being made in reference to another act intended to be an effectual and valid disposition, that is the obliteration of the exception, by which the testator seems to have supposed his two younger daughters would have an accession of the 300 acres. The revocation of the devise to the daughter Elizabeth may not be absolute, as the relative act was not efficacious for the purpose intended. The testator clearly intended to take from the first devisee and to give to the second devisees, and that the premises should not remain unspecifically disposed of; the revocation was therefore for a purpose which failed: and it has been held in a variety of cases that where a devise has been made so as to have legal effect, and afterwards another, by which the former would be revoked, but the other substituted; and it being evident that the testator using the means of revocation, could not intend it for any other purpose than to give effect to another disposition, though if it had been a mere abstract revocation it would have had

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effect, yet the object being only *to make way for another disposition, if the instrument cannot have that effect, it shall not be a revocation. This reasoning will apply as well to revocations of parts of a will as to a will itself. See Powell on devises, pages 631, &c.; and more particularly pages 637, 8, 9, and 640. Also, ex parte, Earl of Ilchester, 7 Ves. 348, and from page 365 to 381.

Mr. Parker and Mr. Ford, the other counsel for the different members of the family, agreeing in opinion with Mr. Pringle that these obliterations did not, under the circumstances, amount to a revocation of the devise to the daughter Elizabeth, the question was submitted

on the part of the testator, whereas the partial performance or part execution to take it out of the statute of frauds, should strictly be on the side of the person seeking specific performance, I have some doubts whether this contract was so obligatory in point of strict law on the executors, as to make it incumbent on them to have it executed, and to pay the expenses of it, as being a debt of the testator. But at the same time if there should be clear and positive evidence, as to the existence of the agreement, and the precise terms of it, I do not conceive the executors bound to take advantage of the statute, or that they would incur any risque in having the contract carried into execution, and the expenses defrayed out of the funds for paying the other debts of the testator.

The testator in his lifetime, bought at the sheriff's sale, in Barnwell district, certain land sold under the decree of the court of equity, having previously agreed with Wm. Loughton Smith, Esq., to whom the proceeds of the sales were to be paid, for a certain time of payment or credit, Mr. Smith is willing to rescind, or not, the bargain, which appears advantageous to the estate. This prop-

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erty falls *into the residue of the testator's estate, which is disposed of equally among the testator's widow and children.

The question is, is the sale binding on the executors, and would it be advisable for them to fulfil the terms thereof as agreed on by the testator and Mr. Smith, and how is the same to be paid for?

I consider the sale to be binding on the executors, and that it is incumbent on them to fulfil the terms thereof. That the consideration money must be paid as the other debts of the testator.

Mr. Parker argued for the legatee James M'Pherson.

The principal point now in dispute before the court is, whether Murriah, her sisters, and their children, and the drivers Ben, Cato, and their families, or any and which of them are inclusive or exclusive of the 100 slaves bequeathed by the testator to his son James?

As the case stands in evidence, it appears thus, viz.—That when the will was executed, the words, "in addition to the one hundred," were not then in the will. That these words were added a considerable time after by the testator himself, but when, not exactly known.

Upon this statement of the case, a natural mind could not hesitate to pronounce in favor of the minor James, that the whole of these slaves were embraced by the super added clause, and that such clause was intended as an alteration or revocation of the preceding words—"in which number one hundred shall be particularly included," so as to make the same be read thus—"to which number 100, or in addition to which number 100, shall be particularly added Murriah, &c."

But the legal mind, disregarding the natural marks of intention, and proceeding by rules and decisions, may be puzzled as to the meaning of the testator, and possibly even inclined to another opinion.

This renders it necessary that a few clear principles should pass in review before the court.

The principles alluded to are these, viz.

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*1st. That no certain rule can be laid down as to the construction of wills, but that they must all depend upon their own circumstances.

2d. That where a latter will is repugnant to a former will, such latter will revokes the former.

3d. That where the testator expresses himself with ambiguity or apparent contradiction, that his expressions shall be reconciled, if possible.

Now if we apply the first principle to this case, we shall find it sui generis, there being none in the books exactly like it. The only cases at all alike to it, are those in which a thing is given by one clause of a will to A. and afterwards in another clause of the same will to B.; upon which the judges have been of different opinions, some saying that the latter clause revoked the former, and some that A. and B. took the thing as joint tenants.

It is clear that the latter opinion was only a device in the judges, to bring the case within the third principle. But whether this was rightly done or not, still it cannot apply, the cases are not the same, because there is no person here to take as joint tenant with James.

But even this latter opinion has been contradicted by great authorities, and is yet unsettled, as will be presently shewn; so that the present question being unlike to it, is at large as res integra; and even if alike to it, not yet settled, and therefore open to discussion.

This will bring us then to the second principle.

Now in applying the second principle, I will shew,

1st. That the decisions which have been given upon the cases at all analogous to the present, to wit; That of a legacy of the same thing to A. and afterwards to B. are so contradictory, that such cases are still unsettled, and therefore open to discussion.

2d. That those decisions which have made A. and B. joint tenants, have broken the 2d. principle, without bringing their case within the 3d. The authorities I quote are 2d.

to the judgment of the court. The Judges of the Court of Common Pleas, after deliberation, gave their judgment that the obliterations in question did not, under the peculiar circumstances of the case, amount to a revocation of the devise.—(Ex relatione.)

Black. Com. 381. S. 6. Hargreave's Co. Lit. 112, Note (1.) Plowd. Com. 541. 1 Atks. 417.

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2 *Atk. 374, 5. 3d. Atk. 493, in which books all the cases on the subject are referred to. Here the court will see that some judges are of opinion that the last clause, will or codicil, which is contradictory to a preceding one on the same devise or legacy, revokes the preceding clause, will or codicil; whilst other judges hold that the devisees or legatees must take as joint tenants. And others again that neither devisee or legatee can take, for uncertainty, and so the devises and bequests are void.

But in referring to Atkins' Reports the court will find what is yet more surprising, to wit: That the great Chancellor Lord Hardwicke changed his opinion twice on this point. In 1 Atk. 417, he is for the joint tenancy. In 2 Atk. 374, 5, he is for the revocation, and in 3 Atk. 493, he relapses into the joint tenancy again. Surely then this question is still open.

I must remark, however, that 1 Atk. 417, and 3 Atk. 493, are only obiter dicta of Lord Hardwicke; whereas 2 Atk. 374, 5, though not exactly the case of the same legacy to A. and B. is nevertheless more close upon that point, and that he there reviewed that very point, and pronounced Swinb. wrong in his law.

So far then as Lord Hardwicke has decided this point, he certainly agrees with Lord Coke, so that the two greatest pillars of law and equity contradict the point of joint tenancy, and are in favor of revocation, and so far in favor of the minor James.

Every man knows that he may vary his will as often as he pleases, and that the last will is the only operative will if contradictory to the former. Every practitioner knows how frequently this is done by codicils, and also how often a testator will change his mind or will even in the very act of penning it. And every lawyer admits that if the last will is absolutely repugnant to the former, it amounts to a revocation, ipso facto.

If this be so, then it is no sound objection to say that the testator has altered his mind

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in the very same will, seeing *that he may vary his will as well in ten minutes as in ten days.

When therefore a testator bequeaths a thing to A. in the first part of his will, and afterwards in a latter part to B. the latter clause forms a case of one will being repugnant to another, as strongly as can be conceived. I speak not here of an express revocation, but only of a repugnancy.—That this is the case of one will being repugnant to another is clear, because although but one instrument is made called a will, still the first clause is the testator's will as to the thing bequeathed; and the second clause is as much another will as to that thing, as if it had been put into a separate instrument. If indeed it had been placed into another instrument, the case would be exactly the same, seeing that any will and codicil put together, form but one will, and that the grounds on which the authorities in favor of joint tenancy proceed, is that of consistency, which applies as well to a will and several codicils as to one single will.

Now every man and every lawyer knows that there is as great a difference betwixt a legacy to B. of a whole and the half of a thing as there is in a legacy to him solely, and as joint tenant, except the right of survivorship, which can be defeated at the will of the other.

The truth and fact are so—therefore the one claim is totally repugnant to the other. If so, the one must revoke the other. How then can those Judges dispense with the second principle? This they certainly do, in saying B. takes as joint tenant, alias only one half of the thing, when the last clause gave him the whole.

But this is not all, for they certainly do not bring the case within the 3d principle, unless they can shew that a half is equal to the whole, which is impossible; and the 3d principle only requires reconciliation, when such reconciliation is proper.

But the slaves in the case under consideration, certainly cannot be divided. There is no person to take in joint tenancy with James, and as already suggested, there being no distinction in stop or expression between

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the slaves *from Murriah down to the families of the drivers, all of them must of necessity be either inclusive or exclusive of the one hundred.

With respect to the ground on which the opposite cases proceed, it is evident, on inspection, that they proceed from consistency, which will hold as well where there is a will and several codicils, as where there is only one will. But so far as the deliberate intention of the testator may be material, it is certain that the same is better manifested in a codicil after, than in one and the same will, though the testator may be equally determined in both.

Now here, the superadded words are clearly in the nature of a codicil, being written long after.

Now if the testator had made a codicil, and in the same bequeathed those slaves, "in addition to the 100," could there have been a reasonable doubt as to his intention and the revocation quo ad hoc? I conceive not. The cunning device of making a half equal to the whole could not apply, there being no one to take as joint tenant, and no other device suggesting itself to our view.

If then the cases are the same, the law must be the same.

But it may be objected, why did not the testator strike out the words, "in which

number shall be particularly included," if he really meant them to be excluded?

To this I reply, that the will itself furnishes evidentia rei. The testator was then inops concilii, by the insertion of such clause in his own hand writing, without the knowledge of any one when it was done, and such addition was in its nature more simple, and more quickly to be done than any other alteration.

Upon this ground of the addition, being in nature of a codicil, it may be proper to remark that as to the cases cited on the subject, those in Co. Lit. 2 Black. Plowd. Vernon, 10 Modern, and Cro. Eliz. and 2 Atks. are all upon different clauses in the same will. Those in Swinb. and Godolp. Orp. Leg. are upon wills and codicils.

To conclude, the question though very old, is not yet settled, but remains to be settled

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by this court, who if they *proceed either on the weight of authorities, or on the reason of the thing, must pronounce in favor of Lord Coke and Lord Hardwicke, and of course in favor of the minor James. But whether or not the court should so pronounce, still the case of the slaves now before the court, being a case totally different, the court must pronounce in favor of the said minor.

The next point in dispute turns upon the word "families." This word, it must be admitted, has two significations; the most common of which is, that which embraces all those who live with a parent in the same house.

It is certain that after once a son has married and settled apart by himself, no one on inquiry of the parent concerning his family, ever alludes to that of his son.

This common acceptation of the word therefore, is the one in which the testator probably used it. But the very clause now in contest, furnishes evidence of this being the sense in which it was so used, as the testator in speaking of Murriah's sisters speaks of their children, and by using a different expression afterwards, in relation to Ben and Cato, he probably meant to express a different idea. The question therefore is submitted to the court as it is now stated.

As to the other points, it appears that the executors have acted correctly and justly, and that the debts ought to be paid out of the general fund, which is in common cases subject thereto.

Mr. Ford argued for the other defendants.

1st point. The testator gives to his son James, one hundred of his negro slaves, to be drawn by lot in families from among those usually residing on said plantations Cotton Hall and its said dependencies, in which number one hundred shall be particularly included, nurse Murriah and her children, and her sisters and their children, and the drivers, Ben, Cato and their families, in addition to the one hundred.

The words "in addition to the one hun-

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dred," were ad*ded in the testators hand writing, after executing the will, but it is unknown at what time.

These added words are inconsistent with, and repugnant to the former words, "in which shall be particularly included." For the former would operate to give 100 negroes only, the latter to give 100 negroes, and the specified negroes over and above.

Being a bequest of personal estate, the added words would stand good without a re-execution of the will.—There is therefore no pretence to reject them on any such ground.

This is not a case in which the court can reject or expunge any of the words of the will, for the court can only do that where the real intent of the testator is manifest, and then it is to be done only to advance and give effect to such manifest intent. But here the intent is doubtful and ambiguous, and the court are not possessed of the principle which alone can warrant such an extirpation of words.

Besides, if the court should be disposed to reject any words, they would instantly be at a loss which set of words to reject. If they reject the latter words, it makes all the named negroes inclusive. If they reject the former words, it makes all the named negroes exclusive. And such is the ambiguity of the whole sentence that there is no more room to presume in favour of the one than there is of the other.

The impossibility therefore of determining which set of words ought to be rejected, proves clearly that the court cannot reject either.

They are all therefore the words of the testator, and are to be construed so as to stand together if possible, and each set of words to take some effect.

There is an intrinsic argument arising out of this will almost conclusive against the court rejecting either set of words.

The testator himself, when he saw fit to alter his will by interpolation of new words,

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struck out preceding clauses *where he saw fit, and having done it in one alteration and not in the other, is a proof he intended the whole should stand; and surely the court will not strike out when the testator himself refused to do so.

If it can possibly be avoided, so much effect must not be given to the one as to rob the other of all their application and effect.

Where the full certainty of constructive import cannot be attained, the nearest and most reasonable one must be adopted. Where the certain intent cannot be discovered, the next grade is the most probable; and in such case the most probable must be the most reasonable.

We will now cite some authorities, to illustrate these principles. "Where the expres-

sion in a will is so general as that it would fail from the uncertainty, there the court will restrict the generality of the expression." 2 Fonb. 349.

There is an old dictum in the books, that where there are two clauses or parts of a deed repugnant, the first part shall be received and the latter rejected. But in the case of a will, the first shall be rejected and the latter received. Sheppard 85, cites the Bishop of Ely's case. But this rule has had but little countenance in latter times, unless it appears to be manifestly in concordance with the intention of the testator.

In 1st Vern. 30, Fane and Fane, the determination was according to this rule, but the court gave different reasons for their determination, and manifestly went on the intention of the will, and did not take the rule as substantive and effectual per se.

In 3 Atk. 493, Lord Hardwicke, states that where a man in the former part of his will gives an estate to A. and in the latter part give the same to B. though it is held by the old books, that the latter revokes the former, it has lately been construed to give a joint tenancy, or tenancy in common according to the limitation. See the case.—Vide also 1 Fonb. 444.

The courts of late have predicated their

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principles of *construction on the whole will taken together, so much so that Lord Hardwicke in Wealthy v. Bosvill (see Fearne on devises, page 4) states it as a rule "that it is immaterial which words come first or last, for the construction must be made upon the whole will.

Next, a will doth not speak until the death of the testator, &c. but the construction ought to be made as matters stood at the making of the will. 2 Fonb. 347.

A will shall be so construed that every part shall stand together if it may. 1 Fonb. 442, and see the note p. and illustrations there. Now to apply these principles in this case, by giving some effect to all the words.

If the court will construe the word, including, &c. to extend to "nurse Murriah and her children and her sisters and their children," and the closing words, "in addition to the 100," to include drivers Ben, Cato and their families, it will come up to these principles, and to the most probable intention of the testator.

The families of the drivers pass as incidental and accessary from the manifest intent of the testator, through the whole will, to avoid separating families.

But should the court give this construction, it will remain for them to determine the import of the words "their families."

The word family, is indeed of various import. In its most comprehensive signification, it may include the whole connexion of persons lineal and collateral, who have descended from a common ancestor. But this is chiefly when eminent personages are contemplated or spoken of politically or with reference to public acts, principles or stations: The Gracchi at Rome, the Medici in Italy, the Bourbons, &c.

And the idea conveyed is always in some considerable degree dependent on the circumstances predicated.

Thus in some cases in this court a testator making provision for his children, has been held and construed to intend grandchildren.

Another set of cases where a testator pro-

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vides in his will *for his family, have extended that word so as to include all the kindred who might take by the statute of distributions.

None of the reasons or principles on which these constructions are bottomed, can possibly apply here, in determining what negroes shall pass under the word family.

The testator must be presumed to have understood, and intended to use the word in its ordinary sense; and the ordinary sense as well as the etymology, confines the sense to a household, or that connexion that usually dwell together. Johnson's Dictionary.

It is derived from familia "which anciently signified the servants belonging to one master—afterwards, together with them, the wife and children, or what we from this word call a family, of which the master was called pater familias, the mistress mater familias. Ainsworth's large Lat. Dict.

But here again this will, and the very clause under consideration, furnishes an intrinsic argument in favor of the interpretation we give of the testator's intent. Where he intended to include collateral relations, he mentioned them; he gives nurse Murriah, and her children, and her sisters, and their children. If the word family would, in his view, have carried the sisters of Murriah and the children of those sisters, it is presumable he would have used it.

We conclude therefore he means to give the drivers and their wives and children, which formed their household.

The next points for consideration are, the contracts the testator had made for building machines.

The rice mill and cotton machine at Laureum, was devised to his daughter Elizabeth. This plantation was furnished with a machine at the time of making the will, which was afterwards burnt down; a new machine was contracted for, and the contract was in writing, and obligatory on the testator, and indeed the work begun.

1st. Is this contract to be carried on, and perfected by the executors?

2d. Is the expense to be borne by the devisee or by the estate?

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*It seems reasonable that the contract should be complied with, and that the estate generally should bear the expense. But this,

as well as the question, relating to the lands purchased by the testator, after making his will, are submitted to the judgment of the court; to which the executors and members of the family will cheerfully submit, as they have heretofore maintained, and are anxious to preserve the family concord amidst the conflict of jarring interests produced by these unhappy circumstances.

Chancellor RUTLEDGE afterwards delivered the decree of the court:

In this case there are several questions for the consideration of the court. The first is, the construction to be given to the following clause of the testator's will. I give to my son James, &c. and it is admitted by defendant that at a period subsequent to the execution of the will, the testator in his own hand writing, at the end of the clause, has interlined the following words—"in addition to the one hundred." When the interlining was made is not known, but it is supposed to be after the testator's return from England. The question is as to the construction to be given to the foregoing clause, with the addition of the words above mentioned.

If the property mentioned in the clause had been real estate, there could be no doubt but that the alterations made by testator would have been ineffectual, as there was no republication of the will agreeable to law; but it being personal estate, over which the testator's power is free from many of the restraints imposed by law on real estate, and the alteration being made by the testator with his own hand, there can be no doubt that it is valid, and may justly be considered as a new modification of the bequest of that property, not altering the bequest as it regards the estate previously given, but extending testator's bounty by giving one hundred negroes to his son, independent of those particularly mentioned.

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*According to the rules of construction, every clause, and every word of the will must be so construed as to effectuate the testator's intent, if it is consistent with the rules of law. By the addition of the words at the end of the clause, it is evidently the testator's intent that his son James should take the negroes specially bequeathed over and above the one hundred: and as such his intent is not inconsistent with any rules of law, it must prevail. Indeed it is admitted that the testator had increased his personal property since the making of his will, by purchasing a considerable number of negroes; it is therefore presumable that might have induced him to make the alteration in the bequest above mentioned.

With respect to the construction of the word 'families,' we think it best to restrain it to the wives and children of the slaves Ben and Cato, living in the house with them, for as much as testator has himself in the foregoing part of the bequest of Murriah and her sister, confined it to their children, and not extended it to their grandchildren.

As to any inequality that may arise among testator's children by the construction which we give to this clause, we cannot prevent it, nor is the argument of much weight, seeing that testator himself has not regarded it in his bequests, having given to his daughter 70 slaves, and to his son 100 slaves, and none particularly to the two youngest children, (tho' there is a large surplus left for them.)

With regard to the contract for building the machines mentioned in the bill and answer, the debt incurred by testator for the lands purchased from Wm. Loughton Smith, and the remaining debts of the estate, the court are of opinion that after the application of the property specially provided in the will for the payment of the debts, and of the crops of the last and present year, the debts above mentioned must be paid out of the residuary estate. The real and personal property purchased by the testator after making his will, must be distributed according to law. And lastly, that the costs be paid out of the estate.

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2 Desaus. *546

*Case LXV.

[Present, Chancellors Rutledge and James.]

DOUGHTY, Surviving Executor of Isaac Porcher, Deceased, v. BACOT and SEABROOK, Executors of Peter Porcher, Representative of Joseph Porcher, Deceased.

(November, 1807.)

[*Principal and Surety* ⇐45.]

The circumstance of one obligor in a bond making payments, and being resorted to by the creditor, raises a strong presumption, that he was a principal in the bond; whilst the circumstance of another obligor not making payments, and not being called upon for them, raises a presumption that he was only surety in the bond.

[Ed. Note.—Cited in Smith v. Tunno, 1 McCord, Eq. 452, 16 Am. Dec. 617.

For other cases, see Principal and Surety, Cent. Dig. § 22; Dec. Dig. ⇐45.]

[*Contribution* ⇐4.]

A laches of many years in pursuing any legal demand against an obligor in a bond, will so far protect, that this court will not aid the creditor seeking relief, against the representatives of the deceased obligor, nor aid one obligor seeking to compel another to contribute.

[Ed. Note.—For other cases, see Contribution, Cent. Dig. § 4; Dec. Dig. ⇐4.]

This was a bill filed by the complainant, as the representative of a co-obligor in a very old bond, against the representatives of another co-obligor to oblige them to account for his estate, and compel the payment of a moiety of the debt, the balance of which had been paid by complainant.

The defence set up, was that the obligor Isaac Porcher, deceased, was a principal in

the bond, and that Joseph Porcher was merely a surety, and therefore not bound to contribute. But that if the evidence should not make out that case, the laches in pursuing the demand was so enormous that the complainant ought not now to be assisted in compelling the defendant to contribute to the payment of the bond.

The bill stated that on the 22d April, 1756, Benj. Singleton, I Porcher and J. Porcher, did by their bond duly executed, become bound, B. Singleton as principal, and Isaac Porcher and Joseph Porcher as sureties unto Alexander Perronneau, deceased, in a penal bond, conditioned for the payment of 1200*l*, with interest thereon. That Benjamin Singleton paid the interest annually, until 1768, when he died, not leaving a sufficient estate

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to pay his *debts. That Isaac Porcher paid the annual interest on said bond, from Singleton's death until 22d. April, 1778. That owing to his death, and the revolutionary troubles, no payments were required, until within a few years past; when a suit was brought, and judgment was entered up against the complainant on the 11th February, 1804. That complainant hath been compelled to pay the principal, interest and costs. That Joseph Porcher, the cosurety, died in the year 1770, without having paid any sum toward said bond. That said Joseph Porcher left a considerable estate which went ultimately under the provisions of his will to his sole surviving son, Peter Porcher.

That said Peter Porcher died intestate in the year 1793, leaving a widow and children; and letters of administration were granted to his widow, and to Thomas W. Bacot, and Thomas Seabrook; and that she dying shortly after, the management of said estate continued in the hands of the other administrators; and that complainant hath applied to them to contribute one moiety of the sum paid by him. But the said administrators have totally refused so to do. Complainant prays for relief in the premises.

The defendants in their joint answer admit the facts generally as stated in the bill, but they deny that Isaac Porcher was surety in the bond; he being a principal therein, and Joseph Porcher alone a surety.

Defendants admit that they have refused to contribute towards the payment of the aforesaid bond, because Isaac Porcher being a co-principal, was liable to pay said bond, and their intestate, Peter Porcher being a surety, ought not to contribute to the payment thereof; and they relied on the great lapse of time.

The case came to a hearing, and it appeared that the bond was dated the 22d. April, 1756, and was executed by Benjamin Singleton, Isaac Porcher and Joseph Porcher. None of the obligors were distinguished on the face of the bond as sureties.

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*There were many receipts on the bond, for various payments made on the debt, down to the year 1768, by B. Singleton.

There were other receipts endorsed on the bond for payments made by Isaac Porcher, in the years 1768, 9, 1771, 2, to Mr. Webb, in whose hands the bond then was.

There were payments receipted on the bond, in the years 1773, 1774, 1775 and 1777, to Mr. Webb, which do not specify by whom the payments were made; but Joseph Porcher was then dead. And one payment in July, 1778, is receipted, as made by Isaac Porcher.

It appeared by a certificate from the office, that Benjamin Singleton, the obligor, died in the year 1776.

Mr. Webb testified that to the best of his recollection, he never received any payments on the bond from any of the obligors, but Isaac Porcher, who he believes made the payments voluntarily. He never spoke to Joseph Porcher on the subject, though he lived five years after the bond came into his hands. Isaac Porcher died in the year 1781. He never afterwards applied to the executor of Isaac Porcher for payment of the balance, till he found he could not get payments from the estate of Benjamin Singleton.

Mr. Henry Bailey testified, that a suit was brought by Mr. Holmes in the year, 1788, against Benjamin Singleton, junior, on the bond of his father, and an order for judgment was obtained. But it was not then entered up. In 1791, a judgment was obtained and entered up against Benjamin Smith, surviving executor of B. Singleton, sen. afterwards he brought suit for a devastavit against the executor of the executor. Judgment in 1798.

The bond was then assigned, and an action brought against the executor of Isaac Porcher, and judgment obtained.

Mr. Turnbull, for complainant, argued that the obligors were all principals.—There was

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no evidence of any *suretyship. That the payments kept the bond alive, till 1778. Then the war stopped the operation of the statute of limitations; and the statute was suspended by acts of the legislature, till 1791 or 2. Since which, suits have been brought, and there has not been time enough to bar the demand, for bonds are only barrable by presumption of payment by a long lapse of time; most of the cases say 20 years. This was not the case here, from the time the statute of limitations resumed its operation: the presumptive bars were estopped as well as those arising from positive statute.

Mr. W. L. Smith for defendants, insisted, that the voluntary payments made by I. Porcher, and the recurrence to him by the creditor, shewed that he was a principal. Whilst the non payment by Joseph Porcher, and the non recurrence to him by the creditors, shewed that he was a mere surety. But

that at all events the laches as to Joseph Porcher, raised a compleat bar to the demand.

Chancellor JAMES delivered the decree of the court.

The complainant in this case has brought his bill to recover of the defendants, as surviving administrators of Joseph Porcher, a certain sum of money, amounting to about £175 being the one half of a sum which he has paid upon a judgment obtained against him as executor aforesaid, upon a bond of Benjamin Singleton, Isaac Porcher, and Joseph Porcher, to Alexander Perronneau, dated 22d April, 1756; in which bond complainant alleges that the said Joseph Porcher was co-surety with his testator, and liable to pay his proportion of the same.

Defendants allege that Joseph Porcher was not a co-surety with the complainant's testator, but that he and Benjamin Singleton were principals, and Joseph Porcher, surety to them both; they also allege laches in the complainant, and plead to the equitable jurisdiction.

The court will take up first, the question as to the jurisdiction; and on this, it appears

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that both the executors, *and one of the heirs of Joseph Porcher died soon after him; in consequence of which, his estate was delivered up to the surviving heir, viz. Peter Porcher, who also died in the year 1793, and the present defendants are his administrators.

The estate then having past from executors to an heir, and again from an heir to administrators, the chain of legal representation has been thus broken, so that a single action at law could not have been brought to include all the representatives. This point being disposed of, we will next consider, 1st. Whether Joseph Porcher has been proved a co-surety? And 2dly, the ground of laches. Upon the first ground, the complainant's counsel urges that Benjamin Singleton signed his name first to the bond, and therefore the presumption is, that he was principal, and the other two obligors sureties; but this is not conclusive; the bond is joint and several, and neither of the obligors have signed their names, with the addition of the word surety. It might have been given for a joint debt, or regard might not have been paid to the order in which the principals and sureties placed their names. But the evidence, so far as it goes, seems to prove that the two first obligors were the principals, and the last only a surety, for the first payments were made by Benjamin Singleton, viz. from the 18th of June, 1757, until the 6th of February, 1765; inclusive; and probably though his name is not mentioned in the receipt, the payment of the 6th of February, 1765, was made by him. After this, we find that while Benjamin Singleton is still alive, for he did not die till 1776 or 1777, and while he is solvent, Isaac Porcher comes forward of his own accord, and without any previous application from Mr. Webb, who then held the bond, makes several other payments upon it from the 16th February, 1768, until the 10th May, 1775, inclusive; for we think those receipts in 1773, and 1774, wherein the name of the payer is not mentioned, must be set down to him, since both the prior and subsequent receipts were so given. But again, after the

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death of Benjamin Singleton, *on the 24th of October, 1777, and on the 20th of July, 1778, payments were made by Isaac Porcher, and that still voluntarily, and without complaining that he was only surety to the bond; and during this whole period, without once calling upon Benjamin Singleton, or his representatives, or upon Joseph Porcher, (who died in the year 1770) or his representatives, to contribute their proportion of the bond, although it is not pretended that either they or their estates were insolvent. A strong presumption must arise from all this acquiescence in paying, that Isaac Porcher considered himself under some moral obligation to pay, greater than that by which mere sureties usually conceive themselves to be bound.

Next, as to the ground of laches. It appears that Isaac Porcher died in 1781, and after his death, as Mr. Webb, the then holder of the bond, was on terms of intimacy with his executor, the present complainant, he did not apply to him for any further payment; but in the first instance he called on the executor of Benjamin Singleton, then deceased, and not receiving payment from him, he next applied to Benjamin Singleton, the younger, who was heir of Benjamin Singleton, the obligor: but even then the heir was suffered to go on wasting the estate of his father, and no suit was instituted until the year 1788, a period of 12 years from the death of the father, and of five years after the peace; and when judgment was obtained upon this suit, it was not entered up. Then another suit was brought against Benj. Smith, surviving executor of Benjamin Singleton, the elder, and judgment obtained in 1791; and afterwards a third suit was brought against the same executor for a devastavit, and a judgment obtained; but that was suffered to lie open for a long time, until in 1798, the execution upon it was returned nulla bona. Thus another period of ten years elapses, making in the whole 22 years, and neither the estate of Isaac Porcher, nor of Joseph Porcher is called upon. But at length in the year 1803, a suit is brought against the complainant as executor

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of Isaac Porcher, and *judgment is obtained and entered up on the 11th February, 1804; so that from the time the last payment

of Isaac Porcher of the 20th July, 1778 was made, until a suit was instituted against his executor upon this bond, a period of 26 years had passed away. Upon the whole of this case, and of the evidence which has been offered, from the great length of time which has elapsed since the bond was given, being fifty years; also, from the very singular circumstance, that no application ever was made by the original obligee, and those claiming under him, to Joseph Porcher, in his life time, or to his representatives after his death, it appears that Joseph Porcher ought not to be considered as a co-surety, with Isaac Porcher, but merely a surety to the bond. Therefore under all the above considerations, arising from the evidence, and from the great laches of the original holders of the bond, and also of the complainant, the court are of opinion that the complainant is not entitled to relief, and that the bill must be dismissed with costs.

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2 Desaus. 552

Case LXVI.

[Present, Chancellors Rutledge, James and Thompson.]

WILLIAM READ v. T. GAILLARD, Administrator of T. Simons.

(May, 1808.)

[*Liens* ⊂⊃7.]

A person borrows a note from his friend to be used in bank, and promises by letter to give a bill of sale of particular personal property as a security.

The borrower of the note dies without giving the bill of sale, and the lender is obliged to take up the note. He has a lien on the property promised to be secured to him in preference to other creditors.

[Ed. Note.—Cited in Delaire v. Keenan, 3 Desaus. 76, 4 Am. Dec. 604; Welsh v. Usher, 2 Hill, Eq. 170, 29 Am. Dec. 63; Dow v. Ker, Speers, Eq. 414, 417; Bank of the State of South Carolina v. Campbell, 2 Rich. Eq. 191; Maybin v. Kirby, 4 Rich. Eq. 113; Parker & Co. v. Jacobs, 14 S. C. 117, 37 Am. Rep. 724; Davis v. Childers, 45 S. C. 144, 22 S. E. 784, 55 Am. St. Rep. 757; Creech v. Long, 72 S. C. 32, 51 S. E. 614.

For other cases, see Liens, Cent. Dig. § 28; Dec. Dig. ⊂⊃7.]

The object of complainant's bill was to have the benefit of an equitable lien on certain personal estate, founded on a written promise of the defendant's testator to give a bill of sale of the same as a security.

The bill set forth that the late Thomas

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Simons, on or *about the 29th October, 1804, wrote a letter to the complainant, of which the following is an extract:

"I am in want of two thousand dollars for a short time; you will much oblige me by lending me your note for that sum, which I will endeavour to have discounted, and I will give you a bill of sale for my schooner and hands to reimburse you in case of my death and other accident, so that you may not be put to the least inconvenience." That agreeably to such request, and relying on the security mentioned in the said letter, the complainant lent his note, which was discounted, and the amount thereof received by the said Thomas Simons. The note was renewed at the end of sixty days, for the full amount, and before the renewed note became due, the said Thomas Simons died; in consequence of which, the complainant was obliged to pay the said note, and has never been reimbursed. That the schooner alluded to was called the Mary & Susan, and the hands then employed on board of her were four negro slaves belonging to the said Thomas Simons. That after the death of the said Thomas Simons, the complainant applied to the defendant as administrator, and requested him to pay the said $2000, with interest, or to deliver up the said schooner and negroes, to be sold for payment of the same; but that the defendant refused so to do, and has sold the said schooner and negroes, and received payment for the same, and converted the proceeds to some other use than payment of the complainant's demand, which is contrary to equity. Complainant prays that defendant may render an account sales of the said schooner and negroes, and be compelled thereout to pay the complainants demand and costs, and that complainant may be further relieved.

The defendant in his answer admits the letter, but says it is without date. He also says that the said Thomas Simons frequently had notes of complainant's discounted, and refers to the accounts filed with his answer. Defendant says he believes the schooner and

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negroes to be the *same as described in complainant's bill. Admits the application for delivery or payment, and refusal, saying that the estate of his intestate is insolvent, and that he is bound to pay the debts in the order prescribed by law. Defendant also says, that it appears by the accounts filed with his answer, and other papers, that the complainant is indebted to the estate of the said Thomas Simons, which ought to be set off against said demand.

The case came to a hearing.

The letter of Mr. Simons to the complainant was produced in evidence; it was written on the 29th Oct. 1804, and corresponded with the copy set forth in the bill of complainant. Mr. Simons died in January, 1805.

Mr. Pringle for complainant, argued that the letter of the deceased Mr. Simons gave a lien on the property. It was in fact equivalent to a mortgage, and gave a real and direct lien; but at all events it was an equitable lien which this court would enforce. The court would consider that done which was agreed to be done, and would give it effect. The complainant, it is conceded, has paid the note, and he is entitled to have the benefit

of the engagement to secure it. The letter not being recorded till the death of Mr. Simons, makes no difference as to general creditors, whatever it might have done as to other mortgagees, if there had been any who had recorded their mortgages, but there are none such.

Mr. Gaillard for defendant. He insisted that this was a mere promise never performed, and that it could not form a lien. The intestate never gave the bill of sale, and the complainant never required it. The presumption arises that it was given up, and not intended to be required. The complainant had endorsed before for the intestate, without requiring any security. The intestate kept possession also of the property, nor was the letter recorded till after the death of Mr. Simons. It would be dangerous to set up these latent liens, as it would open a door to frauds, though the character of the present parties would forbid any suspicion attaching them; and the setting up

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*such equitable and latent liens, is opposed to the policy of our law, which prescribes publicity. It directs mortgages to be recorded, in order to be a warning to others; and to secure this object, it gives priority to the first recorded mortgage.

It would also tend to defeat the regular administration of the estates of deceased persons, according to the order prescribed by statute.

Chancellor JAMES afterwards delivered the decree of the court:

Complainant states in his bill that the testator of defendant, in his lifetime, being in want of $2000 to pay up his debt at the South-Carolina Bank, applied by letter to complainant to lend him his note for that amount, and promised that he would secure him by giving him a bill of sale of his schooner, and his working hands on board. That complainant lent defendant his said note, and the defendant died shortly afterwards, and complainant has since been obliged to pay the same. Complainant seeks payment, and to have his equitable lien on said schooner and hands, established by the court. Defendant states that the estate of his intestate is insolvent, and that he is bound to pay the debts in the order prescribed by law; he also charges that complainant is indebted to the estate of Thos. Simons.

In this case it does not appear from any evidence that there was any mortgage, judgment or incumbrance upon the estate of Thomas Simons, which could claim priority to the demand of complainant. It is indeed stated that Thomas Simons, before the date of his letter, had prevailed upon defendant to become his endorser to a great amount at the bank, which he has since been obliged to pay. Then at the bank, complainant and defendant have both been obliged to pay notes, and at law, would have both stood upon an equal footing, had it not been for the preference given to the complainant by Thomas Simons in his life time. That he had it in

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his power to give such *preference, cannot be denied; nor can it be doubted while Courts of Equity are guided by that important rule of considering what ought to have been done as done, that complainant has an equitable lien upon the schooner and hands for the payment of his demand. The intestate says in his letter—"I will give you a bill of sale for my schooner and hands to reimburse you." The bill of sale must then be considered as made.

Therefore let the amount of the sale of said schooner and hands be appropriated towards paying off the demand of complainant, except the discount hereafter mentioned; and let the overplus be paid to the defendant to be administered by him according to law. And let it be referred to the master to ascertain whether complainant was indebted to the intestate, and if so, let that sum be a set off against his demand so far as it may go.

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2 Desaus. 556

Case LXVII.

[Present, Chancellors Rutledge, James and Thompson.]

The Executors, Devisees and Legatees of RICHARD ELLIS, Deceased, v. the Widow, Devisees, &c., of RICHARD ELLIS.

(May, 1808.)

[*Wills* ⇐191.]

A testator devises his real and personal estate, to be divided among his wife and his six children, whom he names, in the manner prescribed by his will, and in case of the death of any of his children under age, or unmarried, he directs the share of such of them so dying, to be divided among the survivors, in the manner directed.

After the making the will, and 18 months before testator's death, he has a son born, but dies without altering his will, or making any provision for such after born child. This will is too precise to be disturbed. The court cannot give any relief to the unprovided child. It would be to revoke the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 469-478; Dec. Dig. ⇐191.]

[*Descent and Distribution* ⇐47.]

[A testator gave his estate to his wife and his six children named in the will. After the date of the will, but before the death of the testator, another child was born to him, but no alteration was made in the will. *Held*, that no provision could be made for such child, under the statute in relation to posthumous children.]

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 126-130; Dec. Dig. ⇐47.]

The object of this bill was to obtain the opinion of the court, on the last will and testament of the deceased Richard Ellis.

The bill stated, that the testator made his

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last will on *the 17th June, 1802, wherein he devised all his real estate to his four sons Charles, Richard, Edmund and William, except some town lots to his two daughters Elizabeth and Sarah. His personal estate, he directed to be divided between his wife Sarah, and his six children, Elizabeth, Sarah, Charles, Richard, Edmund and William, (who were all his children then living) share and share alike, so that his wife might have a seventh part during her life, and at her death to be divided between his two sons Edmund and William. The testator directed that after the allotment of the shares to the two daughters, the sons shares should be kept together, till his son Charles should attain 21 years of age, when a division should be made. And in case of the death of any of the children without lawful heirs of their body, their share of the estate is to be divided among the surviving children.

That after making the will and before the death of testator, to wit: On the 1st day of May, 1803, another son was born, called Wilkinson Ellis, who is now living, and is one of the complainants.

That the testator died on the 20th October, 1804, leaving alive his widow, and the six children mentioned in the will, and also the said Wilkinson Ellis, without having altered his will or made any provision for the said W. Ellis.

Several questions arose, on which the executors desired the judgment of the court to guide their conduct; but principally what provision could be made for the child Wilkinson Ellis, who was born after the execution of the will, and before the death of the testator; and who therefore did not come within the direct provisions of the statute providing for posthumous children.

The answers of the defendants admitted all the facts, and submitted the questions to the judgment and decision of the court.

The cause came to a hearing, and was argued as follows:

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*Mr. Parker, for Wilkinson Ellis the minor.

The law will not presume a man to act against nature. It will not presume that he meant to disinherit his child. This child was born 18 months before the death of the father. The will was made before his birth. It must have arisen from accident, and comes under the peculiar jurisdiction of this court. The difficulty is to find out what part should go to this child; but the 8th Sect. of the act of 1789, directing the mode of granting probate of wills, &c. affords a clue.

The case of a child born after making a will, before the death of the testator, is the same as of a posthumous child. And that remedial act should be extended to it. It is nearly as probable that a father should know that his wife was pregnant, as that a child was born.

The construction of the words, born after "the death," should be the same as born "after making the will." Cases cannot be said to be fully settled till they have become a rule of property. See in 5 Bur. 2703, White v. Barber, how far the court will go to give relief in such cases. See the case decided in this court, executors of Sinkler v. legatees of Sinkler. Representatives of T. L. Smith, and others, v. Executors of Benjamin Smith. The words children, construed to extend to grand children. John Drayton, and others v. Executors of John Drayton, Surviving son construed grandson.

The intention of the testator was to give his wife an equal share with his children. That intention can be still adhered to, after letting in this child.

Mr. Pringle for defendants.

The law must act prospectively, and not retrospectively. The presumption of law in favor of a posthumous child, is that the father did not know his wife to be encient.

In the case cited from Burr. the court determined on the ground of the testators intention, appearing on the face of the will. The present application is dehors the will, and founded only on the reasonableness of the case.

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*It would be a revocation pro tanto of the will. 7 Bac. 363. 4 Ves. jr. 840, Gibbons v. Gaunt. Doug. 36.

The court cannot go so far, however humane or reasonable it may be.

Chancellor RUTLEDGE afterwards delivered the decree of the court.

The testator, Richard Ellis, has the following clause in his will: "It is my will and desire that all my negroes, together with what may be bought at the time of the division, and all my stock of every kind, be divided between my wife and six children, (naming them) share and share alike, so that my wife may have her seventh part of my personal estate to her only use, during her life, and at her death, to be divided between my sons Edward and William Ellis, share and share alike."

The will is dated 17th June, 1802. After making the will, viz. on 1st May, 1803, and during the life of testator, he had another child born, called Wilkinson. And near 18 months after, viz. on the 20th October, 1804, testator died without altering his will, or making any provision for the child last born.

It is contended for the child, that his case is within the provision of the act of 1789, by an equitable construction of that act. Also that it may be assimilated to the case of White and Barber, 5 Burr. 2703, Amb. 701; but we are of opinion that the act of 1789, only making provision for posthumous children, cannot possibly comprehend or include the present case; this child having been born nearly 18 months before the testators death.

Nor is the case of White and Barber applicable, because the testator did not in this (as he did in that) make provision for any child that his wife might be pregnant with at the time of his decease.

This is an extreme hard case, and we wish we could decree a provision for the child, out of the testator's estate, in any way consistently with his will; but it is couched in such clear and precise words, that it is impossible

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to decree *at all, without in fact setting aside the will, for testator has expressly directed his personal estate to be divided between his wife and six children, whom he names, and his wife is to have her 7th part allotted to her. †

† The extreme hardship of this case as well as a few others which had occurred of the same kind, induced the legislature to enact a statute on the 15th day of December, 1808, by which it is provided that from the passing of the act, any child or children, born of any person after making and executing his last will and testament, but previous to the decease of such person, shall be provided for as posthumous children are directed to be provided for by the act of the 13th March, 1789, i. e. by letting such child or children come in for an equal share of all real and personal estate given to the other child or children, who shall contribute to make up such share or shares, according to their respective interests under the will.

But it may still be doubted whether the acts are comprehensive enough, for they provide only in cases where there are brothers and sisters, or brother or sister, who shall be obliged to let in an after born child, posthumous or otherwise, to an equal share of the estate. But cases may arise where a man has no children, and has disposed of his property by will to others, (as in Parsons v. Lanoe,) 1 Ves. sen. 192, Ambler, 557, and then has children born in his life time, and dies without altering his will; and doubts might arise if these statutes provided for such a case. But the court would strain hard to give relief.

2 Desaus. 560.

Case LXVIII.

[Present, Chancellors Rutledge, James and Thompson.]

ELIZABETH JAMES v. FRANCIS BREMAR, WILLIAM TUNNO, and Others.

(May, 1808.)

[*Wills* ⇐824.]

A testatrix bequeaths an annuity of 60*l.* to E. I. chargeable on her whole real estate.

The heir at law, and devisee of testatrix sells the real estate generally to third persons for valuable consideration, without notice of the charge of the annuity.

On the sale of a house and lot, the last part of the real estate, to W. T. the vendor expressly informed W. T. that the house and lot were subject to the annuity, and allowed him to retain in his hands a sufficient part of the purchase money to cover the annuity.

The annuitant shall be decreed to be paid

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the annuity out of the *house and lot exclusively. The other purchasers protected from contributing.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2122; Dec. Dig. ⇐824.]

The object of the bill was to obtain a decree to establish the right of complainant to the payment of an annuity out of a particular house and lot, and to have such arrangements made as would secure her the regular payment thereof.

The bill stated that Mrs. Charlotte Poaug died in the year 1787, leaving in full force her last will previously made, by which she bequeathed to the complainant an annuity of 60*l.* charged on her real estate, and then devised her estate to her son John Poaug, his heirs, &c. That the said John Poaug sold all the real estate derived from his mother to sundry persons for valuable consideration, except a house and lot in Charleston, which he afterwards sold to William Tunno. That W. Tunno was apprised of the charge of the annuity thereon, and that John Poaug intended that this property should be exclusively liable thereto; and Tunno retained with the consent of Mr. Poaug, out of the purchase money, a sum more than adequate to protect him from said annuity. That he afterwards conveyed the said house and lot to F. Bremar, who was apprized of the circumstances. That an arrear of £611. being due to complainant on said annuity, she applied to said W. Tunno for payment thereof, which he refused to pay. The bill prays for relief.

The answer of F. Bremar admitted all the facts, and stated his willingness that the house and lot should be sold to pay the annuity.

The answer of William Tunno admitted the facts stated in the bill, which relate to the sale of said estate, but does not admit that said house and lot, purchased by defendant, was liable in the first instance to the payment of the annuity, and insists that the whole real estate was liable in average and proportion.

The defendant denied that at the time of his purchase he was apprized of the said annuity, and that J. Poaug intended to make the house and lot exclusively liable to the

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*payment. He denied that he consented or agreed thereto, or retained any part of the consideration on that account.

The complainant filed an amended bill, by which she made the other purchasers parties, and repeated the charge that W. Tunno, either at the time of his purchase, or subsequent to it, knew of the annuity, and of the house and lot being liable to it, and had agreed thereto, and retained part of the purchase money to cover the annuity.

The purchasers of the rest of the real estate, answered and stated that they were purchasers for valuable consideration, with-

out notice, and not liable to the annuity, but on the deficiency of the house and lot, which they pray may be first subjected to the annuity.

Wm. Tunno answered the amended bill, and renewed his denial of any knowledge of the annuity at the time of the purchase, or any agreement subsequent to it, that the house and lot should be exclusively liable to it; and denies there was any agreement for a reservation of part of the purchase money to protect him from the annuity. Admits he owes a balance on the purchase, but says he is pressed for payment by the representatives of Poaug.

On the hearing of the cause, Mr. Turnbull proved the hand writing of Mr. Wm. Tunno to a letter addressed to Mr. Turnbull, dated 5th January, 1803, in which he acknowledged the liability of the house to the annuity of complainant; also, a memorandum of payments made by Mr. Tunno, in which are the following words, "and am bound to pay 60*l.* yearly;" and in pencil, "the balance will be little enough to pay the annuity."

Mr. W. Robertson testified that Mr. Tunno and Mr. Poaug applied to him in the year 1794, to draw titles to the house in question. Mr. Poaug told Mr. Tunno that his mother's will burdened that property with the annuity, but that he would pay it up. Mr. Tunno said there was as much due on the bond as from the interest would pay the annuity. Witness was afterwards directed to institute a suit to secure the balance (which remained due on

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Tun*no's bond) ultimately for Mrs. Poaug, who was entitled to the remainder after the annuity should be satisfied.

Mr. P. Gadsden testified that Mr. Bremar acknowledged the house was liable for the annuity. The witness told Mr. Tunno that his house was liable to the annuity and that he held funds to meet it, and he did not deny it.

Mr. Poaug, in his lifetime, stated that this property was reserved to secure the annuity.

Mr. W. Robertson, (called by defendant Tunno) testified that he believed the house was the last of all the property of Mr. Poaug, which was sold.

The deed from Francis Bremar, was to William Lee, in trust for Mrs. Tunno.

Chancellor RUTLEDGE delivered the decree of the court.

The question in this case is, whether the house and lot in bill mentioned is exclusively liable for the annuity bequeathed to complainant by Mrs. Poaug, who, by will makes her whole real estate chargeable with the payment of it? If the defendant Tunno had been a purchaser for valuable consideration without notice, it would certainly not have been exclusively liable: but it is in evidence that before he had compleated his contract with Mr. P. he knew of the incumbrance, for Mr. Robertson expressly swears to that fact, and says also that Mr. Poaug said he would pay the annuity. The defendant Tunno, in a letter to Mr. Turnbull in 1803, nearly 8 years after his purchase, acknowledges that the house on the Bay, sold to him by Mr. P. was chargeable with the annuity during complainant's life, for the payment of which it was secured, and made liable. From this acknowledgment of T. therefore it may very reasonably be presumed that there was some agreement between Poaug and himself respecting this transaction, though to be sure he has sworn to the contrary.—In another part of the same letter, he says he imagined the executors would not expect any further payment on his bond during the continuance of the incumbrance. If therefore he neglected

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to withhold payment of so much of *the purchase money as would secure the annuity, it was his own fault, and that is no reason why other innocent purchasers, without notice, should be obliged to contribute to the payment of the annuity. The defendant T. is now out of the question, he has no immediate interest in the premises, for he has released all his right to the defendant Bremar, who by his answer, acknowledges the title to be in him—that the house is liable to pay the annuity, and that he has no objection to its being sold. To invalidate Tunno's conveyance to Bremar, a deed of defeasance executed on the same day by Bremar to Mrs. T. covenanting to convey the house to her on being paid by her at the end of five years, the sum of 4061*l.* was produced in evidence on the part of T. Upon examining this deed, it will be found that it is therein recognized that the house, &c. is subject to the incumbrance of the annuity, and that if he Bremar, or the lot should be made subject or liable to the annuity or taxes, &c. then the deed is to be absolutely void. Executions have been issued for taxes, and the house levied on. Though this deed was produced in evidence and submitted to the court for the present we shall give no further opinion than that the property still appears to us to be in the defendant Bremar from his answer and the evidence offered by complainant. The court are of opinion that the house &c. must be considered as exclusively liable and subject to the payment of complainant's annuity.

An order of reference to the master was then made to examine and report the arrears of annuity.

2 Desaus. 564

Case LXIX.

[Present, Chancellors Rutledge, James and Thompson.]

M. MENUDE v. DELAIRE, Executor of Doctor Polony.

(June, 1808.)

[*Mortgages* ⟸28; *Trusts* ⟸341.]

An informal paper, acknowledging that the writer had been entrusted with the funds of another person, and manifestly intended to operate as a security on certain specified property, shall have the effect of a mortgage of such property, and entitle the holder to a priority

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*over other creditors of the deceased signer of the paper, after prior encumbrances are satisfied. Interest to be allowed from the time the money was received.

[Ed. Note.—Cited in Delaire v. Keenan, 3 Desaus. 76, 4 Am. Dec. 604; Welsh v. Usher, 2 Hill, Eq. 170, 29 Am. Dec. 63; Maybin v. Kirby, 4 Rich. Eq. 113.

For other cases, see Mortgages, Cent. Dig. § 44; Dec. Dig. ⟸28; Trusts, Cent. Dig. § 502; Dec. Dig. ⟸341.]

[*Trusts* ⟸25.]

An acknowledgment of the sale of the property and the receipt of a certain sum of money, belonging to another person, and the investment of it in personal property, is a declaration of trust, or gives an equitable lien. The court supposed it was the latter. Interest allowed from the time of receiving the money.

[Ed. Note.—Cited in Welsh v. Usher, 2 Hill, Eq. 170, 29 Am. Dec. 63.

For other cases, see Trusts, Cent. Dig. § 34; Dec. Dig. ⟸25.]

Other monies received, to be on the footing of a common creditor.

The court referred the party to a suit at law, for another sum proved to have been received by defendants testator, but not charged in the bill nor stated in the account.

The object of this bill was to establish a lien on certain property in the possession of the late Dr. Polony, or to have him declared a trustee, for the complainant, and certain property purchased with the funds of the complainant, to be adjudged to be her property; and for other purposes stated in the bill.

The bill set forth, that complainant, a widow, formerly of Cape Francois, on the 28th August, 1791, was persuaded by the late Dr. Polony, to embark for Charleston, and to bring with her all the funds she could command. That she brought to Charleston a valuable property, and afterwards sent for the remainder of her estate, which could be remitted. That the same was received and deposited in the hands of Dr. Polony, in consequence of his promising to manage the same, and place it to the best advantage for her interest. That Dr. Polony made use of complainants funds in the purchase of a plantation and negroes, and house in Church street. That he could not have made said important purchases, or placed his household on its enlarged establishment, without said funds, having brought a trifling property with him. That complainant supplied his household with linen, plate, furniture and servants. That Dr. Polony received the wages of her servants. For all which deposits, funds and advances, complainant has never received any interest or income. That on the 1st. January, 1801, Dr. Polony, desirous of doing justice to complainant, executed an obligation which

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*he confirmed by a supplementary obligation, of 22d. August, 1804, (exhibit A.) acknowledging to have received from complainant the aforesaid funds, and others, all which he secures by a mortgage (being the said paper) on said plantation and dwelling house in town; which said funds and advances, amount, including interest, to $17,239, (exhibit B.) That Dr. Polony died on the 18th September, 1805, having made a will, dated 9th of said month, whereby he devised to complainant the whole of his estate in South-Carolina, (exhibit C.) thus shewing his sense of the preference due to her claim, and that the said estate had been acquired with her funds. That defendant, the executor of said will, has filed an inventory of the personal estate of the deceased, the whole appraised at about $23,000 (exhibit D.) and that testator's real estate would not yield more than 15 or $16,000. That defendant has exhibited a schedule of testator's debts, amounting to $30,000, (exhibit E.) among which is one due on open account, for $5,000.

The complainant from the above statement conceives that her claims as a creditor are paramount to those of the other creditors; and that her demand of $17,000, ought in the first instance to be secured to her, as having an equitable lien on the whole of testators property.

That complainant called on defendant to settle and acknowledge her rights to the real estate as devisee and preferred creditor, and to deliver over to her the personal estate, or to secure to her the amount of her debt, as preferred creditor. But the defendant has refused. Wherefore complainant prays relief.

The defendant, James Delaire, Executor of the late Dr. Polony, put in the following answer:

He admitted that Dr. Polony came to this country and that complainant accompanied him, probably induced by the then dangerous situation of the Cape. Defendant is ignorant what funds she brought with her, but believes remittances were made to her in coffee, since

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her arrival, and *from some papers he believes the said coffee was sold and paid over to Dr. Polony. He is ignorant whether Dr. Polony promised and undertook to place out any of her funds to the best advantage, or with what funds Polony purchased the house in town. All his information on this subject being derived from complainant's exhibit A. Defendant therefore can't admit or deny that the property was bought with her funds. De-

fendant does not know what funds Dr. Polony brought to this country: but has heard and believes he brought with him 300 half joes, or $2,400, as well as some other funds.

Admits the servants, (one excepted) about Dr. Polony's house, belonged to complainant, but believes the wages were received by complainant's son, and appropriated to her use. Admits the household of Dr. Polony was on an expensive establishment, but denies it was supported by complainant's funds. Defendant has reason to believe that Dr. Polony's resources were ample. Defendant knew Dr. Polony at the Cape, and that he had property of considerable value there and in France; and he drew bills on Foache at Havre, for 85405, which were honored. He practised as a physician in Charleston, with repute, and he took in boarders and sick people.

Defendant has seen the obligation stated by complainant. He does not know whether the transaction is correct. Defendant admits Polony's hand writing to the original papers. Defendant cannot admit complainant's account against the estate, and apprehends a considerable deduction must be made therefrom on account of her board and maintenance, and that of her children.

Admits Dr. Polony died at the time mentioned, and left a will as set forth, and that exhibit D. contains a copy of the inventory.

Defendant intends to apply to the ordinary for permission to sell the personal estate, and to apply the assets which may come to his hands according to law. Defendant intends to resort to the personal estate for the payment of the debts, and does not intend to

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take any steps *toward selling the house and lands, till it appears that the personal estate is insufficient.

Defendant considering the lands and negroes mentioned by Polony in his will as his property, after the debts are paid, he will consider himself bound to distribute the surplus according to the directions of the testator. Defendant does not consider complainant as having any lien on the estate, or entitled to any preference. Dr. Polony being in possession of the house in town, a plantation and negroes, and considered the owner of them, obtained credit to a considerable amount. Defendant apprehends her paramount claim is not sustainable, and that unless abandoned, she will not be entitled to the benefit of the devises in the will. Defendant prays complainant may make her election as creditor or devisee, and submits to the direction of the court.

At the hearing of the case, the papers stated in the bill of complaint, and referred to as exhibits, were admitted.

It was also established that the complainant Madame Menude brought with her and afterwards received considerable funds, which were placed in the hands of Dr. Polony, to be laid out and improved for her advantage; and that his own funds were not large, and would not have enabled him to have made the purchases of real and personal estate which he had done.

The cause was fully argued by Mr. W. L. Smith and Mr. Desaussure for the complainant; and by Mr. Gaillard for the defendant; but the notes of the argument have not been preserved.

Chancellor RUTLEDGE delivered the decree of the court.

In this case there are three points to be considered.

1st. Whether the exhibit A. is to be considered as a mortgage of the house & plantation, for the sum of $8,466, received by defendant's testator from complainant, to be by him laid out for her benefit and advantage,

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or merely as *an acknowledgment of so much money received by him for her use, and to be accounted for?

2d. Whether defendant's testator is to be considered as a trustee for complainant, as to $2,500, received for her plate sold in 1804, with which he purchased negroes; which negroes are either to be considered as hers, or he made responsible for the amount of the purchase money?

3d. Whether any interest is to be allowed complainant on the monies received on her account by Dr. Polony, and from what time?

As to the first point, in whatever view this paper is considered, there can be no doubt that the intention of Dr. Polony was to secure to complainant the amount of the different sums of money therein specified, and that too in preference to all his other creditors, (though indeed those whose claims are secured by mortgage and judgment, will have a preference) and therefore though this paper has not the legal form of a mortgage, yet it bears all the features of one; and as the intention of the party that it shall be so considered, is manifested, by his declaring that the house and plantation are mortgaged to complainant in preference to all other creditors, this court, which regards the substance only, and not forms and circumstances, will give it all the efficacy of a mortgage, and support the claim of complainant as far as the funds will extend, with respect to the $8,466, after the prior incumbrances are fully satisfied. Indeed it was conceded by one of the defendant's counsel, that it might operate as far as the $8,466.

With regard to the 2d question, it is evident from the paper adduced, that Dr. Polony sold a considerable quantity of plate belonging to the complainant, amounting to $2,500, and with that money he declares he purchased negroes for his plantation; and further, that for that sum his estate is indebted to complainant, until he should put all his business in order.

This must either be considered as a decla-

ration of trust arising by implication, or it
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must be considered as an equi*table lien: in either view it will have ultimately the same effect; with this difference only, that if it is considered as a declaration of trust, the individual negroes will be bound; but if it is an equitable lien, the estate generally.

The court are rather inclined to consider it an equitable lien on Dr. Polony's estate than a trust, because it does not appear on the face of the paper that he was intrusted with this sum, to be laid out for her benefit and advantage, as he was with that which he first received on complainant's account; and he has not in this last memorandum fixed on any specific property, as a fund out of which this money is to be paid; therefore it must be paid out of the estate generally. With respect to the $696, as he has not noticed it at all, although it has been proved that he received it, yet we do not think complainant entitled to be paid with interest in any other way than in average and proportion, with Dr. Polony's other simple contract creditors; and as to the $1,000, another item reported by the master, which was not mentioned in complainant's account, the court refers her to her action at law. On the 3d ground respecting the interest, we are of opinion, that as the house and plantation are pledged for the payment of the $8,466, that money shall draw interest from the times the sums were respectively received by Dr. Polony, to be paid however only out of funds arising from the sales of the house and plantation; and the $2,500 should draw interest from August, 1804, and to be paid out of the estate generally.

Refer it to the master to ascertain the principal and interest due to complainant, and report thereon.

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2 Desaus. 570

Case LXX.

[Present, Chancellors Rutledge, James and Thompson.]

HENRY HATTIER v. ETIENNE ETINAUD.

(June, 1808.)

[*Chattel Mortgages* ⟸6.]

An absolute bill of sale, given merely as a security for a debt, and to indemnify complainant for endorsements on notes of hand, shall be
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*considered as a mortgage, and the property included therein, sold to pay the debt, &c. Credit given on the sale.

[Ed. Note.—Cited in Delaire v. Keenan, 3 Desaus, 76, 4 Am. Dec. 604.

For other cases, see Chattel Mortgages, Cent. Dig. § 24; Dec. Dig. ⟸6.]

[*Arbitration and Award* ⟸59, 60.]

An award set aside because it did not make a final settlement between the parties, and because it placed the complainant wholly in the power of the defendant: fixed no time for the payment of the debt, and left the mortgaged property in the hands of the mortgagor, to enjoy the profits indefinitely. Defendant referred to law, to recover damages claimed by him.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 292, 303; Dec. Dig. ⟸59, 60.]

[*Mortgages* ⟸415.]

[In a suit to foreclose a mortgage, the court will not set off unliquidated damages, uncertain in amount, as to which defendant has an adequate remedy at law.]

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1223; Dec. Dig. § 415.]

The object of the complainant's bill was to obtain the sale of certain negro slaves, to pay a debt due to him, and to reimburse him a certain sum which complainant alleged he had paid for the defendant on notes, on which he had been endorser for defendant.

The defendant had conveyed the negroes in question to the complainant, by a deed, which on its face purported to be an absolute bill of sale, but which it was conceded was given merely to secure the debt due to complainant, and such sums as he might pay for defendant.

The defendant resisted the demands of the complainant, and the foreclosure of the mortgage and the sale of the negroes, on the ground that the principal inducement to his giving the bill of sale to the complainant, was that the complainant and defendant had entered into various engagements and arrangements, by which complainant was to have advanced defendant further sums of money, to enable him to have established a coffee plantation on the Island of Cuba, on their joint account; but that the complainant had wholly failed therein, to the great injury of the defendant, for which he insisted he was entitled to redress, and that the said bill of sale ought not to be enforced against him. The parties had referred their disputes to arbitration, and the arbitrators had made an award, but the complainant had protested against the award, and refused to abide by it; and had instituted this suit against the defendant, and had him arrested under a writ of ne exeat. The defendant also filed a cross bill to establish his claims; to which this complainant had filed an answer.

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*The cause came to a hearing, and there was a great deal of contradictory evidence, which the court laid out of the case, in the view which it took of the cause.

Chancellor THOMPSON delivered the decree of the court.

The object contemplated by the complainant in this case is to foreclose the equity of redemption in seventeen negro slaves, which were conveyed to him by defendant by a deed which was intended as a mortgage, (but in fact is an absolute bill of sale,) for the purpose of securing a certain sum of money in the bill mentioned, due to the complainant by the defendant, and also to indemnify the complainant against certain notes of hand

of the defendant, endorsed by the complainant, which in consequence of the insolvency of the defendant, the complainant has been compelled to discharge. The defendant does not deny that the deed was intended to secure the complainant's debt, and to indemnify him against the payment of the notes he had indorsed; but states that the original motive for executing the deed was for certain purposes set forth in the answer; which however it is admitted were not carried into effect. Their differences were afterwards submitted to arbitration; and the complainant protested against the award, after it had been reduced to writing, but previous to its having been signed, for the reasons expressed in his bill. The award not having been so framed as to make a final settlement between the parties immediately (although the court believe it was made with the best intentions by the arbitrators) must be set aside, because the complainant is put altogether in the power of the defendant, with respect to the time of payment of his debt, no period being fixed by the award for so doing; and the defendant is in the mean time to enjoy the profits arising from the work and labor of the negroes.

It is considered unnecessary to remark on the evidence, it being very contradictory, and having no tendency to invalidate the com-

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plainant's demand. With respect to the *defendant's attempt to set off in discount the damages he has sustained by not carrying their original contract into execution, as that is a matter of great uncertainty, and the defendant can have complete redress at law, this court will not interfere, but leave him to pursue his remedy there. The fact of a debt being due is admitted by the defendant; it is only therefore requisite that it should be liquidated. It must be referred to the master to settle and state the accounts, and report the amount with interest upon the sums paid on the notes endorsed by complainant, and that he do within two months, advertise and sell so many of the said negroes, as will be sufficient to pay and satisfy the complainant's debt, and the costs of suit; and that he give a credit of nine months.

Mr. Pringle for complainant.
Mr. Ward for defendant.

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2 Desaus. 573

Case LXXI.

[Present, Chancellors Rutledge, James and Thompson.]

MARY FRASER, CAROLINE and HARRIET FRASER v. PAUL HAMILTON, and Others, Executors of John C. Livingston, and GEORGE, WILLIAM, JOHN & ALEXANDER FRASER, Minors.

(June, 1808.)

[*Wills* ⟸597.]

A devise "of the residue of testator's property," to be equally divided among the devisees, passes the fee simple in the real estate. The intention is manifest, and the words are sufficient: No words of inheritance or perpetuity are necessary in devises where the intent is plain.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1319–1326; Dec. Dig. ⟸597.]

[*Wills* ⟸587.]

[A will, giving "all the residue of the testator's property," passes real, as well as personal property.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1282; Dec. Dig. ⟸587.]

[*Wills* ⟸559.]

[Cited in Canedy v. Jones, 19 S. C. 301, 45 Am. Rep. 777, to the point that the devise of an estate includes all the interest of the testator therein.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1207–1209; Dec. Dig. ⟸559.]

The bill of complainant set forth that the complainant Mary Fraser, is the only sister of the late John C. Livingston; and that the complainants Caroline and Harriet Fraser, are daughters of the said Mary.

That John C. Livingston was seized and possessed of considerable estates in this state, and in Georgia: that he made his last will and testament on the 29th Sept. 1803, and died, leaving the same in full force. The bill

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sets *forth the will, which among other things contains pecuniary legacies to the complainants and others, and a devise of all "the rest of his property" to be equally divided among his nephews George, William, John and Alexander Fraser. That the executors have proved the same, and qualified thereon, and have possessed themselves of the estates; and the complainants have applied to them for the payment of their pecuniary legacies; but the executors have refused payment on the ground that the profits of the estates have not yet been adequate to payment of the whole of the legacies. The bill further states that the complainant Mary Fraser, as heir of the said John C. Livingston, has applied for an account of the rents and profits of the real estate, but that the executors have refused to account, on the ground that such real estate passed under the residuary clause of the will to the residuary devisees George, William, John and Alexander Fraser. The bill prays that the executors may be decreed to pay the said pecuniary legacies to the complainants, and account for the rents and profits of the real estate to the complainant Mary Fraser, and for other relief.

The defendants Paul Hamilton and John Bolton, executors of the late J. C. Livingston, filed their answer to the bill of complaint. They admitted the facts charged in the bill of complaint, and submitted the case to the judgment of the court.

The answer of George, William, John and Alexander Fraser, by their next friend, states that defendants are ignorant of the matters alleged in the bill. Being infants of tender years, they submit themselves and their

rights in their late uncle's estate to the protection of this court. They pray to be dismissed with reasonable costs, &c.

The cause came to a hearing. The principal point was, the construction which should be given to the residuary clause of the testator's will, by which he "devised his residuary property to be equally divided among his

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four neph*ews George, William, John and Alexander Fraser," when they came of age.

Mr. Gaillard for the complainants contended that the devise by the testator of "all the residue of his property" to his four nephews, without any words of inheritance, or perpetuity, could not carry away the fee simple of the real estate from the heir to the devisees. The heir is not to be disinherited without plain words, which technically import a fee simple, or without a manifest intention distinctly expressed. The word estate has been allowed to carry the fee in a devise; but the word property never has been construed to mean the fee simple estate in the lands of testator. And there is no other evidence of intention but these words.

By confining the words used in the will to the personal property, they would be satisfied.

Mr. Desaussure for the defendants, the residuary devisees.

The will in question was drawn without the aid of counsel, and should be construed favorably. The great and acknowledged rule is, that the intention of the testator should prevail, unless inconsistent with some rule of law. The intention is manifest enough here, for the testator gives pecuniary legacies to his neices, and to his sister who is his sole heir, and then devises "the residue of his property" to be equally divided among his four nephews. In common parlance, the residue of a man's property, means not only the property itself, but the interest in it. The word property has not yet indeed been construed technically to mean a fee, but as indicative of intention, it may well carry the fee; and the words, to be equally divided among the devisees at 21 years, shew that the testator really meant to give the absolute estate.

The rule ought not to be so strict in this country as in England, for our statutes have, almost in all respects, put real and personal estate on the same footing. See also the cases in 2 Black. 108. 3 Term Rep. 356. 4 Term Rep. 89. 3 Cranch. 97.

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*Chancellor RUTLEDGE delivered the decree of the court.

When a man sets about making his will, it is to be presumed he means to dispose of the whole of his property, and not to die intestate as to any part of it, and that where he uses general words, he means to dispose of every thing he has.

In this case the testator, after giving several large pecuniary legacies, and devising some small parcels of lands he bequeaths to four nephews, named in his will, all the residue of his property, to be divided between them, when "they come of age." There can be no doubt of testator's intention in this case, to dispose of his whole estate real and personal; and there is no reason for confining the devise to personal property, the word property being full as comprehensive as the word estate, and in common parlance, includes both real and personal estate. The act abolishing the right of primogeniture has almost completely levelled all distinction between real and personal property. There is therefore no longer any substantial reason for the rigid construction and appropriation of certain words, as descriptive of particular species of property. The testator however in the last clause of his will has plainly defined his meaning of the word property, by disposing of the whole of his property to the Parish of St. Luke, for the benefit of the poor, if the deed therein mentioned is not carried into effect.

The court are of opinion that by the devise of the residue of his property, it is plain and evident that the testator intended to dispose of all his real and personal estate, to his four nephews, named in his will, and that such devise is good.

2 Desaus. *577

*Case LXXII.

[Present, Chancellors Rutledge, James and Thompson.]

ALFRED WALTER, and MARY His Wife, Daughter and Principal Devisee of C. PETERS, v. THOS. RADCLIFFE, Administrator of Mrs. Keziah Ford, and MORTON WARING, Jun.

(June, 1808.)

[*Limitation of Actions* ⇐143.]

An executor is not bound to plead the statute of limitations to a debt which he believes to be a just one; and his acknowledgment will prevent the statute from running against it.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 578–583, 587; Dec. Dig. ⇐143.]

[*Executors and Administrators* ⇐453.]

The court will not, in such a case, set aside or open the judgment at law to let in the devisees and legatees to plead the statute.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1897; Dec. Dig. ⇐453.]

This was a bill filed to procure a perpetual injunction against a judgment at law, obtained by Mr. Radcliffe, as administrator of Keziah Ford, on a note of hand given in his lifetime by C. Peters, now deceased, and which it is alleged has been paid.

The injunction was granted in the first instance by a chancellor at Chambers, until the further order of the court.

At the hearing of the cause, a great deal of evidence was given with respect to the origin, and the alleged payment of the note: but upon a full examination, and comparison of the evidence, the court was clearly of opinion that the note was fair in its origin, and had not been paid. It was then strenuously contended by the counsel that the note had been barred by the statute of limitations, which ought to have been pleaded; and the court was urged to set aside (or open) the judgment, and to direct an issue, to give the complainant an opportunity of pleading that statute.

The court, after stating the case, and decreeing on the other points arising out of the testimony, (but making no point proper to be reported) came to the consideration of the question as to the statute of limitations, and expressed itself as follows:

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*"All doubts being removed as to the justness of the debt, the complainant's counsel contended that the debt had been barred by the statute of limitations, and urged the court to set aside the judgment, and direct an issue, to give complainants an opportunity of pleading that act. But the court do not see how that could be done, was it enclined to it, as the complainants are not executors of C. Peters, and the surviving executor of Peters is no party to this suit.

But independently of that, W. B. Peters, (the then acting executor) in a letter to the administrator (of Ford) the present defendant, previous to the note being barred, acknowledged the justness of the debt and promised to pay it: and the surviving executor W. P. Smith, who was afterwards sued, knowing, we presume, the debt to be justly due, and the testator, (C. Peters,) having directed all his lawful debts to be paid, did not choose to plead the limitation act. Nor will it be contended that an executor is obliged to plead that act, if he is satisfied that the debt is a fair and honest one. Upon the whole, therefore, the court are of opinion, that the debt being fully substantiated, there is not that hardship or injustice in the case which is contended, Mr. Peters, in his lifetime, having received a valuable consideration for the note. The injunction must be dissolved, and the bill dismissed with costs."

Peace & Cheves, for the complainants.

K. L. Simons for the defendants.

2 Desaus. 578

Case LXXIII.

[Present, Chancellors Rutledge, James and Thompson.]

WILLIAM WIGHTMAN v. WILLIAM RESIDE.

(June, 1808.)

[*Interest* ⇐51.]

A bill for specific performance of a written contract for the sale of land: The agreement set forth the terms of sale exactly. The purchaser paid part of the purchase money, took possession of the lot, and built thereon; but was deterred from making the full improvements he intended, by a suit brought to recover the

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land by another *person: pending that suit, which was a long time undecided, no titles were made by the vendor to the vendee. That suit was finally decided against the claimant. The court decreed that the purchaser should compleat his purchase, on the vendor, making him good titles with a general warranty. But no interest allowed on the arrears of purchase money till the date of the verdict, which established the title.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 120; Dec. Dig. ⇐51.]

This bill was filed to enforce the specific execution of a contract for the sale of a lot of land in Charleston.

The bill set forth, that the complainant purchased of James Butler a lot of land in Charleston, (described in the bill) and that he contracted, on the 14th August, 1797, with William Reside for the sale of the said lot, on the following terms: that the purchaser should give bond for the payment of £600 by three equal annual instalments, with interest from the date of the contract. That on the 21st October, 1797, the said parties entered into an additional written agreement, that any buildings erected on the lot lately bought of Mr. Wightman should be at the risque of the purchaser, (Reside) should the titles be

called in question respecting Mr. Butler's right to the property he sold Mr. Wightman; and Mr. W. agreed that Mr. Reside should have leave to remove the said buildings. That the said Wm. Reside paid £116 to Wightman in part performance of the contract, and took possession of the land, and erected a wooden house thereon of considerable value. That soon after, and before any titles were executed by the said Wightman to the said Reside, a certain Mr. Warnock set up a claim, and brought an action to try the title to the said lot of land; which after some delay has been decided by the verdict of a jury and the judgment of the court, in favor of the said Wightman.

That pending the suit, Mr. Reside did not ask for a conveyance of the lot, nor did complainant tender him titles. That after the termination of the suit the complainant applied to defendant for a specific performance of the contract, and to pay the principal and interest of the purchase money or that he

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would rescind the *contract altogether. But the defendant refused to pay the interest, alleging that he was not bound to do so, as he could not improve the lot during the suit. But complainant insists he was bound to pay it, as he was really not prevented from enjoying the premises during the suit, but had leased them out, and as his resort would not have been to complainant in case of the actual loss of the land, under the additional agreement of the 21st October, 1797, but to Mr. Butler.

The bill prays for a specific execution of the contract, or of such other relief as might be proper.

The defendant in his answer admitted that he contracted with the complainant by a written agreement on the 15th August, 1797, as stated in the bill. But he denies that he agreed to pay interest as charged; and the written agreement of the 15th August, which stipulates for the payments, and fixes the precise periods, does not say a word of interest. That by the agreement the complainant stipulated on receiving the first instalment, in payment of said lot, to make titles to the said defendant, which of course, as is alleged, meant conveyances in the usual form and with the usual clauses and covenants and warranty. That subsequent to the contract, the additional agreement of the 21st October, 1797, mentioned in the bill, was entered into; the meaning and intention whereof was not as stated by complainant, but that the complainant should warrant Mr. Butler's title to said lot, and to protect defendant in the removal of the buildings he had erected, in case of the loss of the suit. That defendant could not be supposed to have relinquished without consideration, his right to a perfect and warranted title, arising out of his first contract; and if such a meaning can be attached to the subsequent memorandum of the 21st October, 1797, it was an imposition on him; and it is void as nudum pactum.

The defendant admits that he paid £116.

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part of the pur*chase money, and took possession of the lot of land, and erected buildings thereon as charged. He also admits the suit by Warnock, and the final determination thereof in favor of the complainant. And that subsequently, the complainant applied to the defendant for a specific performance of the contract, which defendant was willing to do, except that he refused to pay interest whilst said suit was pending, as he was materially interrupted in the enjoyment of said property, and could not lease the the same, during the litigation; and he did not dare to make his intended improvements, because he might not recover, (in case of the loss of the land) damages proportioned to his expenditures, and because complainant had also set up a pretence that under the memorandum of 21st October, 1797, he would not be liable to make good any losses to defendant, in case of eviction.

The cause came to a hearing, and after argument, Chancellor JAMES delivered the decree of the court.

In his bill, complainant claims a specific performance of a written contract entered into with the defendant for the purchase of a lot of land, made on the 15th of Aug. 1797, by which contract, the defendant agreed to pay 600*l.* for the said lot, in three equal instalments, on the first day of October, 1797, 1798, and 1799, with interest from the date of the contract.

Complainant states, that in consideration of the said agreement, the defendant paid him 116*l.* on the same, took possession of the said lot, and has built a house thereon. Complainant further states, that as an action at law had been brought by Warnock and wife against the defendant to eject him from the said lot, that complainant and defendant entered into an additional written agreement, that the buildings erected on said lot should be at defendant's risk. Complainant also further states, that having tendered good titles, he prays defendant may be decreed to a specific performance.

The defendant in his answer, admits that

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he purchased *said lot for 600*l.* payable in three instalments, as stated by complainant; but he denies that he was to pay interest thereon. as stated in the bill. The defendant also admits that he took possession of the said lot, erected a house thereon, and paid a part of the purchase money; but he denies that the additional agreement set forth by complainant is to have the effect that he contends for. As to this additional agreement, it appears to the court that since it is agreed on all hands that the suit of War-

nock and wife is at an end, and as the said additional agreement is predicated upon the suit, that ought also to be at an end. Then the case becomes a very plain one. Defendant acknowledges the contract, has taken possession of the lot, has improved the same, and paid a part of the purchase money; and therefore it is obvious that he must be decreed to comply with his contract. Also, as the said first agreement was in writing, signed by the parties, there can be no doubt but that defendant must pay interest on the purchase money; but as he was prevented from improving said lot to the extent he wished, by reason of the suit, let him pay interest only from the date of the verdict which established the title. Let complainant also execute to him good and sufficient titles, with a general warranty for the said lot.—Let it also be referred to the master to report such payments as have been made by defendant on the contract, and ascertain the balance.

Parker & Lightwood for complainant.
W. Drayton for defendant.

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2 Desaus. 582

Case LXXIV.

[Present, Chancellors Rutledge, James and Thompson.]

DAVID RAMSAY and MARTHA L. RAMSAY and PAUL HAMILTON v. WILLIAM BRAILSFORD.

(June, 1808.)

[*Specific Performance* ⊂⊃99, 101.]

Where the complainant who seeks a specific performance of an agreement for the sale of

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land, has not performed what was incum*bent on him by contract to do, the court will not decree specific performance, especially if any injury has resulted to the defendant from such non performance. But the defendant, having taken possession of the land, and paid part of the purchase money, and executed the agreement in part, the court will consider him as having waived his objections to the complainant's conduct, and will decree the execution of the agreement. It will, however, extend the time of payment, vary the security to be given, and regulate the payment of interest, according to the justice of the case, under the circumstances produced by the conduct of the parties.

[Ed. Note.—Cited in Rutledge's Adm'rs v. Smith's Ex'rs, 1 McCord, Eq. 405.

For other cases, see Specific Performance, Cent. Dig. §§ 302, 313; Dec. Dig. ⊂⊃99, 101.]

[*Specific Performance* ⊂⊃103.]

(A contract made in this state, for land lying in another state, may be enforced in personam, by one party against the other, according to the English authorities. But the question of jurisdiction was waived in this case.)

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 320–323; Dec. Dig. ⊂⊃103.]

This was a bill filed to compel the specific execution of an agreement for the sale of a tract of land in Georgia.

The bill stated that Paul Hamilton, as trustee for Martha Laurens, had the legal seizin of one third part of a tract of land, called Broughton Island, situate in the state of Georgia, devised to her by her father, with a power to sell the same, with the assent of the trustee; and the said P. Hamilton gave his consent to a sale thereof about the 21st December, 1803. That an agreement was entered into with W. Brailsford, in substance as follows:

David Ramsay and Martha Laurens Ramsay, agreed to sell to Wm. Brailsford, their remaining one third of Broughton Island, and to deliver the said W. Brailsford two bonds, given to their trustee by Fabian; he the said W. Brailsford agreeing to give to Paul Hamilton, a bond including the principal of said two bonds, payable on the 1st day of March, 1805; and to give their said trustee a further sum of four thousand pounds for the said third of Broughton Island, payable in four equal instalments, with interest at the periods stated in the contract. And those bonds were to be secured by a mortgage of the whole of Broughton Island; titles to be executed as soon as possible; but the titles on the one side, and the bonds on the other, to be retained until certificates are produced from the proper officers, that the mortgage

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aforesaid is duly re*corded, and that there is no prior unsatisfied mortgage, judgment, or incumbrance whatever on the said Island. It was further agreed that the interest due on the bonds of Fabian, should be paid in cash, or in notes; and that a year's interest should be advanced at a fixed discount on the four bonds given for the purchase of Broughton Island. That in consequence of the said agreement the said Brailsford entered on the premises, and hath kept possession thereof; and although complainants are now, and have been at all times ready to perform their part of the agreement, and have long since had titles drawn and executed by the trustee, yet defendant hath prevented the agreement from being carried into specific execution. That although defendant had paid complainant the sum of $2004.20 cents, yet that sum is not as much as defendant was by the agreement to have paid in cash, and that defendant refuses to pay the remaining part. That the defendant hath neglected to secure the complainants, by a mortgage of the whole of the said island, and to produce a certificate that there was no incumbrance on the same.—That complainants have applied to defendant to comply with the aforesaid agreement, which he hath refused to do. The bill prayed for a ne exeat, and for relief.

To this bill, the defendant filed an answer.

The answer of William Brailsford, admits Paul Hamilton is seized of the land in question, in manner stated, and that complainant Martha Laurens, is entitled to an equitable estate under the will of her father in the said

land; he also admits the agreement stated in the bill, and that the complainants David Ramsay and Martha Laurens, may have informed him of the assent of the trustee to the sale, but avers the first regular notice he had of said assent, was by a letter of the said trustee, dated 27th March, 1806. He also admits that he entered on the said island soon after making the agreement; but not on account of the said contract, but in consequence of a contract made with the administrator of Fabian, for the other two thirds

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*of the island, who put him in possession thereof. Defendant denies that complainants have been always ready to perform their part of the agreement, for he avers that the bonds of Fabian, which were to have been delivered to him have been retained; although defendant, on his part, had paid the interest due thereon, and one years interest on the bonds to be given by him; being so paid, in consideration of his receiving said bonds of Fabian. That the immediate receipt of the said bonds of Fabian, formed a material part of the aforesaid contract, to enable defendant to compleat his contract with the representatives of Fabian.

That the complainant David Ramsay, hath farther impeded said contract, by informing the administrator of Fabian, that defendant had not paid up the cash which he was to advance, and that the complainant Dr. Ramsay, looked solely to the administrator of Fabian, for payment of the bonds in complainant's hands. That the titles for the said one third of the said island have not been executed to this day. Defendant admits that he has not fully complied with his contract, in procuring such an unincumbered title to the whole island, as to enable him to give a mortgage of the same, because certain judgments were obtained against Fabian's estate, which render it impossible for defendant to comply with the contract. Defendant contends that the default of complainants in not delivering the bonds, was much greater than the default of the defendants in not giving the mortgage. That defendant, as to the cash part of the contract, fully complied. That it was mutually agreed on, notwithstanding the express words of the contract, that whenever the cash payment was made, the titles and bonds were to be delivered to the defendant. The defendant admits that complainants Paul Hamilton and David Ramsay, did by letter of 25th and 27th March, 1806, propose to release defendant from that part of the agreement respecting the mortgage of the whole of the island, and in lieu thereof, to receive a mortgage for the one third part thereof; but yet they

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refused to deliver up *Fabian's bonds. That defendant conceives the subject matter of complainant's bill to be rather a quantum of damages than a case for a specific execution; that defendant is willing the amount of damages sustained should be assessed by the master of this court, taking into view the proper rent for the said island, and the money advanced by defendant. Defendant denies all combination, and prays to be dismissed with costs.

The cause came to a hearing.

Thomas Martin was called as a witness by the complainants. He testified that the bonds of Mr. Fabian, (given for the purchase of part of Broughton Island, from Dr. & Mrs. Ramsay) were in his hands, as assignee of Dr. Ramsay, for the benefit of his creditors. That Mr. William Brailsford, the defendant, applied to him for them, and was anxious to get them, but he refused to deliver them without security. He afterwards sued & got judgment on the bonds.

The agreement for the sale of the land, as stated in the bill, was produced.

Mr. Parker for the defendant, stated as an admitted fact, that the defendant had paid all the interest on Fabian's bonds, and on his own to complainants, down to the 1st of March, 1805.

He produced certificates of the proceedings of the court in Georgia, by which it appeared that the defendant was evicted by verdict and judgment from that part of Broughton Island which he had agreed to purchase from Fabian, on account of his not being able to comply with the terms. Judgment 16th May, 1806.

Also, the letter of Paul Hamilton, trustee, dated 27th March, 1806, approving the sale by Dr. and Mrs. Ramsay to the defendant.

And also, other evidence; all of which that is material, is noticed in the decree.

Dr. Ramsay argued in propria persona, that the complainants had complied with their part of the contract as far as defendant was entitled by his acts to have it completed. But that defendant had not complied

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on his part, *for he had never produced the certificate required by the agreement, nor given the mortgage. That defendant had nevertheless taken possession of the land, and occupied it, and was bound to complete the purchase, and make the payments. That his non-compliance was a great injury to complainants, and that the defendant had no equitable claim to be released from his contract.

Mr. Parker and Mr. Drayton for the defendant, insisted that the defendant might well object to the jurisdiction of the court to decree the specific execution of a contract for the sale of land, lying in Georgia, out of the jurisdiction of the court.† And also,

† This question of the jurisdiction of the Court of Chancery, with respect to lands in other countries, is a very delicate one. There are some decisions which throw light upon it. In the case of the Earl of Derby v. The Duke of

that he might require the complainant's bill to be dismissed, and that they should be sent to law, where they had adequate remedy for the recovery of the money due on the contract. But that the defendant being desirous to obtain a final decision on the merits, waived both these objections.

As to the merits, the complainants are not entitled to a specific performance of this contract, for they had not complied with the terms of it. It was part of the agreement

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*that the complainants should deliver to the defendant the bonds of Mr. Fabian; and nothing afterwards occurred to alter this agreement. And it was indispensably necessary to the arrangements of the defendant, to get possession of those bonds to enable him to settle with Fabian's administrator. He was defeated in these objects, by the refusal to deliver these bonds to him: Also, by Dr. Ramsay's letters to Fabian's administrator, calling on him for payment of the bonds, and enforcing the demand by suit.

On the other hand, the defendant had done everything in his power to comply with his agreement, and was always ready when complainant should comply with his part. He had paid the interest due on Fabian's bonds, and on his own contract, and yet he got no benefit by it. That the bonds of the defendant were not to be delivered to complainant till the titles were delivered him, which had never been done yet. The delay, and the injury resulting from it to defendant, ought therefore to induce the court not to decree a specific performance of this contract, but to leave the parties to their legal remedies.

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There was no more *reason that the vendee should be hung up an indefinite time, before the contract was complied with, than the vendor. The vendor should be obliged to complete the titles at the time specified, or in a reasonable time after; or the court would not decree specific performance.

The counsel cited 4 Ves. jun. 690. 1 East, 627, and Givens v. Calder, ante, p. 171, 2, &c.

Besides, the deeds of conveyance now offered for the first time, are not perfect. There is no warranty, nor proper covenants. They are not such deeds as a purchaser is bound to accept; nor can the trustee now make good titles to the purchaser, though he might have done so under the will of Mr. Laurens, (devising the land to his daughter Mrs. Ramsay,) before Dr. Ramsay's rights had been transferred by assignment.

The judgments against Dr. Ramsay bound

Athol, decided by the Lord Chancellor Hardwicke, 1 Ves. sen. 202, it was determined first, on the point of pleading, that whoever pleads to the jurisdiction, must shew what other court has jurisdiction; and that for the want thereof, the plea is bad, and ought not to be allowed. Second, on the merits, that the general averment, that no title to land, &c. lying in the Isle of Man, is examinable in this court, is not true or well founded, but is laid down much too large; because upon an equitable right to that Island, and both parties resident within the jurisdiction of this court, it might be determined here. So upon a mortgage of the Island, and the mortgagor & mortgagee residing within the jurisdiction of the court, upon a bill concerning it, the court would hold jurisdiction of it; for a Court of Equity acts in personam. And in the case of Penn v. Lord Baltimore, also decided by Lord Hardwicke, in 1750, a specific performance was decreed of articles executed in England, concerning the boundaries of two Provinces in America. The Lord Chancellor in delivering his very able judgment in the case, stated that the original jurisdiction on the direct question of the right

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of the boundaries *was not in the Court of Chancery; but that the contract of the parties brought it within the jurisdiction. For it was founded on articles executed in England, under seal, for mutual consideration, which gives jurisdiction to the King's Courts, both of law and equity, whatever be the subject matter. There are several cases wherein collaterally, and by reason of the contract of the parties, matters out of the jurisdiction of the court originally will be brought within it. The conscience of the party is bound by the agreement, and being within the jurisdiction of this court, which acts in personam, the court may properly decree it as an agreement, if there be a foundation for it. The Lord Chancellor decided also, that the objection as to the lapse of time, in the performance, should not prevail: for it is the business of this court to relieve against lapse of time in the performance of an agreement, especially where the non-performance has not arisen from any fault in the party seeking the specific performance. The Chancellor said that the objection that the decree could not be enforced in rem, was not valid; for though the court could not enforce its decree in rem, it could in personam; and that the strict primary decree in this court, as a court of equity, is in personam, long before it was settled whether this court could issue process to put into possession in a suit of lands in England, which was first begun and settled in the time of

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*James the first. But it is ever since done by injunction, or writ of assistance to the sheriff. (Vide Stribley v. Hawkie, 3 Atk. 275, 6.) In Lord Chancellor King's time in the case of Richardson v. Hamilton, the attorney-general of Pennsylvania, the court made a decree, respecting a house and lot in Philadelphia, though it could not be enforced in rem.

The Lord Chancellor Hardwicke decreed in the principal case that the agreement should be carried into execution by Lord Baltimore. But having added, "that the plaintiff and defendant should hold according to the articles," he afterwards altered that, saying it would be improper to have a decree in this court, for quiet enjoyment of lands in another jurisdiction, in America. But he left it on the footing, that the court would enforce the decree in personam, if it were not obeyed. See also the cases of Foster v. Vassall, 3 Atk. 589. Roberdeau v. Rous, 1 Atk. 543; and Lord Cranstown v. Johnson, 3 Ves. 170, decided by Lord Chancellor Loughborough.

In the case of Pike v. Hoare, Amb. 428, Lord Chancellor Henly refused to direct an issue to try the validity of a will made in England, relating to real estate lying in Pennsylvania. And he said that Lord Hardwicke had expressly made the distinction in Penn v. Lord Baltimore, and that it was the contract which gave the court jurisdiction in that case.

his rights, and his assignment conveyed them. Here were then legal and equitable rights to be regarded, which prevented the trustee from making good titles to the purchaser: and the court would not oblige him to ac-

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cept conveyances, *which might not give him a good and perfect title. Nor would the purchaser be safe under these circumstances, without his seeing to the application of the purchase money to its proper purposes. Lumbe v. Mills, 5 Ves. 520. See also Burden v. Dean, and Oswell v. Probat; 2 Ves. jun. 608, 680, Brown v. Clark, and Freeman v. Paisley; 3 Ves. jun. 166, 421, Franes v. Franes; 4 Ves. 515, Co. Lit. 290, n. 1, 351, Sug. 331; Mitford, 39, 78—144. 2 Bla. 335.

Dr. Ramsay spoke in reply, but no note of his argument has been preserved.

Chancellor JAMES delivered the decree of the court.

The complainants in this case pray for a specific execution of a contract made with defendant for the sale of one third part of Broughton Island, of which they state defendant to have been in possession, ever since a short time after the date of the said contract, to wit, on the 21st Dec. 1803. The defendant insists that the said contract should now be rescinded, because the complainants prevented him from complying with the same, by not delivering to him J. Fabian's bonds, as he alleges they were bound to do by the contract, previous to his taking any steps to comply with the contract.

The court then took a full view of the contract, and of the conduct of the parties under it, and declared its opinion to be, that the complainants were bound to have delivered the bonds of Fabian to the defendant, when he made the payments which he actually did; and that certain ill consequences having resulted to the defendant, from the complainants not having delivered these bonds, the court would not have decreed a specific performance of the contract, if the matter had rested there. But (the court said) the decree for specific performance does not now depend upon the mutual stipulations of the contract, for it appears that the defendant took possession of the land with complainants permission, shortly after the date of the agreement. That he has remained in

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possession ever since, *and has also paid the interest which he was bound to pay by the terms of said agreement. Therefore he has in part executed the contract, and by his own act, has waived the mutual stipulation, and it is too late for him now to say to complainant, you have not performed the condition precedent, and therefore are not entitled to a specific performance.†† But as the complainants by their own act in pressing for the payment of the bonds of Fabian, and threatening suit, when in equity they ought to have tendered the same to defendant, have thereby indirectly compelled the administrator of Fabian to eject the defendant from the other two thirds of the Island, and rendered it impossible for him now to mortgage the same; therefore the court will only direct him to give four bonds for the purchase money of the remaining third, and that he do mortgage the said third. But as defendant has paid to complainant all the interest due on Fabian's bonds to the 1st March, 1805, and one years interest in advance on the purchase money, that he be allowed the amount of the money so paid on Fabian's bonds, with interest thereon from the time he paid it, as a part of his purchase money; and that the same be deducted from the first bond, which he is hereby decreed to give to complainants trustee. But as it appears by a letter of Mr. Harford, as early as the 20th of August, 1805—"that Dr. Ramsay had written two letters to Mr. Elliott, urging him to make speedy arrangements to take up his bonds;" and the first letter from the trustee, Paul Hamilton, threatening to sue, is not until the 3d September, 1805, it appears to the court that the conduct of Dr. Ramsay, in particular, has not been equitable.

1st. In not offering to deliver the bonds of Fabian, thereby to ascertain if defendant could comply with his part of the contract; and in constituting himself the judge of his ability to comply with the same.

2d. In making use of those bonds knowing-

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ly, (for by *the letter of Brailsford, above cited, he ought to have known it) as the indirect means of evicting defendant from the other two thirds of the island, and thereby lessening the value of the remaining third.

Under all these circumstances, it appears to the court that defendant is entitled to some favor.

It is therefore decreed, that the complainants do make to the defendant good and sufficient titles for the said third of Broughton Island, and that the defendant do give bonds and a mortgage of the premises. The bonds to be made in the following manner, viz. the first bond for the balance of the first instalment, if any, as above directed, payable on the 1st March, 1809, when the last instalment was to have been paid; and the three remaining bonds, payable in the three following years, viz. 1810, 1811, and 1812.

Moreover, as the use of said lands, enjoyed by the defendant, ought to be adequate to the interest of the purchase money, let the said four bonds draw interest from the time that defendant took possession of the lands, with permission of complainants. Also, let it be referred to the master to ascertain the time of defendants taking possession, to

†† See the case of Fludyer v. Cocker, 12 Vesey, 25, 6; and Powell v. Martin, 8 Vesey, 146.

liquidate the several sums, and to take bonds and mortgage on the principles above established.†

† There is a slight notice on some of the papers of a re-hearing, or bill of review. But I have no notes of it, and there does not seem to have been any alteration of the decree.

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2 Desaus. 592

Case LXXV.

[Present, Chancellors Rutledge and James.]

The Administrator of CHARLES M. PICTON v. ANGUS GRAHAM and J. WALKER.

(November, 1808.)

[*Equity* ⊜345.]

Parol evidence to vary a written deed, not permitted to prevail against the positive answer of the defendant, denying the charges of

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*inserting provisions in the instrument different from those agreed on, and of surprise on the complainant, in the execution of the deed.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 715–724; Dec. Dig. ⊜345.]

[*Deeds* ⊜69.]

The complainant could have read the deed, and it was his own folly if he did not read it, or signed what he did not understand; and no proof of fraud in the case.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 162; Dec. Dig. ⊜69.]

The original bill was filed to set aside a deed of marriage settlement, or to correct and reform the deed; some of the provisions contained therein, having been obtained by fraud, or inserted by mistake, as was alleged.

This was a bill of revivor, to revive that which had been filed by Mr. Picton, and who died soon after.

The bill stated that William Byers executed his last will and testament on the 25th May, 1783, by which he bequeathed a certain proportion of his estate to his wife, and the remainder to his only child Elizabeth Byers, and her heirs, &c. Wm. Byers died on the 1st June, 1793, leaving his will in full force; but his wife died before him; so that E. Byers became entitled to the whole estate of her said father.

That Mrs. Elizabeth Walker bequeathed to her granddaughter, the said Elizabeth Byers, several negro slaves; but if the said E. Byers should die, without lawful issue, then the said slaves were to go to the testatrix's sons R. Barlow, Angus Graham, and John Walker.

That a marriage being about to take place between C. M. Picton, the complainant's testator, and the said E. Byers, her maternal uncles Angus Graham and John Walker, requested the said Picton to agree to a marriage settlement of her property, to be made conformable to the wills of her father and grandmother; to which he readily consented; and they undertook to prepare the same.

That on the evening of the marriage, and but a few minutes before the ceremony, Angus Graham tendered to the said C. Picton for his signature, a deed of settlement, which he had caused to be drawn up; and the said Picton supposing it to be properly drawn, signed it without reading it.

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*That the marriage took effect immediately after, to wit, on the 8th May, 1801, his wife being then about 18 years of age. That she died on the 8th June, 1802, under the age of 21 years, but leaving a female child, who died 12 days after its mother: whereupon all the property which had belonged to the said Elizabeth, became vested in said C. Picton, her surviving husband.

That the deed of settlement, executed as abovementioned, was kept by the said Angus Graham, who never recorded the same, nor communicated its contents to said Picton, till about one year after the death of his said wife. That by a clause in the said settlement, inserted by the procurement of the said Angus Graham and John Walker, it is provided that if the said E. Byers should die before the said C. Picton, her then intended husband, leaving no issue, or leaving issue, and such issue should die before the age of 21 years, and unmarried, the property included in the settlement, should vest in the said Graham and Walker. The complainant charges that such clause was introduced fraudulently, without the knowledge or consent of the said C. Picton, and contrary to the terms verbally stated to him before the marriage, to wit, that the settlement should be made conformable to the wills of the father and grandmother of said E. Picton.

That the said Graham and Walker have possessed themselves of all the property in question, and keep the same as their own. The bill prays discovery, and an account, and such relief as complainant is entitled to.

To this bill the defendants put in the following answer:

The defendants admit that William Byers made his last will and testament, by which he bequeathed his property as complainant states, and died, leaving his said will in full force, and leaving Elizabeth Byers, his only child. His wife died before him.

They admit that Elizabeth Walker made the will attributed to her, and died leaving the said will in full force. And they have been advised, that under the said will, the

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*property devised to the said Elizabeth Byers, in the events of her dying unmarried or under age, or without leaving issue, which should attain the age of maturity or be married (which event has occurred) would devolve upon themselves absolutely. They admit the solemnization of the marriage between the complainant and Elizabeth Byers, who was about 17 years of age. That ex-

hibit C. is a true copy of the deed of marriage settlement; but they deny the manner in which the complainant says the deed was executed, and aver that the complainant was informed three weeks before his marriage, that the property belonging to his wife, was to be settled agreeably to the provisions afterwards inserted in the said marriage settlement, assented thereto, and was about eight days before the marriage specially informed by one of the defendants of the contents thereof, with which he confessed himself perfectly satisfied.

The defendants deny that the wills of William Byers and Elizabeth Walker were ever considered or agreed upon to form the grounds of the said settlement, but were adverted to merely to collect from them a description of the property. They deny that the settlement was signed by the complainant without reading it, averring that before he signed it, he perused it with care and attention; sometime after which the ceremony was performed.

The defendants admit that the deed was not recorded until the time mentioned in the bill; and they allege various reasons for its not having been done earlier; and declare that had a sight of this deed been required at any time either by the complainant or any one authorized by him, it would readily have been produced. They admit their present possession of the property which they claim as their own.

At the hearing, the wills of Mr. Byers and of Mrs. Walker, and the deed of settlement were produced in evidence.

The following testimony was also given:

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*Mrs. Collins. About three weeks before the marriage, Mr. Graham called, and said to Miss Byers, it was very proper to have a marriage settlement. She said nothing. He then addressed himself to the witness, who said it was what she wished, to have a settlement of the property to her and her issue. He said it was impossible it could be made exactly in that way, and that it was a matter of form. Miss B. said nothing.—Is sure he had no previous conversation with her. He said it was to be according to his mothers will. She never heard any thing from Graham in the first conversation, implying that Walker and Graham were to have any thing. She was present at the execution of the deed. Graham, who offered it to Picton, said it was only a matter of form, and it could not affect his rights. Picton said if he read it, he would not understand it. Miss B. who had not been anxious for a settlement, was in another room; she hesitated a moment, but she stept forward to sign. This was immediately before the marriage, just before the minister came. Believes Mr. Picton looked at one part, but cannot say whether he read the whole.

Mr. Verree. Was present at the marriage of Picton—saw the deed handed to Picton; he objected to it, not knowing the contents. Graham said there was nothing in it to injure him, he need not hesitate to sign it; and he signed it. He did not read, he thinks, from the short time he had it in his hands, ten lines. He asked for the contents of it. Next day he mentioned to witness he did not know the contents. The deed was offered immediately before the ceremony. He turned over to one particular part in which the will was mentioned. Dont know whether he said agreeably to the will, or which referred to the will. Miss B. asked no questions when she signed the deed. She appeared to be frightened.

Mr. Hodgson. Was present when this deed was executed by Mr. Picton—not a quarter of an hour between the signing the deed and

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the ceremony; but did not actually *see Picton sign the deed, or any other person. Never knew the contents of the paper till long after.

Mr. Walker called on witness on Sullivan's Island, to prove the deed. It was proved on 7th June, 1803.

Letters were also produced, which shewed Mr. Graham's consent to the marriage of his niece.

The other subscribing witness to the deed was dead.

Mr. Drayton for the complainant, contended that the deed in question must be set aside, on the ground of fraud or mistake. That the deed was executed by the complainant without a knowledge of its contents; its being proved that he never read it, confiding in the probity and representation of Graham, the uncle of his intended wife, who stated that the deed of settlement contained nothing to his injury. It was produced for execution immediately before the marriage ceremony, which was no fit time for the examination of the provisions of the deed: nor were they examined. That this confidence was abused; for the deed did contain a limitation to the injury of the intended husband, unusual in its nature, and not conformable to the provisions of the will of the father or grandmother of Miss Byers, to which Mr. Graham had alleged the settlement was to be conformed. These wills contain no limitation similar to that introduced into the deed.

This was a fraudulent misrepresentation, on which the court will set aside the deed.

The husband was kept ignorant of the contents of the deed, which might have alarmed him, and induced him to obtain its collection or reformation in the life time, and by the authority of his wife. The uncles kept it secret without recording it till her death, and thus rendered it a void instrument, as it regarded creditors, and powerless as to the main object of marriage settlements, the protection of the property for

the wife and children; and powerful, only to the injury of the husband's marital rights.

The settlement included not only what Miss Byers derived from the wills of her

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father and grandmother, but al*so what was absolutely her own, on the death of her mother.

The answer of the defendants is not entitled to credit with the court, for it alleges what is incorrect in several particulars; and this takes away all credit from it.

It states that the deed was deliberately read over by Mr. Picton; whereas two witnesses prove that he never read it at all.

The not reading the deed is a badge of fraud. In the peculiar circumstances of delicacy in which the parties were placed, it was incumbent on the defendants to have insisted on the deed being read, and perfectly understood.

The deed thus prepared, under the instructions of the uncles, without the privity of the intended husband of their niece, was fraudulent for want of consideration. There was so manner of consideration for thus inserting a clause of an unusual nature, restricting the marital rights in the property, and for the benefit of these uncles. See White v. Hussey, in Prec. in Chanc. p. 13. Bennet v. Vade, and others, 2 Atk. 324, 7.

But if there were no proofs of fraud, the court would relieve on the ground of mistake. Assent is necessary to the completion and validity of all contracts. But there cannot be an assent where the party is ignorant of the contents of the paper he subscribes. 2 Bro. C. C. 150. Powell on Contracts, 134.

The court relieves most readily, in cases where a guardian, or one standing and acting in that relation, takes an advantage of the confidence of his ward, and turns it to his own advantage. 2 P. Wms. 205. See Cole v. Gibson; 1 Ves. 503, Turton v. Benson; 1 P. Wms. 496, 8; 3 P. Wms. 129, 374; 2 Ves. 547; 1 P. Wms. 118.

Parol evidence will be received to explain such frauds or mistakes. Sugden 110, 118; 1 Bro. C. C. 341; 1 Bro. C. C. 92, 3.

Mr. Cheves for the defendants.

There is no grounds for the charge of

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fraud in this case. *If there be any thing wrong, it is by mistake, which is essentially different.

The party cannot allege he did not read the deed, (Sugden 119,) where there is no restraint, or contrivance to prevent; where he can read and undertakes to read for himself. And it is in proof that he took up the deed, and began to read it; there was no restraint on him. If he did not read the deed, it was his own fault. Here then is a deed regularly executed by the parties interested: He who alleges that it was intended to have made a different deed, must prove that intention. But the proof here is not sufficient to establish that. Courts of justice must abide by the written acts of the parties, unless shewn clearly to have been erroneous by fraud or mistake. The concurrent intention of all the parties as to the alleged agreement, differing from the deed itself, must be proved, and that by irrefragable evidence. The courts receive parol evidence on this subject with great hesitation and reluctance. See Sugden 108, 9, 110, 117, 119.

It is true it is laid down, that if two persons employ a third person to draw up minutes of their intention, and such person does not draw them accordingly, the case may be relieved, because it is a kind of fraud. Sugden 110. And in the case of Shelburne v. Inchiquin, 1 Bro. C. C. 341, the Lord Chancellor Thurlow, says, it is impossible to refuse, as incompetent, parol evidence which goes to prove that the words taken down in writing, were contrary to the concurrent intention of all parties; it is the only way of explaining latent ambiguities; but it must be irrefragable evidence, and it must be an essential ingredient to any relief under this head, that it should be on an accident perfectly distinct from the sense of the instrument. Lord Chancellor Eldon, in observing on these dicta, (Marquis of Townsend v. Strangroom, 6 Vesey, 328; Sugden, 108, 9,) said that Lord Thurlow seemed to say the proof must satisfy the court what was the intention of all parties; and he added it must never be forgotten to what extent the

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de*fendant, one of the parties, admits or denies the agreement in his answer.

In Irnham v. Child, 1 Bro. C. C. 92, 3, parol evidence was refused to be received, to prove that part of the agreement was left out of the deed, it not being charged to have been omitted by fraud. In that case, Lord Chancellor Thurlow laid down the general rule to be firmly established, that parol evidence is not admissible to contradict, or even vary a deed: but that in cases of imputed fraud, it is admissible; for the rule of evidence is not subverted, if there be clear proof of fraud; but it must be quite clear.

As to mistake or accident, if that be admitted, the court would not overturn the rule by varying the deed, for it would be an equity dehors the deed. Then it should be proved as much to the satisfaction of the court as if it were admitted. The difficulty of this is so great, that there is no instance of its prevailing against a party insisting that there was no mistake.

And surely the case of an alleged fraud, in the execution of a deed, must be proved at least as clearly as in a case of mistake.

The pretence of a party neglecting to read the instrument, when he is capable of doing so, and there is nothing to prevent him, as a ground for breaking through the rule, forbidding parol evidence, is not listened to favorably. It is his own folly—Where a lessor drew a lease for one year, instead of

21 years, and then read it for 21 years, the lessee brought his bill to be relieved, but as he could read, it was deemed his own folly, and as the case was within the statute, his bill was dismissed with costs. See Skinner's Reports, 159; Sugden, 117. See also Harwood v. Ellis, 2 Vesey, 195.

It must be observed that there is no proof at all of the terms and provisions alleged in the bill to have been agreed on. The answer denies the terms stated; and the answer is not sufficiently contradicted. The presumptions arising from the hasty execu-

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tion of the deed, from the not *recording it during the life of Mrs. Picton, and other circumstances relied upon, do not amount to that proof required to shake a formal deed regularly executed.

Chancellor JAMES afterwards delivered the decree of the court:

The Judge stated the case fully from the bill and answer, and then proceeded as follows:

To prove that the marriage settlement was obtained by fraud, the complainant, the administrator, has produced three witnesses; Mrs. Collins, Mr. Verree, and Mr. Hodgson. The first, Mrs. Collins, has said much respecting conversations with Mrs. Picton before the marriage, but all that she appears to recollect about Picton was, that he said when the settlement was offered to him for his signature, "that if he did read it, he would not understand it," and that Graham said, "it was matter of form." Mr. Hodgson, one of the witnesses to the deed, was called out of the piazza about a quarter of an hour before the ceremony to witness the deed, but saw no one sign it, and heard Graham say, "it was matter of form." Mr. Verree was present at the marriage of Picton; when the settlement was presented to him, he objected to it, and Graham said there was nothing in it to injure him, and that he might sign it. Picton took up the deed, but had not time to read ten lines, and witness does not think he could have read more. The next day he said he had a good opinion of Graham, and that he did not think he would injure him." So far goes the testimony of three witnesses, who were to establish a fraud sufficient to overthrow a solemn deed in writing, entered into by the parties. But this evidence has been contradicted by defendant's answer, in which they state, that "Picton was informed three weeks before the marriage of the provisions to be made in the settlement, and that before he signed it, he perused it with care and attention." Verree indeed says, "that Picton could not have read ten lines;" but here is the answer of two defendants to contradict him, and the

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court must give that *weight to the answer which equity is accustomed to do.—If Picton could not understand the settlement, he might in three weeks have applied to counsel, who could have explained it for him; and if it has been injurious to him, it was his own fault that caused it; for why did he sign an instrument which he did not read, and could not understand?

Complainant stated further in his bill, that defendants took into their possession all the property bequeathed to Mrs. Picton, under the will of her father and grandmother; but defendants deny that they ever were possessed of any of the property bequeathed to complainant's wife; so that as to this charge, the bill is not supported by any evidence, and is denied by the answer. Therefore under all the circumstances adduced in evidence, let the complainant's bill be dismissed with costs.

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Case LXXVI.

[Present, Chancellors Rutledge and James.]

Executrix and Executor of GEORGE BAGUE v. WILLIAM BLACKLOCK.

(November, 1808.)

[*Executors and Administrators* ⊂⊃537.]

Executors and legatees must bring a suit at law, in the first instance, on the administration bond, in order to make the surety in it liable for the acts of the administrator.

[Ed. Note.—For other cases, see Executors and Adminstrators, Cent. Dig. § 2485; Dec. Dig. ⊂⊃537.]

[*Executors and Administrators* ⊂⊃537.]

The defendant who had arranged a debt due to the complainants, by a circuitous settlement, under the sanction of their attorney in fact, and who acknowledged verbally that he had thereby saved a certain sum for the complainants, which they would not otherwise have got, shall under the circumstances be held responsible under that acknowledgment, as far as the funds came into his hands, though he stated in his answer, that his acknowledgment was founded in mistake, and he had informed the parties so, soon after it was made.

[Ed. Note.—For other cases, see Executors and Admnistrators, Cent. Dig. § 2567; Dec. Dig. ⊂⊃537.]

This was a bill filed by the complainants to make the defendant liable on an administration bond, in which he had joined as surety with Edwin Gairdner, who had administered in this state on the personal estate of

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George *Bague, for certain sums of money received by said Gairdner, for the said estate, from its debtors, and not accounted for; and also to oblige the said William Blacklock to account for a certain sum of money alleged to have been received by him, from a debtor of the said Bague, for the benefit of that estate.

The complainants bill set forth, that sometime in the year 1784, their testator George Bague had considerable mercantile transactions with Archibald Brown, deceased, and others, in this state, in the course of which

they became indebted to him in considerable amounts. That their said testator came to this state, and resided some time, to settle his affairs, and departed this life, leaving his last will and testament in full force, in which he names one of the complainants, Sarah Bague, executrix and residuary legatee, and the other an executor of the same. That complainants appointed Robert W. Powell as their agent, with full powers to settle the affairs of said estate, and with authority to substitute any other person in his place, in case he should quit the state. That said R. Powell before he quitted the state, to wit, on the 1st May, 1800, by deed, dated on that day, substituted Edwin Gairdner as attorney in his place, and as complainants believe, delivered him all the papers, vouchers, &c. belonging to the estate of said testator. That while said R. W. Powell acted as their attorney, he had adjusted and settled many disputed accounts, and liquidated the same by receiving from them and particularly on account of Brown's debts, bonds and notes, payable at a future period: all of which, except a few hereafter mentioned, were paid into the hands of said Edwin Gairdner, who never accounted for the same, but on the contrary, on the 1st November 1802 committed divers acts of bankruptcy, by which all the sums received by him, and not accounted for, were lost to the estate of said Bague. That previous to his receiving the above mentioned debts, to wit, on the 11th September, 1801, said Edwin Gairdner

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had been *compelled to take out letters of administration from the Ordinary of Charleston district, on the estate of said Bague; the debtors of said estate refusing otherwise to come to any settlement. That on his giving bond for the true performance of his duty as administrator, he gave William Blacklock as security in the bond. That subsequent to that event, said Edwin Gairdner received to the amount of $17,000, which he never accounted for, and for which said W. Blacklock as surety, is liable to complainants. That previous to the aforesaid bankruptcy, divers debts were still due to said estate of Bague, which had not then been received by Edwin Gairdner; and said W. Blacklock, having discovered that Gairdner had received considerable sums of money on account of said estate, and apprehensive of the derangement of his affairs, in order to secure himself from more loss, proposed to said Gairdner, to deliver to him all the specialties, &c. that he might collect and apply them to the purposes of said estate. And said Gairdner accordingly delivered all the specialties, &c. to said W. Blacklock, contained in a trunk. And as there was then due from William Clarkson the sum of $6,000 and upwards, said Gairdner gave Blacklock a paper authorizing Clarkson to settle with Blacklock for all monies due by him, said Blacklock assuring him that they should be applied to the use of the creditors, of which Gairdner informed complainant, Sarah Bague. That said Blacklock shortly after came to a settlement with said Clarkson, and received a considerable sum, about $7,150, on account of said estate. That the complainants by their attornies, applied to said Blacklock to make good as far as the penalty of the administration bond, the monies misapplied by said Gairdner, and also to account for all monies received from papers entrusted to him by said Edwin Gairdner, and particularly for the sum received from Clarkson. But said Blacklock refused to give any other satisfaction than merely to deliver the trunks of papers, insisting that he was not liable for the defalcation of said Edwin Gairdner, as he at the time was the substi-

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tuted attorney of said *complainants, and his receipts therefore theirs; and that with respect to monies arising from said papers previous to the bankruptcy of Edwin Gairdner, he had never received any from Clarkson on any trust whatever, except in part payment of his, Blacklock's demand against Gairdner; and there never was any idea that the same, when received, should be applied to the use of said estate. And he refuses to give any account of the monies received by him. The bill prays relief.

The defendant filed an answer, in which he admits the facts generally charged, down to the appointment of Mr. Powell, as attorney, and his substitution of Gairdner. But that defendant is ignorant whether Powell delivered to Gairdner, all the papers belonging to the estate of Bague: nor can he state particularly what specialties, notes, &c. of the executors of Bague were in the hands of Gairdner, but that on his bankruptcy, Gairdner delivered to this defendant, for safe keeping, the trunk of papers belonging to Bague's estate, on the 6th November, 1802.

Defendant declares that the trunk was never opened by him but once, and then in the presence of a witness. That there was not at that time in the trunk, a single paper worth a shilling. That he determined to deliver the trunk of papers to the first person authorized to receive them, and accordingly gave it to Dr. Chichester, with all the papers in them as he received them: he thought them of such little consequence, that he did not take a receipt.

Defendant has been informed that E. Gairdner received from Henry Laurens about $12,000; and in order to obtain that payment, he administered as the attorney of the executrix and executor, with the will annexed: that the payment was made on account of Archibald Brown's part of the debt of Brown, Clarkson & Co. and the defendant is assured that any other sums which may have been received by Gairdner, were received previous to his administration, and in his

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character of attorney. Defendant *called on

E. Gairdner to know the situation of Bague's estate, but it was some time after September, in fact the 6th November, when Gairdner was a bankrupt.

Defendant denies that he ever received from Clarkson any money which he should have paid to Gairdner, as administrator, either in cash or notes. But that Gairdner, some time in 1802, (August) directed Clarkson to pay Alexander Bower, a partner of defendant, the balance due Bague's estate, from W. Clarkson, as surviving copartner of A. Brown & Co. or Brown, Clarkson & Co. and that Clarkson settled the balance by two notes, with a condition that he should not be compelled to pay them, until he had recovered the amount from the estate of his deceased partner Archibald Brown. Defendant states that these notes never came into his hands until lately, on the dissolution of the copartnership of Blacklock & Bower, as part of the funds of the copartnership, and that he did not receive them under the circumstances charged in bill.

Defendant denies that he ever had authority to receive, or ever received any money for the estate of Bague; but admits that he may have told Dr. Chichester that a sum was secured from Gairdner for Bague's estate; but that he afterwards apprized Dr. Chichester of his mistake.—Admits that he has been applied to by complainants to fulfil the condition of the administration bond, and that he has refused to pay it; and he submits that it is an unreasonable and unconscionable proceeding, to attempt to make him liable for the losses sustained by the mal-administration of their confidential and authorized agent; denying all combination, &c. &c.

At the hearing, the following evidence was produced:

The power of attorney, by the executors of G. Bague to Mr. R. W. Powell, dated December, 1800.

A substitution by Mr. Powell to Mr. E. Gairdner, dated 12th May, 1801.

The administration bond by E. Gairdner, on the estate and effects of Mr. G. Bague, in

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this state, in which Mr. *W. Blacklock was joined as surety. Dated 11th September, 1801.

The examinations under commission of Dr. John Chichester, and Mr. E. Gairdner.

The substance of Dr. Chichester's evidence is so fully and distinctly stated in the decree, that it is unnecessary to state more at present, than that he attested that Mr. Blacklock had informed him, when specially called upon on the subject, early in January, 1803, that he, as surety of Gairdner, had saved six or seven thousand dollars for the estate of Bague, which, without his interference, would have been lost, as Gairdner would not have remitted it.

Mr. Gairdner's testimony was not considered by the court so material as to have any influence upon the decision of this part of the case.

Mr. David Deas testified, that he knew Mr. A. Brown was indebted as a partner of Brown, Clarkson & Co. to Mr. G. Bague; and he, (as the brother and attorney of Mrs. Brown, the widow,) agreed with Mr. Clarkson to provide for the debt on certain terms. Mr. Brown had sold property to Mr. Laurens, and out of that fund he was to pay. Witness required that an administration should be taken on Mr. Bague's effects here, before any payment should be made. This was done, and E. Gairdner became the administrator, and Mr. Blacklock surety; and Mr. Laurens paid Mr. Gairdner as administrator, £3000. sterling, on account of Mr. Brown's proportion of the debt. About 2 years after, and some time in 1805, Mr. Clarkson called on witness for a final settlement of Mr. Brown's proportion of the debt, and produced a receipt signed by E. Gairdner, shewing that Mr. Clarkson was entitled to such settlement. He thinks the balance of Mr. Brown's proportion was $5000. Mr. C. said he had given his notes for it, and he proposed to take witness as collateral security to the notes which he had given to Mr. Blacklock.—Witness understood there was some arrangements or discounts between Blacklock and Bower, and Mr. Clarkson.

Mr. Robertson testified that in the be-

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ginning of Nov. *1802, he was present at Mr. Blacklock's store, when Dr. Chichester came in and produced a letter, which he said was from Mr. Powell, and asked him if he would pay the money to Bague's estate: that Mr. Blacklock said he had no money for that estate, and that he had repeatedly told him so, and he was surprised he should ask him. Dr. Chichester then spoke of some notes. Mr. B. anwered that he knew nothing of any notes, and that he must inquire of Bower. The witness then saw Dr. Chichester go up stairs to Mr. Bower, (who was Mr. B's. partner.) The warmth of Mr. Blacklock's manner made him notice what passed.

Witness was present when the trunk of papers (Bague's) was sent by Gairdner to Mr. Blacklock, and opened by him. The key came in a sealed letter, dated 6th November, 1802. Mr. B. desired witness to attend to it, and the papers were all opened before him. There were no specialties, or any thing of value in the trunk, nothing but old letters, and accounts current. Cross examined—he was present at no other conversation but that above stated, which was before the delivery of the trunk to Mr. Blacklock. He thinks the transaction took place about the time of Gairdner's bankruptcy. He was in town afterwards in January, 1803, but W. B. was then in the country.

Mr. W. Clarkson testified that Gairdner informed him that Mr. Deas, (acting for Mr.

Brown's estate,) had paid him £3000. on account of Mr. G. Bague's estate. Gairdner often threatened to sue witness on the debt due to that estate; but added that it would answer, if he would settle it with Bower, saying he owed Bower money. He afterwards drew an order in favor of Bower, on 30th August, 1802. The witness made conditions with Bower: he was to give notes for the debt of Brown, Clarkson & Co. to Bague, but they were not to be payable to order, nor to be urged for payment till Mr. Clarkson could obtain from Mr. Brown's estate, his proportion of the debt. He accordingly gave notes on the 18th Septembef, 1802, for $2000, and on the 20th September, 1802, for $5150.19, in full, and got receipts.

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*The notes were made payable to Blacklock & Bower.—He had doubts of Gairdner's situation; but he still stood high; remained a director of a bank, and in credit. Cross examined—Mr. Clarkson said, that these arrangements were made without the privity of the defendant Blacklock, as far as he knew. He never paid him any money on account of that estate; he had nothing to do with him, and had no conversation with him on the business until afterwards: the business was transacted with Bower; the notes were not paid: he discounted $1500 with Gairdner for notes endorsed by witness for Gairdner, and gave one note for $500, and another for $5150.19, payable to Blacklock & Bower. Bower transacted all the bank business of B. & B. Witness had paid in June, 1801, £2978. 8s. 10d. to Mr. Powell for Bague's estate, partly in cash, and $6764 in two notes. Mr. Powell left the notes in the hands of Gairdner, to whom witness paid them.

Mr. W. L. Smith and Mr. Parker for complainants.

They insisted that the funds of the estate of Mr. Bague had been improperly diverted to accommodate Gairdner, and Blacklock & Bower.

That with respect to the notes of Mr. Clarkson, there can be no doubt the defendant is accountable to complainants. The house of Blacklock & Bower, acting in concert with Gairdner, the administrator of Bague, make an arrangement, by which a receipt is given to a debtor of Bague's; and the funds came into Blacklock's & Bower's hands. The act of giving the receipt to Clarkson, and the declaration that he had secured monies for Bague's estate, makes Mr. Blacklock a trustee to that extent; and whether he received the notes as agent or security to the administrator, he is liable to the amount. An agent is forbidden to discount his own debt with the debtor or a purchaser; no money was actually paid, yet the whole debt was settled. Defendant had no confidence in Gairdner himself. He told Dr. Chichester he did not believe Gairdner would remit a cent.

Mr. Robertson must have heard another

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conversation, *different from that testified by Dr. Chichester. It is totally different in its tenor and acknowledgments, and as to the time.

As to the liability on the administration bond, there can be no doubt of that. Gairdner was administrator, and Mr. Blacklock security. He received large sums, and never paid them over to Bague's representatives: he is therefore liable, and his surety also. As soon as the law required an administration, it became the act of the law, and Blacklock is bound for all the acts of the administration. See 1 Eq. Cas. abr. 240.

Mr. Pringle, Mr. Gaillard, and Mr. Drayton for defendant.

With respect to Gairdner's taking out letters of administration, it was unnecessary: he could have acted under the power of attorney from the executors of Bague. 6 Co. Rep. 3 Bac. title Executor, p. 57. But if it were necessary, the defendant Blacklock cannot be made liable, as the surety in the administration bond to the complainants: he might be liable to the creditors for the acts of Gairdner; but the complainants, the executors of Bague, employed Gairdner as their attorney, and they must look to him.—3 Atk. 235, 7. Ibid, 241. The complainants mistake the nature of their suit, and their remedy; they file their bill as executors and creditors; but they are only executors, and not creditors. Mitf. 144. Can a complainant make a defendant liable for his own acts in case of misfeasance? The acts of Gairdner were the acts of the executors, who had constituted him their attorney. It was in quality of attorney that he took out letters of administration, (for he was not entitled to it as a relation or creditor of Bague) and received money under it from some debtors, and compounded a debt with Blacklock & Bower. Such composition is binding, and Blacklock happening to be surety, makes no difference. Executors of Dickson v. Executors of Ramsay. 3 Cranch. 333; 1 Atk. 163: 1 Hen. Bla. 154; 9 Rep. 40. If these acts of the attorney were proper and necessary for

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him to perform, then the act of any *one assisting him, cannot make the assistant responsible, though creditors might have an action against the surety, and make him liable; yet he would have his action and his reimbursement from the complainants who made Gairdner their attorney, and who became administrator in that character.

If executors give a power to compound, and have no authority to do so, and the attorney compound, the executor is liable. Toller's law of Executors, 256; 1 Atk. 463. The attorney, Mr. Gairdner, having signed a receipt in full, the matter is closed; it is the same as if the executors had done it. There

is no proof that Blacklock knew that Gairdner would misappropriate the funds, or aided him in doing so. It is in evidence that Gairdner was then in high credit. Many respectable merchants and others had confidence in him to the last moment, before his bankruptcy: some suffered by that confidence, by assisting him at the last hour. The defendant was of that number. Then there was no fraud in the arrangements and settlements. The complainants trusted most in Gairdner; they made him their attorney, and their administrator, and his acts are theirs. They who trust most must suffer most.

From this reasoning, it results that as to the administration bond, the defendant is not liable on that, or at least only to creditors, and not to complainants, whom Gairdner represented both as attorney and administrator, and for whose acts they are liable; and that at all events the complainants must seek their remedy, if they have any, at law.

That Mr. Blacklock's expressions to Dr. Chichester ought not, as to the money or notes received from Mr. Clarkson, to conclude him. They might not be well understood by the witness. It would be to saddle him with a debt on uncertain recollections of loose verbal declarations incautiously made. He might think he had done a service to Bague's estate, and say so: but he soon corrected his error, and told Dr. Chichester so.

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*It would be hard to bind him now, when he gains nothing.

THE COURT was of opinion on the first question, that the complainants ought to resort in the first instance, to a suit at law, on the administration bond, to make defendant liable as surety in that bond; but delivered no formal written opinion. On the rest of the case, Chancellor James delivered the decree of the court.

After the decision already made by the court, that the complainants must resort to a suit at law upon the administration bond, the only questions that remain for our decision are:

1st. Whether the defendant is not bound by his acknowledgment to Dr. Chichester, and his admission in his answer, that he had saved six or seven thousand dollars for the estate of Bague? And whether it is not probable that he could have had no other debt but the one due from Clarkson to that estate in contemplation at the time of such acknowledgment?

2. Whether at the time the debt due from Clarkson to the estate of Bague was settled with Blacklock & Bower, it was not in the knowledge of one or both of the latter, that Gairdner was insolvent, and if so, whether such settlement was not a legal fraud, and as such must be set aside?

Upon the first question of defendant's acknowledgment to Dr. Chichester, the latter states in his evidence, "that on the 3d or 4th January, 1803, he waited on the defendant in consequence of a letter he had received about that time from Robert W. Powell, the friend of the complainants, dated London 30th October, 1802, and read to him, the defendant, the said letter, upon which he then said to this examinant, that he the defendant had known for 12 months before, that Gairdner never would remit a shilling to Mrs. Bague, but that in consequence of his being Gairdner's surety, he had saved about six or seven thousand dollars for the estate of

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Bague, and had *taken a certain trunk containing the papers relating to the estate, from Gairdner; and which sum (he added) had it not been for his, the defendant's interference, would have been lost;" and he made a merit of having saved so much. And this examinant took a memorandum of the conversation, and on the same day he wrote to Mr. Powell, that so much money "had been secured by the said defendant." Thus far goes the testimony of Dr. Chichester as to the acknowledgment of defendant; and although it has been attempted to shake or to weaken this evidence by that of Mr. Robertson, yet it appears that this has not been done; the latter deposes, "that in the beginning of November, 1802, he was present in defendant's store, when Dr. Chichester came in and took a letter out of his pocket, and said it was from Mr. Powell, and asked the defendant if he would pay the money to Bague's estate. That defendant said he had no money for that estate; that he had repeatedly told him so; and that he was surprized he should ask him for it."

Upon a cross examination, Mr. Robertson does not appear certain as to the time of said conversation, but says, "he thinks it took place about the time of Gairdner's bankruptcy," which it appears by the answer of defendant was on the 6th November, 1802. But the letter of Mr. Powell, to which both Witnesses have referred in their evidence, being dated, London, the 30th October, 1802, could not possibly have been produced at Mr. Blacklock's store, in Charleston, about the beginning of November, in the same year. Dr. Chichester also swears positively as to the time, and produces the letter with a memorandum he made upon it, of the substance of the conversation at the time, and likewise when he answered it, viz. on the 4th January, 1803, to shew the correctness of his testimony. Now the evidence of both these gentlemen being unimpeached, but the one being positive, and the other not, it is clear, that by the well known rule of evidence, the court must rely upon that which is positive. Besides, as Mr. Robertson has stated that de-

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fendant said, "I *have repeatedly told you I have no money of the estate of Bague;" from his using the word, "repeatedly," it becomes

evident that this was not the first, but some subsequent conversation upon that subject. Again, Mr. Blacklock in his answer has admitted, "that he may have told Dr. Chichester that a sum was secured from Gairdner for Bague's estate, but he afterwards apprized Dr. Chichester of his mistake," which admission in the answer still further confirms the testimony of the Doctor, and shews that Mr. Robertson must have heard some subsequent, and not a first conversation. But the point being thus established that the defendant in a first conversation with Dr. Chichester, a person authorized to call him to account, has acknowledged that he had saved $6000 or $7000 for the estate of Bague, in the opinion of the court, there can be little doubt of the effect of such acknowledgment; more especially when it comes to be coupled with other circumstances. These circumstances are to be found in the testimony of Mr. Clarkson, the further testimony of Mr. Robertson, and admissions of the defendant. Mr. Clarkson deposes, "that he as the surviving partner of Brown, Clarkson, & Co. was indebted to complainants; that Gairdner as their attorney, threatened to sue him," but after several conversations on the subject, he at length said, "that he, Gairdner, was indebted to Bower, and if Clarkson would settle the matter with Bower, it would be the same thing." That Bower was then the copartner of Blacklock.

That witness still hesitated about the proposal, but having made terms with Bower, that he should draw notes not negotiable in favor of Blacklock & Bower, and that he should not be sued till he could recover from Brown's estate, the witness finally settled the debt due to the complainants with Bower, by giving two notes to Blacklock & Bower, the first dated the 18th September, 1802, for $500, and the second, on the 20th of the same month, but neither of them negotiable; and

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also by discounting *$1500 with Gairdner, for notes endorsed by witness for him.

That Gairdner then gave witness a receipt in full of the latter date, but no money was actually paid. Such is the evidence of Mr. Clarkson: and Mr. Robertson has stated, "that he was present, and saw the trunk opened, which was sent from Gairdner to Blacklock, and that there was no paper of value in it, and nothing in fact but old letters, and accounts current."

Defendant has admitted in his answer, "that these notes have come into his hands since the dissolution of the copartnership of Blacklock & Bower; but that he never received from Clarkson any money, which he should have paid to Gairdner: he also states that the trunk contained not a single paper worth a shilling." Now from the whole of the above evidence, it is to be collected that Bower, the partner of Blacklock, and for whose acts he is liable, settled a debt with Clarkson, which of right, belonged to the estate of Bague, and for which that estate has received no valuable consideration. That after the said debt was thus settled, Gairdner did indeed give a receipt in full, but it was a business of accommodation all around. That these notes taken together, amount to $5650, and that defendant never had in possession, neither from what papers were contained in the trunk, nor otherwise, any debts or specialties of the estate of Bague; and yet upon a conversation with Dr. Chichester, after the said settlement, he acknowledged that he had saved six or seven thousand dollars for that estate. From all which parts of the evidence thus collected, it appears evidently that in the acknowledgment to Dr. Chichester, the defendant had in contemplation this debt of $5650, nearly equal to $6000, and no other. Under all these circumstances of the case, therefore, the court will consider him as bound by his said first acknowledgment, so far as to oblige him to deliver up those notes to the complainants; and as to his subsequent statement, "that he had made a mistake," we can only view it as an

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after thought. Consequently the case *being decided against the defendant on the first ground, it will be unnecessary to travel into the second.

Therefore, let the defendant deliver up the two notes in question to the complainants, or their attorney, and let him pay the costs of this suit.

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2 Desaus. 616

Case LXXVII.

Heard before Chancellor Rutledge, at his Chambers.

[The following case was argued at Chambers, and the injunction granted there. But it is so important, that it is thought to be proper to include it among the decided cases. It was decided at a somewhat earlier period.]

THOMAS SHUBRICK v. JOHN GUERARD.

(November, 1808.)

[*Injunction* ⇐38.]

Injunction granted to restrain defendant from cutting timber, and committing other waste, he being in possession of the land, which he claimed by an adverse title, and there being a suit pending to try the title at law.

[Ed. Note.—Cited in Kinsler v. Clarke, 2 Hill, Eq. 618.

For other cases, see Injunction, Cent. Dig. § 87; Dec. Dig. ⇐38.]

[The doctrine on the subject collected from the decided cases, in a note: and such injunctions not granted, except under special circumstances.]

The bill in this case was filed by the complainant, who claimed a certain tract of land, to obtain an injunction against the defendant to restrain him from cutting timber, and committing waste on the said land, then in the possession of the defendant, who claimed

the same by an adverse title, and was in the cultivation of part thereof.

The complainant in his bill set forth minutely and particularly the deduction of title under which he claimed the tract of land in dispute, situate in Beaufort district, containing 3,000 acres, from a grant of the lords proprietors of South-Carolina, dated the 25th of October, 1726, to Isaac Lowndes, and thence by intermediate conveyances and devises to the complainant. And that John Guerard the defendant, pretending a claim to part of the land, claimed by complainant, has lately entered on a part, and felled the trees, cut up

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the timber, dug up the soil, and *committed other acts of destruction and waste, and continues to do so. Complainant further states that he has lately instituted an action of trespass against said John Guerard to try title, and for damages; but this action will not remunerate him in damages down to the time in which he shall be put in possession by an execution. Nor will any damages given by a jury, on a calculation of the injury on common principles, indemnify complainant, as the waste will be more injurious as it shall affect the adjoining lands of complainant, than that part trespassed upon. That complainant has represented these things to said John Guerard, and requested him to cease to commit waste, and to yield up possession. But he absolutely refuses to deliver up possession, or cease to commit waste, and is proceeding to clear and plant and exhaust the soil, pretending that he has a title thereto. Whereas the land on which he trespasses is part of the 3,000 acres of complainant, and that said John Guerard has no title to any part thereof.

The complainant prays that the said John Guerard may be restrained by writ of injunction to stay waste, &c.

The bill also prays for a writ ad respondendum, &c.

Mr. Cheves, the complainants counsel, moved Chancellor Rutledge, at his chambers for an injunction to stay waste, conformably to the prayer of the bill.

He contended that the court would interpose in cases of trespass to prevent irreparable mischief, and where there are peculiar difficulties in the way to an easy or speedy decision of the rights at law. See the case of the Mayor of York v. Pilkington, & others. 1 Atk. 282. 2 Atk. 302.

Here there would be irremediable mischief; for in the sale of real estate, particularly of lands fit for the culture of cotton, it makes a great difference whether the land be new, or cultivated and worn. The difference of price would be much greater than any damages which could ever be recovered at law, for the mere cutting down the timber. And the injury done by the waste will affect not only the value of the land trespassed on, but

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the adjoin*ing lands; for which injury he cannot have any redress.

Mr. Desaussure for the defendant, contended that this was not a proper case for the interference of the court, by granting the injunction to stay waste.

That this was the common case of trespass, and a dispute about the title between persons claiming by adverse titles, where there is a plain and adequate remedy at law. The defendant is in possession and in the actual cultivation of the land; and the right is triable at law. That the complainant has brought a suit to try the title, which is now depending; and if the court should interfere in this case to restrain the defendant from cutting down timber and cultivating the land, till the legal title should be established at law, it might as well do so in every case of trespass and a disputed title, which would be a very injurious interference with the rights of property. And if the complainant failed to establish his title at law, the defendant could have no remedy for the injury he had sustained from the restriction put upon him, as it would have been the act of a court of justice. This would make the court cautious of interfering; more especially as this would be an indirect method of forcing the defendant to expose his title, if he is obliged to answer the bill. There is a most marked distinction between waste and trespass. Waste is always spoken of as an act done by a tenant; trespass by a stranger. The doctrine of waste applies to tenants or persons between whom there is a privity of title. Hinde. 587, 8. And to protect the rights of the landlord, the lessee is liable for waste, though it be committed by a stranger. 7 Bacon's Abr. 269, 270.

There are no decisions which shew that this court has ever interfered in cases of mere trespass, where there was no privity, and no extraordinary circumstances. And the total absence of precedent is conclusive against this application.

The cases cited by Mr. Cheves, do not sup-

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port this *application. In the Mayor of York v. Pilkington, 1 Atk. 282, Lord Hardwicke allowed the demurrer to the bill at first; but afterwards changed his mind, and overruled the demurrer; but it was in order to prevent multiplicity of suits. In the case of Lord Teynham v. Herbert, 2 Atk. 483, Lord Hardwicke allowed the demurrer to a bill filed to establish a right to a fishery, and to be quieted in the possession, against the defendant, who claimed the piece of ground where the fishery was, as belonging to his manor. He said that where a man sets up a general exclusive right, and there are many persons who controvert it, and he cannot by one or two actions at law quiet that right, he may come to this court first, which is

called a bill of peace.† But this is to prevent multiplicity of suits. Lord Hardwicke added in Lord Teynham's case that this was in the nature of an ejectment bill. The plaintiff claims the ground, and the defendant resists it, and insists it belongs to him, so that this may be very properly determined at law, as it is a single question, to try the right between the two parties, which is very unlike the case of the Mayor of York v. Pilkington. This reasoning is completely applicable to, and decisive of the case now under consideration, for it is not a case of waste, but of a dispute about title between two individuals, properly and easily triable at law, and the defendant is in peaceable possession of the property.

Chancellor RUTLEDGE granted the injunction in this case, restraining the defendant from cutting timber or committing other waste till the trial and determination at law of the rights of the parties. No note has been preserved of the grounds of his decision. The defendant afterwards filed a demurrer, but it was never argued, the parties having compromised.

[This is the only case which is remembered, of the Court of Equity in this state having ever granted an injunction to restrain a defendant in possession, and claiming by an adverse

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title, from cutting *down timber, or exercising any other acts of ownership over his property, till the trial and determination of the right, at law.

There can be no doubt that in its origin, the writ of waste was confined to guardians in chivalry, tenants in dower, and by the curtesy.—Afterwards it was extended by statute to tenants for life, or for years. And when the Court of Chancery began to interfere to prevent waste, by enjoining the tenant in possession, the exercise of this power was confined strictly to the cases of waste between landlord and tenant, and tenants for life or years, and remainder men or reversioners.

By degrees, it was extended to cases of trespass, between persons claiming by adverse titles; but this was only to prevent irremediable mischief, or where there were many claimants, to a right of common, or of fishery, or such interests as would require a multitude of suits at law to try the right. To prevent this evil, the court interfered in the case of the Mayor of York v. Pilkington. 1 Atk. 282.

In Pilsworth v. Hopton, 6 Ves. 51, the Lord Chancellor Eldon refused to grant an injunction to restrain the defendant from committing waste, he being in possession, and claiming by an adverse title.—He said he did not remember that the court had ever granted an injunction under such circumstances. He added that he remembered perfectly, being told from the bench very early in life, that if the plaintiff filed a bill for an account, and an injunction to restrain waste, stating that the defendant claimed by a title adverse to his, he stated himself out of court, as to the injunction.

In Mitchell v. Dors, 6 Ves. 147, an injunction was moved against the defendant, who having begun to get coal in his own ground, had worked into that of the plaintiff. The Lord Chancellor said, this is trespass, not waste: but I will grant the injunction upon the authority of a case before Lord Thurlow, where a landlord of two closes had let one to a tenant, who took coal out of that close, and also out of the other which was not demised; and after some hesitation, he ordered the injunction as to both.

In Hanson v. Gardner, 7 Vesey, 305, &c. Lord Eldon granted an injunction on affidavits against cutting, and pasturing cattle in a wood; the plaintiff praying the injunction as tenant in fee, or as lord of the manor. The defendants denied the former title; and as to the latter, claimed common of pasture, estovers, &c. The injunction was dissolved on the coming in of the answer.

In this case, the Lord Chancellor stated, "that the law as to injunctions, has changed very much; and lately, they have been granted more liberally. Formerly, when legal rights were set up to the extent in which they are in this case, the court was very tender in granting injunctions." (2 Bro. C. C. 88.)

He said, "Lord Thurlow had great difficulties as to trespass. In a case before him, there was a demise of close A. to a tenant; the lessor being also landlord of an adjoining close B.

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The tenant dug a mine *in the former close. This was waste from the privity: but when we asked an injunction against his digging in the other close, though a continuation of the working in the former, Lord Thurlow hesitated much; but did at last grant the injunction:—First, from the irreparable ruin of the property as a mine: Secondly, as it was a species of trade: and thirdly, upon the principle of this court, enjoining on matter of trespass, where irreparable damage is the consequence."—(p. 308.)

"This led to Robinson v. Lord Byron, 1 Bro. C. C. 588, in which also this principle operated, that unless there was some jurisdiction to prevent it, there would be a great failure of justice in this country. The ground of that case was irreparable mischief, which would have been done before there could have been any trial at law, as to the right to let off the water."—(p. 308.)

"The principle, [as to the granting injunctions to prevent multiplicity of suits] is very clearly stated in Lord Teynham v. Herbert, 2 Atk. 483; that in these actions there would be no end of bringing suits for trespass."—(p. 310.)

In Smith v. Collyer, 8 Ves. 89, the Lord Chancellor refused an injunction against cutting timber, where the title was disputed, as between the devisees (complainants) and the heir at law, contesting the will. The motion was pressed on the ground, that "the mischief would be irremediable; and no damages would be a compensation; and that is the ground of the jurisdiction," as was held in 3 P. Wms. 389, and 1 Vern 273. The Lord Chancellor said, "I do not recollect any instance of this sort. The defendant denies that the plaintiffs are devisees. It is not waste, but trespass on their own shewing. There is no instance of an injunction in trespass, till the case before Lord Thurlow upon a mine; to which I have alluded, (see 6 Ves. 147, Mitchell v. Dors) which though trespass, was very nearly waste. In that case, there was no dispute whatsoever about the right. Here the right is disputed." The Chancellor made no order for injunction.

In Courthope v. Maplesden, 10 Ves. 290, Lord Chancellor Eldon granted an injunction against a trespasser cutting timber, by collusion with the tenant, without prejudice to the case of a mere trespass. The Chancellor said, "I have no difficulty in granting the injunction in this case; but I will not be bound as to what is to be done upon a mere trespass; though it is strange that there cannot be an injunction in that case to prevent irreparable mischief: the rather, as there is a writ at common law to prevent the further commission of waste during the trial: whereas, if the court will not interfere against

† 2 Atk. 391. 1 Bro. C. C. 40, 572.

a trespasser, he may go on by repeated acts of damage, perfectly irreparable. But the ground in this case is, that the trespass partakes of the nature of waste, more than in general cases, the tenant colluding; and if the tenant's act is waste, the act of the other must have so much of the quality of the tenant's act, as to make it the object of an injunction."‡ It

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*appears, p. 290, (10 Vesey) that Lord Thurlow had refused exactly such an application, in Mogg v. Mogg; 2 Dickins, 670. But he afterwards altered his opinion, and granted an injunction in Hamilton v. Worsefield, against a trespasser who pretended some title to the estate, and cut timber by collusion with the tenants, and also against the tenants. See also the still later cases illustrating this doctrine, Crockford v. Alexander. 15 Vesey, 138, Kinder v. Jones; 17 Ves. 110, Earl Cowper v. Baker; 17 Vesey, 128, Grey v. Duke of Northumberland; 13 Vesey, 236, and 17 Vesey, 281; Twort v. Twort; 16 Vesey, 128.

The only case which I find decided in America on this point is, that of Steevens v. Beekman, and others, 1 Johnson's Chan. Rep. page 318. It was argued before Chancellor Kent, of New-York, who refused to grant the injunction against the repetition of trespass, by defendants who claimed under an adverse title, or had no title. That eminent judge said it was the case of an ordinary trespass on land, and cutting down timber. The plaintiff was in possession, and had complete and adequate remedy at law. And if the precedent were once set, it would lead to a revolution in practice, and would be productive of public inconvenience. There was nothing special or peculiar in the case to call for this particular relief.

It appears from this revision of the decided cases, that the court has relaxed the ancient strictness of the rule, and has granted injunctions to restrain the commission of trespass in certain specified cases.—Those are where irreparable damage might be the consequence, if the act continued; or where the trespass has grown into a nuisance; or where the principle of the prevention of multiplicity of suits among numerous claimants was applicable: or where the person cutting timber, got possession under articles to purchase, as in 15 Ves. 138; or where the trespasser colluded with the tenant. But that without the special circumstances, which have induced the relaxation, the rule remains in force, to wit, that in a case of trespass, committed by a person who is a mere stranger, or claims under an adverse title, the court will not enjoin, but leave the plaintiff to his remedy at law.

The court is also very tender of medling in cases between joint tenants, and tenants in common, unless in cases of destruction; but if one of the joint tenants, or tenants in common, takes a lease, or makes an agreement to occupy the proportion of the other, he changes his character, and the court will restrain him from committing waste. Twort v. Twort, 16 Ves. 128.]

‡ See the same idea expressed in 8 Ves. p. 90, Smith v. Collyer.

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2 Desaus. *623

*Case LXXVIII.

[Present, Chancellors Rutledge and James.]

The Executor of ALEXANDER INGLIS v. JOHN NUTT.

(November, 1808.)

Interest ⟸67.]

The bill charges improper restraint on complainant in obtaining his bond for an open account debt, including war interest. The charge not being supported by any proof, and being denied by the defendant, in his answer, must be put out of the case.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 155, 156; Dec. Dig. ⟸67.]

[*Interest* ⟸34.]

A debtor giving his bond voluntarily, for an open account, including war interest, is bound by it.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 71; Dec. Dig. ⟸34.]

[*Interest* ⟸34.]

A debtor quitting this country and joining the British, and living in England, as a British subject, and giving his bond in England, for a debt on account, including war interest cannot in this country get rid of the bond. More especially as he acquiesced for many years and had new dealings with the defendant.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 71–74; Dec. Dig. ⟸34.]

[*Equity* ⟸43.]

The defendant had a remedy at law, if he had any rights, on suit brought against him on the bond, of which he did not avail himself, and comes too late to this court.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 122; Dec. Dig. ⟸43.]

This was a bill to obtain an injunction to restrain the defendant, who was a British subject, from enforcing a judgment obtained on a bond of Alexander Inglis, since deceased; and to set aside said bond as improperly obtained; and that the accounts between the parties should be referred to the master, to ascertain what was legally due.

The bill set forth, that the deceased residing in America before the revolutionary war, had commercial dealings with defendant, residing in England; and that at the peace of 1783, a considerable balance was due by the former to the latter. That Inglis being in London in 1784, was induced by threats of a suit to give bond for the balance due Nutt, including all the interest charged in defendant's account, and which Inglis was not by law liable to pay, but being ignorant of his rights, Mr. Inglis reluctantly executed the bond. That Inglis died in 1791, before any adjudication was made by the courts of this state, on the question of interest during the war, on British debts.

That an action was, after Inglis's death,

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commenced *against complainant as his executor on said bond, by defendant's agent Mr. Powell, and complainant suffered judgment to go by default, on the express condition and understanding, that suffering said judgment to go by default, should in no wise prejudice the question respecting complainants' rights as to the war interest.

But defendant now claims the full payment of the war interest, and threatens to enforce his judgment.

Bill prays that defendant may be restrained by injunction from proceeding at law; the bond brought into court and cancelled;

and that the defendant's account may be referred to the master or a jury to ascertain the amount legally due, according to the principles established in the federal courts, and prays general relief.

The answer of the defendant John Nutt, of London, sets forth, that Inglis, before the American war, carried on business with the defendant in a confidential manner. That before the conclusion of the war, Inglis left Carolina, and was not there when peace was made. That when peace took place, Mr. Inglis prepared to return to Carolina, and having expressed his wish to have his account with defendant settled, and that a bond should be taken for the amount, such account was made out, and the bond given for the balance, including 300*l.* for goods sold to Inglis, in September, 1784. Defendant denies that he ever used any threats to Inglis, for the purpose of obtaining said bond; but the same was given voluntarily by Inglis. That defendant has been informed that a judgment has been obtained against the estate of Inglis, and that no plea was entered for the purpose of depriving defendant of the war interest on said bond: but that an application was afterwards made to deduct such interest, which application the court refused to grant. Defendant prays to be dismissed, &c.

At the hearing, the written evidence of Mr. R. W. Powell, was produced, and read.

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Mr. Powell stated that *he was the attorney in fact of John Nutt, at the time the suit was instituted, and judgment obtained on the bond of Mr. Inglis. He had no power, nor did he consent or agree to compromise, or to give up or reserve the question of the interest during the war.

That the judgment at law was obtained in the usual course: and witness understood that when the defendant afterwards attempted to get the judgment set aside, in order to be let in to a defence, to get rid of the interest during the war, the Court of Common Pleas refused to set aside the judgment.

No evidence was adduced by the complainant of any duress, or threats in obtaining the bond in question; and that point was not insisted on in the argument.

Mr. W. L. Smith for complainant, argued that Mr. Inglis being in England when he gave his bond for the debt on his open account, including interest during the war, was then ignorant of his right to have that interest deducted. That such ignorance of his rights would excuse his giving the bond, and would induce this court to open the transaction, and to give complainants an opportunity of getting the benefit, of which he was deprived by such error.

That interest during the war ought not to have been allowed. It was against reason and natural justice, that the citizens of this country should be obliged to pay interest on debts due to subjects of that government, which by inflicting the calamities of war on this country, prevented the beneficial use of the money. And that in consequence of these national calamities, the courts of justice had interfered to protect the citizens from being obliged to pay interest during the war.†

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*In the case of Greenwood v. Higginson, though the account including interest was acknowledged by Greenwood, yet the court opened it, & the jury struck off 7 years war interest. The counsel cited also the cases of Greenwood v. the Executors of Maham, decided in 1791; and Greenwood v. Air, in 1795, in which interest during the war was disallowed. Also, 2 Dallas, 102, 132; 4 Dallas, 22; 1 Eq. Cas. abr. 84; 2 Bro. C. C. 150: and 3 Ves. 456.

See also Mr. Jefferson's reasoning on this question in his letter to Mr. Hammond, the British Minister Plenipotentiary. That part of his letter which applies to this subject, is copied in 2 Dallas, p. 104 to 110, in note.

Mr. Cheves for defendant. He argued that this was the case of a debtor deliberately settling his account, and voluntarily giving his bond for the balance, including the war interest. This was a waiver of his objections to the payment of interest during the war. There was no injustice in this, and he would be bound to pay interest as secured by his bond. See 1 Term. Rep. 285, and 2 East. 469. There was no such ignorance of rights as would entitle the party to open this settlement, and get rid of this bond. There is a marked distinction between the ignorance of the law, and legal rights; and of the facts on which a man's rights are founded. An ignorance of the former does not excuse or release a man from his engagements. But Mr. Inglis was in England, in the character of a British subject, and was not entitled to the benefit of such exemption from interest, if there had been such law, and he was bound by his act done there.

But justice is wholly against this plea to extinguish interest; for the debtor has had the use of the creditor's money, which entitles the latter to interest. It would be most mischievous, if the contests among na-

†The only case which I find in the books on this subject is, the case of Basil v. Atcheson, 1 Bro. P. C. 526, 529, where it was decided by the house of lords, on appeal from a decree of the Court of Chancery in Ireland, that where lands, which are a fund for the payment of interest, produce nothing by reason of a general national calamity, interest ought not to run during the continuance of such grievance. The order of the Court of Appeals was (p. 530.) That in making up the account, "such allowances were to be made of interest, as were usually done in Ireland, on account of rebellions or other public calamities happening to estates in mortgage." See, also, 14 Viner, p. 457; case 7. 15 Viner, p. 474, note to, case 1. 2 Eq. abr. 529, 611.

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tions should *cut the cords of justice, which bind individuals to each other.

There have been indeed some cases decided in America against the responsibility of debtors to pay interest during the war, but they do not go so far as to establish a general rule, and still less to release a party, who has voluntarily agreed to pay interest after the war was ended.

They are generally, if not wholly, cases of account. And these decisions have been overruled by others of higher authority.

In Massachusetts, an act of the legislature was passed disallowing interest from 19th April, 1775, to 20th January, 1783: but in 1787, the legislature repealed all laws repugnant to the treaty; and their courts have ever since allowed interest during the war.

The Supreme Court of the United States decided in favor of interest; four judges reversing the judgment of one judge brought up from the Circuit Court in Virginia. 3 Dallas, 199. Ware, administrator of Jones, v. Hylton—This decision was delivered after great consideration, and is binding on the State Courts, which have generally conformed to it.

In the case of Crawford v. Willing, 4 Dallas, 286 to 290, decided in the Supreme Court of Pennsylvania, the two judges present, Smith & Breckenrige, expressly declared that the effects of the revolutionary war would not furnish the defendants with a justification or excuse against the claim of interest.

The act of our legislature, for the payment of debts by instalments, expressly reserves the question of interest during the war with Great-Britain. See Judge Grimke's collection of the Public Laws, p. 467.

Chancellor RUTLEDGE delivered the decree of the court.

There are abundant reasons why the complainants are not entitled to any relief in this case. Because the defendant has posi-

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tively denied the charge of duress, and *as positively swears that it was by A. Inglis's own desire that he settled his debt with defendant, and gave his bond for the amount freely and voluntarily, and there is no evidence to contradict his answer. None of the cases that have been determined are applicable to this. For in those cases the defendants uniformly opposed the allowance of interest during the war, and refused to settle their debts on those terms, except G. and D. who signed stated accounts, allowing interest, but they were British subjects, and the other partners who were citizens of this country refused to abide by their acts. Because A. Inglis having refused to take the oath prescribed by law at the commencement of the revolution, left this state, and went to reside in Great Britain, as a British subject; he being banished by the act of 1782, and he could not have returned here, without being liable to be tried for a capital offence. That he continued a British subject, and was such at the time of signing this bond, being then in London, although he had permission to return under certain terms and conditions, which he had not then accepted. Because A. Inglis after his return to this state, where he resided for several years, made no objections (that the court know of) to paying this bond; but it appears from the defendant's answer, had considerable dealings with him, and drew bills on him to a large amount, which were regularly paid: Because it does not appear on the face of the bond, what part of it was for interest, if any; and it is impossible to discriminate principal from interest, without unravelling accounts contracted upwards of thirty years ago, and which have been settled, for any thing that appears to the court, to the satisfaction of all parties, upwards of twenty-four years since. Because all the creditors of Inglis in this suit have become so subsequent to the date of the bond to defendant, when he was a British subject. Because if complainants were really entitled to the relief prayed for, they had compleat and adequate remedy at law. That having neglected to make their defence in the first instance, and the court of law having refused

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to set *aside the judgment on motion for that purpose, there is no ground for this court to interfere.

Bill must be dismissed with costs, to be paid out of the funds of Inglis's estate, now in the bank.

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2 Desaus. 629

Case LXXIX.

[Present, Chancellors Rutledge, James and Thompson.]

JOHN R. FENWICKE v. WILLIAM H. GIBBES, Master in Equity.

(May, 1808.)

[*Judicial Sales* ⟸7; *Officers* ⟸114.]

A master in equity is not amenable to a suit for an error in judgment, in taking a security on a sale of property; where the court specially instruct him, he is bound to pursue the instructions strictly. He sometimes acts in a ministerial, and sometimes in a judicial capacity.

[Ed. Note.—Cited in Ex parte Gray, Bailey, Eq. 85.

For other cases, see Judicial Sales, Cent. Dig. § 20; Dec. Dig. ⟸7; Officers, Cent. Dig. § 190; Dec. Dig. ⟸114.]

This was a bill filed against the master in equity, to recover an indemnity for an alleged misfeasance in his official capacity. That he had sold property in which the complainant was interested, under the orders of this court, and had not taken security in the manner the order prescribed, or his duty dictated; and that acting in this respect in a min-

isterial capacity, united too with an agency, he was amenable to the party injured, whose remedy lay particularly in this court, forasmuch as the master was its ministerial officer, and the subject matter arose under its decrees.

It seems that the property in question (a town lot of land) had been sold under a decree of the British board of police (which exercised judicial powers while the armies of Great Britain occupied Charleston) at which sale William Simpson was the purchaser, and had erected buildings thereon. After the evacuation of Charleston, and the full restoration of the state authority, the sale thus made was set aside in this court (all proceedings before that tribunal being held nugatory by the courts of this state) and a resale directed, which sale was made 13th May, 1785, by the master, and the said William Simp-

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son was the pur*chaser, for himself and his brother and partner, Jonathan Simpson, who was absent in New-York. That the terms of the decretal order expressed no directions as to the nature of the surety. The defendant took the bond of William Simpson and mortgage of the premises with an assurance that Jonathan Simpson, who was soon expected to arrive, would sign the bond. This never happened. Coercive measures against William Simpson were adopted by the master, and ultimately a bond of the late Colonel Maurice Simons was assigned as a collateral security, which the master had given up to the executor of Edward Fenwick, and afterwards sued under a power of attorney. The estate of M. Simons, though deemed good, proved to be insolvent; and the defendant having sued Simpson to execution, it was returned "nulla bona." It was objected also that the master had accepted the assignment of Mr. Simons's bond from one of the partners or obligees, which was an invalid assignment, as he ought to have known, and that he ought to be amenable for the amount.

Mr. Cheves and Mr. Drayton for complainant.

Messrs. W. L. Smith, Parker and Simons for the defendant.

It was contended for the complainant, that the master of this court, in the discharge of those executive duties which its decrees dictate, acts in a ministerial capacity, and is liable for neglect of duty in like manner as sheriffs. That when this court orders him to sell an estate on credit, though it is sometimes expressed, it is always implied, that he should exact security from the purchaser before he makes titles or delivers the property sold. That personal surety, besides a mortgage of the property, is not only reasonable, but is consonant with the usages of this court, and of all public sales of real estate on credit. Conformably to this the master advertised, "requiring bond with interest and good securities;" and at the sale he declared the terms to be "bonds with sureties to be approved by the master, and mortgages

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of the land if required." That *he took the mortgage and dispensed with the securities, inverting the option reserved to him by the terms of sale; in doing which he took on himself the sufficiency of the security. The complainant who was interested in having the land sold for the highest possible price has thus sustained all the injury that can be supposed to arise from selling under the requisition of personal security from the purchaser; and yet by the master's misconduct, is bereft of the benefit of that sort of security. But more than this, the sale is entered in the master's sale book thus, "bought for Jonathan Simpson by Wm. Simpson;" and yet he afterwards lets Jonathan, who is the most substantial, off the purchase, and takes William, who is insolvent.—That this was not a judicial act, and defendant was bound to conform to usage: his own advertisement, and declared terms of sale, prove what his own sense of duty was.—The definition of a judicial act, is the exercise of the mind in determining the rights of others. He omitted to take any security at all except the mortgage for upwards of three years, and then took that which turned out a nullity. It was also contended that he was a bailee for valuable consideration. Jones, 73, 137. Lex Mercat. Amer. 392, 394, 396. 1 Hy. Blacks. Shields v. Blackburn: and he has been guilty of laches, by which the complainant is injured. That the statute of limitations which he has pleaded will not avail him, because this was a case of trust, and that too conferred upon him by the law, and by this court, whose agent he is, to execute its decrees for the benefit of suitors.

For the defendant. This was not a case of bailment; if it was, then the complainant may sue the bailee at law, and therefore has no remedy in this court. That defendant acted solely in a ministerial capacity, is not admitted: for the decree was silent as to the nature of the security he was to take; and the court not having determined that point, committed it of course to the judgment and discretion of the master; and as he had the power to judge of, and dictate the security, so he necessarily possessed, as all judges must have, a discretion to vary or model his

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deter*mination, according to circumstances. This he may have done, and may have made a mistake on the point of discretion, for which no judicial officer is liable. As to his being a trustee for the complainant, that is not correct, for the executors of the father's will stood in that capacity as testamentary guardians; and so far as their acts can go, they have avowed all that the master did,

by receiving the securities under the fullest acquiescence. They were parties in the suit under which the sale was made, and if they had discovered that the master was acting illegally or injuriously, they might, and ought to have come before the court in a summary way; the business would have been reviewed, and the master directed. But though they lived for many years after the transaction, no complaint was ever made.

That the master cannot be regarded as a trustee, is moreover manifest, from his having received no money, which if he had done, he might be charged as a trustee of the fund, and the statute could not avail him. 1st Eq. Cas. abr. 304, Ca. 10; also, 509; 2 Vern. 90. That from all the facts in the pleadings and the testimony, it is plain that the master acted under the eye and direction of the complainant's friend and testamentary guardian; that he judged and acted for the best; and if full success did not result, it was owing to untoward circumstances not to be foreseen, and for which he ought not to be amenable.

The decree of the court was delivered by Chancellor JAMES, as follows:

The decree states the substance of the bill and answer. Also, that the defendant had pleaded the statute of limitations. The court having considered the argument of counsel on that point, declined giving their judgment upon it, until they had considered the merits of the case on defendant's answer. (See p. 48.)

In the examination of this case, it is necessary to consider, first, the decretal order of this court for the sale of the lot in question, (sold by the master) and the general

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usage *of it in such cases. 2d. Whether the master in this case has been guilty of such misfeasance as to make him liable, either in his ministerial or judicial capacity. From the nature of the case, these grounds are difficult to separate. It appears that the decretal order of the 2d of April, 1785, did not express any particular terms on which the master was to sell the lot; nor did it point out any particular security which he was to take. The instructions are general, "that the lot on East-Bay be sold," thereby leaving it in the breast of the master to consult the true interest of the estate, and to take such security as was consistent with the general usage of the court. Now it is well known that the chances of a good sale are diminished by requiring personal security. The court therefore generally leaves the terms to the parties interested, as the best judges of their own advantage. Therefore the court considers the master as left to his own discretion to demand personal security or not. It is objected however, that as the master had made the giving personal security, the terms of sale in his advertisement of his property, (then in this matter he acted judicially) it was not in his power to depart from those terms. If the premises were true, they might warrant the conclusion. But on reference to the advertisement, it appears that besides the lot in question, the master advertised for sale, the whole of E. Fenwicke's property, (of which the lot was a part) on a credit of twelve months, with interest and good securities; and these words may apply to all the deeds to be taken from purchasers (which is the most obvious meaning) or to the lot alone. This brings it to a mere dispute about words, which being general, may imply bond and mortgage, which in common acceptation, is deemed good securities, as the master did in this case.

It is also objected, that in this transaction, there was gross neglect of the complainant's interests, and not the same circumspection as in his own affairs.

But the most wary are often deceived. It has been proved that the lot brought a high

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price, on account of a *rage for purchasing at that time in that quarter of the town, of which it was the master's duty to avail himself for the benefit of the estate. It has been proved that the house of J. and W. Simpson was in good repute; and the master states in his answer, that for some time he had William Simpson's promise of his own, and his brother Jonathan's bond and mortgage. It is said that the master let the matter rest till June, 1788—(3 years.) This is true, but a bill of the Simpson's was pending in the court from May, 1786 to December 1787, to establish a discount for the buildings they had erected on the lot, of which respectable counsel thought favorably: and the master swears he apprehended an injunction, if he proceeded pending those proceedings. During all this time, Jonathan Simpson was in New-York, out of the reach of the court, and the master was still deceived by the promises of Wm. Simpson. Had the master been here alone to attend to the business, or had he acted solely on it, there might have been a plausible ground to make him responsible. But there were parents, (the mother and her second husband) trustees, legatees and executors on the spot, who minutely examined the conduct of the master. If he acted negligently, they could have complained to the court. But at a meeting of the parties, with their counsel, many years after, to settle the affairs of the estate (in 1791,) and whilst Thos. Fenwicke was still alive, (who was then interested in this particular lot) and years before the complainants claim arose, there was no complaint against the master; but a report is drawn up and made to the court, and confirmed, by which his conduct was virtually approved. Great complaints are made about taking Maurice Simons's bond as

security from the Simpsons, (who held that bond) because the estate of Mr. Simons is insolvent: but it was then supposed to be a good estate; and the master in his answer, swears that if M. Simons had been alive, he would have taken him as personal security. But it is objected that the assignment of this bond by one of the partners, was illegal. This is admitted; but then the master is charge-

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a*ble only with an error in judgment. Now on the authority of the cases cited, from 2 Vernon, 90, Comer v. Hollinshead, and 1st. East. 555, Harman v. Tappenden, and others, no bill in equity, or action at law can be maintained against a public officer for an error in judgment. That the master has never been deemed liable in a pecuniary view, for error in judgment is evident, from the question having never before been agitated in this court. His liability, at present, arises solely from the act of 1791, which obliges him to give security for his conduct; but that act is prospective, and cannot affect this case.

It is hardly necessary, after what has been said, to go into the second question, which is, whether the master is liable in his ministerial or judicial capacity, by any misfeasance in this case: but examine it a little. In his ministerial character, he is bound strictly to follow the instructions of the court. If he does more than he is advised to do, with a view to benefit the parties, he ought not to be censured for it. He is frequently a judicial officer. The determinations of this court, the acts of assembly of 1721, Public Laws, p. 110, and of 1746, p. 212, plainly evince him to be so. In this capacity, he is a judge, and exercises his mind in forming decisions, concerning the rights and interests of others. In this case his judicial powers were exercised only on the interests of others, as they generally are, except in cases of waste, and some few others. In his ministerial character, he was to sell the lot, and he did sell it, and is not liable on this ground. Next, as to his judicial character. Although the master in most instances acts as a judge, yet it is always with an appeal to the court. Therefore if he did not exercise his judgment for the best, in deciding upon the interests of the estate of Edward Fenwicke, there were relations, legatees, trustees and executors to call him to account before the court; but from 1785, to 1791, this was neglected. He was suffered to follow his own course, and in 1791, his conduct approved by the parties interested, and his report confirmed by the court. But

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it is not clear that the mas*ter erred in judgment, for very circumspect persons might have considered the security sufficient; and no human foresight could have anticipated the failure of the securities. Under all the circumstances, the court is of opinion on the merits of this case, and without adverting to the plea (of statute of limitations) that the master is not liable to make good the difference of price, between the first sale (when Simpson purchased it) and the second sale, (when sold to raise money for the payments of the first sale, and which was far short of the first price) of the lot in bill mentioned. Bill dismissed with costs.

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Case LXXX.

[Present, Chancellors Rutledge and Thompson.]

JOHN GREGORIE and Others, v. PATRICK DUNCAN and Others.

(May, 1808.)

[*Sales* ⊂⊃19, 20.]

An agreement for the sale and assignment of a present interest in a considerable property, which was executed, shall not be set aside on the ground of mere inadequacy of price, where there has been no fraud, concealment or misrepresentation; where the parties were adults, and the vendors knew as much of the property and its situation and value as the purchaser.

[Ed. Note.—Cited in Butler v. Haskell, 4 Desaus. 696.

For other cases, see Sales, Cent. Dig. § 32; Dec. Dig. ⊂⊃19, 20.]

This was a very important case which it was proper to have reported with great fulness and accuracy. Great pains were taken to procure the papers and information for this purpose, but without success. The question was on the validity of an agreement for the sale of a very considerable property in this state, and an assignment thereof, made by persons residing abroad, for a price now alleged to have been greatly inadequate, and which the vendors seek to set aside.

The bill, it is stated, made no charge of fraud; but relied on the great inadequacy of price.

The purchaser, in his answer, denied any concealment and misrepresentation; and insisted that the complainants knew more of the circumstances and value of the proper-

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*ty than the defendant. But it was not denied that the property greatly exceeded in value the price given.

The case was fully argued, but I have not been able to procure any note of the argument.

The court refused to set aside the agreement, and dismissed the bill with costs; apparently on the following grounds: That the vendors appeared to know as much of the circumstances and value of the property in question as the purchasers. That there was no evidence of any fraud, concealment or misrepresentation on the part of the purchaser; and the defendant positively denied these acts. That the interest sold, was not

a reversionary,† but a present interest, and that the agreement was executed, must also have had great weight with the court. It was simply a case of inadequacy of price, without any turpitude or concealment; and the court did not think that alone, under the circumstances, sufficient to set aside an executed agreement relating to a present interest.

Chancellor RUTLEDGE delivered the decree of the court.

In this case there is no direct positive charge of fraud on the part of the defendant Duncan; and if there was, there is not a tittle of it proved. The only grounds then on which the assignment of complainants could possibly be set aside, would be, 1st, ignorance in complainants of their rights, or 2d concealment of circumstances relating thereto, in the knowledge of defendant Duncan, whereby they were induced to make the contract which they would not have done had those circumstances been disclosed to them; or 3d, gross inadequacy of price in the purchase.

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*With respect to the first ground, it is pretty evident that complainants were by no means ignorant of their rights, because as early as 1784, they sent over a power of attorney to gentlemen of respectability in this city, to prosecute their rights. Another reason why it is presumable that complainants were not ignorant of their rights, is that Mr. Gregorie, their attorney, was particularly informed of the situation of Rantole's estate, by Mr. ——— so early as 1796, and he certainly could not have been so inattentive to the rights of his constituents as to suffer five years to elapse after he obtained that knowledge without communicating the information to them: and the deed of assignment in 1801, is a further proof that complainants were not ignorant of their rights, for it begins with reciting, that Rantole died possessed of a considerable real and personal estate, and had devised the greater part thereof to them. The ground of ignorance therefore fails altogether.

On the ground of concealment, the defendant Duncan in his answer swears that he was unacquainted with the value of the estate. That he had heard it was considerable, but did not know the amount of its value; and he positively swears that he was not informed by his co-defendant, Nicholson, that £6000 or any other amount, had been paid to Petrie and wife by the representative of Wilkinson, on account of Rantole's estate; and through the whole of his answer he swears positively he had very little information on the subject, nor did he know whether Rantole made a will or not. That he did not apply to complainants to make the bargain which was concluded between them. His meeting with some of the complainants was accidental and not sought by him. That Cunningham introduced the subject of his, and the other complainants, being entitled to a considerable estate from Rantole; he relates the conversation; the circumstance of Petrie wasting the funds, and their subsequent agreement and assignment of their claim. The subject of the compromise offered by Mrs. Petrie, it is evident he could know nothing of, being then in Scotland, and

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the as*signment to him had been made two months previous thereto. Defendant Nicholson is not at all implicated in Duncan's transaction with complainants. In his answer, however, among other matters, he denies that the sole purpose which induced him to examine the papers in the register's office, was to advance the speculation of Duncan, or that he communicated or gave any information to him of what passed between Mr. Gregorie and him, until long after the execution of complainant's assignment. To the defendant Duncan's answer, the court must give credit, as it stands uncontradicted. From that, it appears manifestly there was no concealment of circumstances on the part of Duncan, which could induce the complainants to make the bargain they did; the assignment therefore cannot be set aside on the ground of concealment.

The only one that remains is, the gross inadequacy of price. On that point, it seems to be generally agreed that mere inadequacy of price, is no ground for the court to set aside, an agreement though executory, if it appears to have been fairly entered into and understood, (and nothing appears to the contrary in this case) and still less is it to be considered as a ground for rescinding an agreement actually executed, which this was. And for as much as the exorbitancy of price has not been held sufficient to discharge a defendant from the performance of his contract, by the same parity of reasoning complainants shall not be relieved if they have disposed of their property for less than the value. In the present case, the parties are all adults. They knew as much of their rights as defendant Duncan, (if his answer is to be credited, which the court cannot but believe;) and as they recite in the deed of assignment, that they had not heard for many years from their attorneys, it seemed to them a kind of forlorn hope, and that it was better to get something than to remain longer in a state of suspense, for Mr. Rantole had been dead twenty years, therefore they

†See the case of Gowland v. de Faria, 17 Vesey, 20, 24, 5, where it is distinctly recognized as the settled doctrine of the court that the sale of a reversionary interest, is considered in the Court of Equity as the case of an expectant heir, "and forms the exception to the general rule, that for mere inadequacy of value, a contract is not to be set aside." And that during the continuance of the parties in the same situation, long acquiescence has no effect: and that the value is to be estimated at the time of the transaction, and not according to the event.

disposed of their claim. And although it may be in fact a hard bargain, yet if persons will enter into them with their eyes open,

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unless fraud can be shewn, this court *will not relieve. This was undoubtedly a speculation on the part of Duncan, which might or might not turn out to good account; but as on the one hand, if it had proved a bad one, he could have no return of the money he had paid; so on the other hand, if it should ultimately prove advantageous, he ought not to be deprived of it. If this court was obliged to hear and determine on all the speculations made in the community, there would be no end to its session. The court therefore, upon the whole of this case, are of opinion, that on the ground of actual fraud, Duncan is perfectly clear; that complainants were as fully informed of their rights, at the time of the assignment, as Duncan, if his answer is to be credited, and which has not been disproved: also, that he does not appear to have concealed from complainants, any circumstance respecting their rights, therefore that the contract was fair: and that being the case, the mere inadequacy of price is not sufficient to set aside the assignment, which the complainants did not attempt to impeach for upwards of four years. The bill must therefore be dismissed with costs.

Mr. Simons for complainants.
Mr. Drayton for defendants.

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2 Desaus. 640

Case LXXXI.

[Present, Chancellors Rutledge and James.]

ELIZABETH VAIGNEUR, DAVID STROBHART and Margaret, His Wife, v. W. J. KIRK, Survivor of his late wife, Mary Jane Kirk.

(November, 1808.)

[*Bastards* ⇐8.]

On the question of marriage of parents and legitimacy of a child, there being such contradictory evidence as to leave the matter doubtful, an issue was directed, though the court is not bound to do so. At the trial, the verdict was against the marriage of the parents and legitimacy of the child, founded on certain written acts of the parents, contrary to the evidence arising from repute, and acknowledgment.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. § 12; Dec. Dig. ⇐8.]

In this case the complainants filed their bill to oblige the defendant to deliver up to

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them their proportion of *the estate of their brother the late Nicholas Winckler, jun. deceased, and to account for the rents and profits thereof.

The bill stated, that the late Nicholas Winckler died in March, 1802, intestate and without lawful issue, possessed of considerable real and personal estate; and he left a widow, Mary Jane, and two sisters, Elizabeth and Margaret, the latter of whom had since married David Strobhart. That by the statute in such case provided, the said real and personal estate was divisible into two moieties, to one of which the said Mary Jane, the widow, had an absolute right, and to the other moiety, the surviving sisters in equal shares.

Complainants charge that the said Mary Jane administered on the said estate, and possessed herself thereof, and hath since married the defendant William John Kirk, and died. That during her life, they jointly held the whole of the estate of said Winckler, and appropriated to their own use all the profits thereof; and since her death the said W. J. K. continues to do so. That complainants have applied to said W. J. K. to have their shares of the estate delivered up, with an account of the profits since the death of said Nicholas. But said W. J. Kirk hath refused to comply with their demands, and to acknowledge the rights of complainants.

Complainants pray that the said W. J. Kirk may be obliged to give a full account of the estate left by said Nicholas, of the increase of negroes, and of the crops and profits thereof, and be compelled to deliver to the complainants their legal portions of said estate, and account for the annual income of the same since the death of said Nicholas Winckler.

The defendant put in an answer and a demurrer.

The defendant admits the facts generally as charged by the bill of complainant, except that he denies that said complainants Elizabeth and Margaret, are entitled to a

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*moiety of the real & personal estate of said N. Winckler, jun. because this defendant hath been informed, and believes that said N. W. jun. was not the legitimate brother of the said Elizabeth and Margaret, he not being born in lawful wedlock; but that he was a natural son of N. Winckler, senior, and of Mary Barbara Wonderly, a widow, to whom said N. Winckler was never lawfully married; or that said N. Winckler, jun. was born prior to such their marriage. Defendant further saith that among other documents which tend to confirm him in this belief, there was found among the papers of said N. Winckler, jun. a deed made on 28th September, A. D. 1768, between said N. W. sen. and N. W. jun. in which deed the said N. W. jun. is styled by N. W. sen. the natural son of him the said N. W. sen. by and with Anna Barbara Wonderly, widow; by which deed the said N. W. sen. granted to N. W. jun. two negroes, and a third part of his stock of cattle.

Defendant further saith, that there were also found among the papers of said N. W. jun. deeds of lease and release, bearing date respectively, the 18th and 19th days of Oc-

tober, A. D. 1785; whereby said Mary Barbara granted, bargained and sold unto said N. Winckler, sen, a plantation, containing 225 acres, in St. Peter's Parish. Also a deed poll, dated 18th October, A. D. 1785, by which said Mary Barbara sold unto said N. W. sen. a negro man slave and 30 head of neat cattle; and another deed poll, 19th October, A. D. 1785, whereby said M. Barbara, widow, sold to said N. W. sen. all the negro slaves, horses and neat cattle, as should be allotted to her as a dividend, to which she was entitled out of the said D. Wonderly's estate; which deeds defendant presumes would not have been made if the said N. W. sen. and said M. Barbara had been married.

As to the residue of said bill, defendant demurs, for the following cause: That complainants are not entitled to an account till they shall have proved themselves to be the legal representative of Nicholas Winckler, jun.

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and entitled *to a distributive part of his estate, and defendant prays judgment whether he shall be compelled further to answer, &c. and prays to be dismissed, &c.

The cause came to a hearing on the point of the legitimacy of the late Nicholas Winckler, jun. deceased.

Much testimony was produced on both sides, and the court having doubts was pleased to direct an issue to try the legitimacy of the said Nicholas Winckler, jun. in Beaufort district, where the parties and witnesses resided, and where the cause arose.†

The issue was accordingly made up, and was tried at the Circuit Court in November, 1808.

The complainants produced a number of credible witnesses, who attested that they

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had for many years known *Nicholas Winckler, sen. and Anna Barbara, who had been the widow of David Wonderly. That they lived together as man and wife, and he always acknowledged and treated her as his wife; and that she presided in his family as his wife, and was so reputed and known by the neighbours; and that Nicholas Winckler the younger was the issue of that marriage, and the brother of the complainants Elizabeth and Margaret.

On the other hand the defendant produced the deeds stated, and referred to in his answer, in and by which the said N. Winckler, sen. and Anna Barbara, transacted business as unconnected persons, with distinct interests; and in one of which deeds he calls Nicholas Winckler, jun. his natural son by Anna Barbara Wonderly, widow, &c.

Upon this evidence the jury found a verdict, that Nicholas Winckler, jun. was not the lawful issue of N. Winckler, sen. but his natural son.††

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*The effect of this verdict was to defeat the claim of the complainants to any share

†The question of the marriage of parents, and legitimacy of children, is one of those in which the Court of Chancery is most desirous to have the aid of a jury, by directing an issue. Indeed Lord Chancellor Hardwicke seems to have thought it obligatory on him: for in the case of Graydon v. Hicks, 2 Atk. 16, 17, he says, "If there was any doubt of the marriage, I ought to direct an issue to try that fact;" but as he did not think there was any doubt in that case, he did not direct such an issue. And indeed the body of the cases lay down the doctrine broadly, that it is in the discretion of the court to direct such issue, or not. In Hampson v. Hampson, 3 Vesey and Beames, 41, 2, Lord Chancellor Eldon recognizes distinctly the settled doctrine of the court on this subject. He says, "Courts of Equity have an original jurisdiction, which I agree must be exercised according to a sound discretion, to try facts without the intervention of a jury: and which aid is sought according to the common expression, for the purpose of informing the conscience of the court. I agree that a mistake in refusing to send the cause to a jury, is a just ground of appeal, if the Court of Appeals should think that the contrary decision would have been a sounder exercise of discretion: but it is a competent exercise of the authority and duty of the court in every case, and throughout every case, and in every stage, to determine according to its discretion, whether it does or not want that assistance."

And so the question of granting a new trial, after the verdict is returned on an issue, directed by the court, is wholly in the discretion of the chancellor. See 9 Vesey, 155, the minor Cannons of St. Paul's, v. Morris; and the above cited case of Hampson v. Hampson, 3 Vesey and Beames, 41, 2.

††The subject of marriage, and consequently the legitimacy of children, is on the same loose footing in this state that it was in England, before the statute of 26th, George 2d, ch. 33, and as it is now in Scotland. We have no statute regulating marriages or providing any form for the celebration of them, or for recording them. And they are usually celebrated in any form the parties please, before a clergyman or magistrate.

We must therefore resort to the law as it stood in England, prior to the statute abovementioned, to ascertain what constitutes a lgeal marriage, and the legitimacy of children in this country. That law is well stated by Mr. Justice Blackstone, in his commentaries, 1 vol. chap. 15, p. 433, &c.

And Sir William Scott has recently examined the subject of marriages in Scotland, [which are not regulated by statute, but remain on the footing of the canon law] with wonderful ability and acuteness, in the case of Dalrymple, the wife, against Dalrymple, the husband.—His judgment, delivered in the Consistorial Court of London, in July, 1811 in his character of chancellor of that diocese contains a most luminous and complete view of the subject.

He sums it up by stating,

1st. That the law of the country, where the marriage was contracted, must govern, though one of the contracting parties may have been domiciled in another country.

2d. It is a civil contract regulated by law, and

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endowed with civil *consequences; to which in most civilized countries, the sanctions of religion have been superadded.

3d. That marriage having been erected into a sacrament by the Roman Catholic Church, the marriage contract fell naturally enough under the ecclesiastical cognizance, with respect both to its theological and legal constitution.

But the canon law so far respected the nat-

in the estate of their brother, so found to be illegitimate. That moiety of his estate which did not go to his widow by the operation of

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*the statute of February, 1791, escheated to the state. But the legislature, on petition, passed an act to remit the escheat, and to vest the property in his sisters, the complainants.

Desaussure for complainants.
Pringle for defendant.

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ural and civil origin of marriage, as to consider that where the natural and civil contract was formed, it had the full essence of matrimony, without the intervention of the priest.

The Ecclesiastical Courts, which had cognizance of ecclesiastical causes, held that, "an irregular marriage, constituted per verba de præsenti, though not followed by any consummation shewn, was valid, to the full extent of voiding a subsequent regular marriage, contracted with another person." The statute 32, Henry 8th, ch. 38, [made of force here] enacted that marriages solemnized in the face of the church, and consummate with bodily knowledge, shall be deemed good, notwithstanding any precontract of matrimony, not consummate with bodily knowledge, which either or both the parties shall have made." This statute was repealed in England by the statute of 2d Edw. 6, ch. 23: [but the repealing statute has not been adopted here; See Mr. Justice Grimke's collection of the Public Laws.]

The Temporal Courts recognized the doctrine of the Ecclesiastical Courts, as the existing rule of the matrimonial law of the country. See Bunting's case, 4 Coke, 29. In Collins v. Jesson, 3d of Anne, it was said by Lord Chief Justice Holt, and agreed to by the whole bench, "that if a contract be per verba de præsenti, it amounts to an actual marriage, which the very parties themselves cannot dissolve by release or other mutual agreement, for it is as much a marriage in the sight of God, as if it had been in facie ecclesiæ." "But a contract per verba de futuro, which do not intimate an actual marriage, but refer to a future act, is releaseable." 2 Salk. 437, Mod. 155. In Wigmore's case, 2d Salk. 438, the same judge said, "a contract per verba de præsenti, is a marriage; so is a contract de futuro, if the contract be executed, and he take her, it is a marriage."

And this continued to be the law in the Ecclesiastical Court. See the remarkable case of Lord Fitzmaurice, Coram Deleg. in 1732, which was extremely similar to the case of Dalrymple.

The marriage act of 26th Geo. 2d, ch. 33, put

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an end to all this *doctrine in England, by establishing a public and regular form, without which, the relation of husband and wife cannot be contracted.—But that statute did not alter the Scotch law. And that statute not being made of force here, the law relating to the marriage contract, stands upon the footing it was in England, prior to the statute of George, grounded on the canon law, controlled however by the statute of 32, Henry 8th, ch. 38.

The remarkable facility of contracting matrimony in this state is strongly contrasted with the impracticability of dissolving the contract. No divorce has ever taken place within the state. The legislature has uniformly refused to grant divorces, on the ground that it was improper for the legislative body to exercise judicial powers. And it has as steadily refused to enact any law to authorize the courts of justice to grant divorces a vinculo matrimonii, on the broad principle that it was a wise policy to shut that door to domestic discord, and to gross immorality in the community.

APPENDIX

AS TO THE AUTHORITY OF JUDICIAL DECISIONS

2 Desaus. *647

*The degree of weight which is properly attributable to judicial decisions, has never perhaps been settled or stated with the precision which the importance of the subject requires. Some judges profess a high respect for the judgments of the courts as binding precedents; whilst others regard them only so far as they accord with their own reason and judgment.

Lord Mansfield following his predecessors, said, "what is determined upon solemn argument, establishes the law, and makes a precedent for future cases." 4 Burr, 2545. Yet Lord Mansfield, and his brethren of the King's bench, repeatedly departed from this salutary rule, and decided contrary to what had been settled by preceding determinations; as in the cases of Carrick v. Vickery, 2 Douglas, 655, and Wyndham & Chetwynd, and many others.

The authority of decided cases cannot however be stated to be so absolute in any case as the statute law. For that, when clear and positive, must be submitted to, (if within the constitutional limits) without the least regard to its wisdom or utility, and whether enacted by learned or unlearned men. But the authority of judicial decisions depends a good deal on the reason of the judgments themselves, on the unanimity of the bench, on a concurrence of successive judges, and even on the character of the judges who decide.

Decrees or judgments by Lord Hardwicke, or Lord Mansfield, Lord Cowper, or Lord Holt, have much greater weight than those of many of their predecessors or successors.

That great Chancellor Lord Hardwicke has himself given his sanction in some measure to this sort of discrimination: for in the well considered case of Chesterfield v. Janssen, 1 Atk. 301, 353, he says, "whatever may be called a legislative authority in this court, I utterly disclaim; but so far as the court have already gone in cases, so far as Lord Nottingham, Lord Cowper, Lord King, and Lord Talbot, have gone in the several cases before them, I think myself under an indispensable obligation of following."

This discrimination Lord Hardwicke never would have made between the authority of the acts of different parliaments; and it shews that there is a marked difference between the authority of statutory enactments, and judicial decisions.

It would be desirable, but it seems difficult to fix, by some precise rules, the extent of the authority of the decided cases, as binding precedents.

This subject seems to have been considered with attention, and some rational rules laid down by Baron Maseres. They do not embrace the whole subject, but as they may be useful to the profession, they are subjoined, with general approbation, if not with unqualified adoption.

Extract from Baron Maseres' Canadian Free-Holder; and see Howells State trials, Vol. 20, p. 350.

The general rules concerning the authority of judicial determinations on points of law, I take to be the following:

1st. Where a point of law has been agitated in all the courts through which it may be carried by appeal, or writ of error, and has been finally determined by a judgment of the highest court of appeals, that is of the House of Lords; (for that is in Great Britain the highest court of appeals, both in matters of law and equity,) such determination is reckoned to be of almost as much authority with respect to the point so settled, as an act of Parliament; or at least it is so considered by all the ordinary courts of justice; though perhaps the House of Lords itself might on another occasion, if they thought there was very strong grounds for it, determine it in a different manner.

2dly. When a point of law has been fully

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argued and solemnly determined by *one of the four great courts of Westminster Hall, (that is, the Courts of Chancery, Kings Bench, Common Pleas and Exchequer) and the party against whom the judgment has been given, has acquiesced in it, and has forborne to bring an appeal, or writ of error, into the next higher court, and such forbearance does not arise from the poverty or inability of the said party, such a determination acquires a great degree of respect and authority, and is usually followed by the courts of justice, as often as the same point comes before them. Yet it is not of quite so great authority as a determination of the House of Lords, in the last resort. And we have sometimes seen such determinations overturned by the same or other courts, as was done in the case of Wyndham & Chetwynd. Yet such overturning of former solemn decisions is very unfrequent and not in general approved of, though in some cases they may be justifiable, as where former determinations have been made upon very wrong principles.

3dly. When a matter has been fully argued and solemnly determined in one of the courts, in favour of one of the parties, and in the said judgment, more than one point of law has been determined in favour of such party,

and the losing party acquiesces in the said judgment, such determinations acquire considerable weight, but are not quite so much respected as in the two former cases; and for this plain reason, that as more than one point of law are determined at the same time, it is uncertain whether the losing party when he acquiesces under the whole judgment, acquiesces in all the points determined against him, or only in some or one of them; because, if only one is rightly determined against him, the judgment would upon writ of error, be as much affirmed as if all the points had been so determined. This uncertainty concerning the particular point in the determination of which the losing party may be supposed to acquiesce, takes from the determination of each of the points of law, some part of the weight and authority which might otherwise be deduced from his acquiescence.

4thly. If a matter has been solemnly argued in a court of Westminster Hall, and a solemn judgment has been given upon it in favor of one the parties, & in that judgment, one or more than one point of law has been determined in his favor, and another point or points of law against him, and the losing party acquiesces in the judgment, such acquiescence can operate as a confirmation of those points only which are determined against him, and not of those points which are determined for him. In such case therefore, there will be several determinations made by the same judges in the same cause, which will have different degrees of weight and authority. Namely, the points determined in favor of the losing party, and the points determined against him. For the points determined in his favor will have only that degree of weight which arises from the learning, abilities, and integrity of the judges who decided them; and to the deliberation with which they were decided. But the points determined against the losing party will be entitled to an additional degree of respect, arising from the acquiescence of the losing party, which shews that he and his counsel despaired of having those points determined in any other manner, even if they should have brought a writ of error. These seem to me to be the different degrees of authority due to the several decisions of the English Courts.

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[End of Volume 2 Desaus. Eq.]

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

COURT OF CHANCERY OF THE STATE OF SOUTH CAROLINA

FROM THE REVOLUTION TO DECEMBER, 1813,
INCLUSIVE

IN THREE VOLUMES

BY

HENRY WILLIAM DESAUSSURE

SENIOR JUDGE OF THE COURT OF EQUITY, AND PRESIDING JUDGE OF THE COURT OF APPEALS IN EQUITY IN THE SAID STATE

VOLUME III

Justitia est velle omnibus quod æquum est.
The duties of life are more than life.—Bacon's Works, Vol. VI.

COLUMBIA, S. C.
PRINTED BY CLINE & HINES
1817

ANNOTATED EDITION

ST. PAUL
WEST PUBLISHING CO.
1917

District of South-Carolina.

Be it Remembered, That on the twenty-fifth day of April, Anno Domini one thousand eight hundred and seventeen, and in the forty-first year of the Independence of the United States of America, the Honorable Henry William Desaussure deposited in this Office the title of a Book, the right whereof he claims as author and proprietor, in the words following, to wit:

"Reports of Cases, argued and determined in the Court of Chancery of the State of South Carolina, from the Revolution to December, 1813, inclusive, in three volumes, by Henry William Desaussure, senior Judge of the Court of Equity, and presiding Judge in the Court of Appeals in Equity in the said State."

"Justitia est velle omnibus quod æquum est."

"The duties of life are more than life."—*Bacon's Works, vol. 6.*

In conformity to the act of Congress of the United States, entitled "An act for the encouragement of learning by securing the copies of Maps, Charts and Books to the Authors and Proprietors of such copies during the times therein mentioned;" and also, an act entitled "An act supplementary to an act entitled 'An act for the encouragement of learning by securing the copies of Maps, Charts and Books to the Authors and Proprietors of such copies during the times therein mentioned,' and extending the benefits thereof to the arts of designing, engraving and etching historical and other prints."

JAMES JERVEY, Clerk of South-Carolina District.

TO T. FORD, ESQUIRE,

BARRISTER AT LAW.

DEAR SIR,

Permit me to gratify my feelings by placing your name at the head of this volume of reports of the decisions of the Court of Equity in this State. It is due to our friendship, commenced in very early life and continued to this day, with unabating attachment and esteem. But it is equally due to the distinguished station you occupy at the bar of this State—a bar unsurpassed I believe by any in America, for learning and for integrity. To be eminent among such men is higher praise than any which I can presume to bestow.

Accept, my dear sir, the assurances of an attachment, which is strong in proportion to the perfect knowledge which I possess of your character.

HENRY W. DESAUSSURE.

Columbia, S. C., July 1, 1817.

THE COURT OF CHANCERY

WAS COMPOSED OF THE FOLLOWING CHANCELLORS, DURING THE TIME COMPREHENDED IN THE REPORTS OF THIS VOLUME.

Hugh Rutledge, elected in February, 1791, died in January, 1811.

William Dobein James, elected in December, 1802.

Waddy Thompson, elected in December, 1805.

Henry William Desaussure, elected in December, 1808.

Theodore Gaillard, elected in December, 1808.

Thomas Waties, elected in December, 1811, in the place of Hugh Rutledge, deceased.

Chancellors James and Thompson, resigned in December, 1813, and were re-elected during the same sitting of the Legislature and took new commissions of that date.

On the resignation of John Julius Pringle, who had served as Attorney-General many years,

Langdon Cheves was elected Attorney-General in December, 1808.

On his resignation in December, 1810,

John S. Richardson was elected Attorney-General.

SOLICITORS FOR THE STATE ON THE CIRCUITS.

Robert Stark, David Johnson, Ja's Irvin, John Taylor.

OTHER LAW OFFICERS OF THE COURT.

For Charleston—W. H. Gibbes, Master in Chancery.

Thomas Hunt, Commissioner in Equity.

Benjamin Elliott, Register.

Georgetown—R. Heriot, Commissioner and Register.

Cheraws—Robert Bruce, do.

Camden—B. Bineham, on whose resignation John Carter was appointed Commissioner and Register.

Beaufort—Benj. H. Buckner, Commissioner and Register.

Orangeburg—Samuel P. Jones, do.

Columbia—Benjamin Haile, on whose death James Dellet was appointed Commissioner and Register.

Edgefield—Whitfield Brooks, Commissioner and Register.

Ninety-Six—Richard A. Rapley, on whose resignation J. M'Comb was appointed Commissioner and Register

Washington—John Garlington, Commissioner and Register.

Pinckney—J. W. Darby, do.

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REPORTS OF CASES

ARGUED AND DECIDED IN

THE COURT OF EQUITY AND IN THE COURT OF APPEALS IN EQUITY OF THE STATE OF SOUTH CAROLINA

FROM FEB. TERM, 1809.

*Case I.

MARY & HANNAH JACKS, per Pro Amie, v. ADAM TUNNO and Others.

[Tried before Chancellor Rutledge and decree pronounced by him March 10, 1809.]

[*Fraudulent Conveyances* ⊂⊃61.]

Voluntary gift of property by parents to children not void, as to creditors, unless fraudulent.

[Ed. Note.—Cited in Kirkley v. Blakeney, 2 Nott & McC. 547; Howard v. Williams, 1 Bailey, 584; Henderson v. Dodd, Bailey, Eq. 140.

For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 150, 154; Dec. Dig. ⊂⊃61.]

[*Fraudulent Conveyances* ⊂⊃146.]

[Cited in Howard v. Williams, 1 Bailey, 579, 21 Am. Dec. 483, to the point that where a father conveyed certain land to his children in consideration of natural affection, his remaining in possession of the land was *held* to afford no evidence of fraud; the children being of tender age.]

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 455; Dec. Dig. ⊂⊃146.]

The scope of complainants' bill is to restrain defendants, by perpetual injunction, from selling the house and lot therein mentioned, for the debts due by their father, James Jacks. Complainants claim the premises as their property by the gift of their father, whilst in prosperous circumstances, and not being made with an intent to defraud his creditors. Defendants in their answer, deny that Jacks was in easy circumstances when the gift or purchase was made, but largely indebted; that it was made in complainants' name, to secure the property to them; that it was fraudulent and intended to defeat his creditors.

The principal question in this case is whether the conveyance to complainants of the lot in bill mentioned, is to be considered as a voluntary conveyance from the father, and made with an intent to defraud his creditors. In order to form a correct view of the case, I must advert to the evidence which has been adduced, to see what was the situation and circumstances of Jacks

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at the time *this deed was executed, and from thence draw the conclusion, whether the transaction was or was not fraudulent. The first piece of evidence was the titles to complainants of the lot, dated 6th Feb. 1797: which were recorded on the 18th Feb. of the same month and year. Mr. James Scott was then examined for complainants, who swears that Jacks came here in 1784, was a watchmaker, an industrious man, and an economist: he was intimately acquainted with him till the year 1796. He was so prosperous that in 1791 he went to England, and brought out a cargo of jewelry, and acquired a considerable property clear of debt; he met with no losses of consequence; that he would have known it if he had, being very intimate with him, and had reference to his books. His credit was very good; he imported goods, seldom less than £3000. per annum. That he went to England in the spring of 1796: previous to which he took an account of his stock, and it amounted to upwards of £4000. first cost, on the top of the last page of the book without striking the balance. That he was surprised so much stock should be contained in so small a compass. Jacks then told him a quantity of the large articles had been lately sold off, and there was at least £2000. due him in debts: that when Jacks went to England, he carried with him about £2000. more than would pay all his debts; (in this witness however was mistaken, for he owed some debts there to the amount of about £2200.) that Jacks left his store and goods with Gibson to sell during his absence. That in the fall of 1796, Jacks brought out a cargo worth 4 times as much as any previous one. He considered Jacks a man of property, worth in the spring of 1797, £7000 or £8000, clear of debt, when he purchased the lot: that Jacks told him of his intention to purchase. The bank was established in

1791. Witness was Jacks' principal endorser till he went to England in 1796—he was not much indebted to the bank—witness was never called upon to pay any of Jacks' notes. His debts in bank were not occasioned by what he owed previous to his going to Eng-

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land. *Witness never endorsed Jacks' notes after his return. J. M. Davis was his endorser, afterwards, till his bankruptcy. When Jacks went to England, his wife's property was worth £2000. and was mingled with his: it was reduced by compromise to £1000. In March, 1797, Jacks went to settle in Philadelphia and returned here in the fall of 1798. He told witness, Gibson was much pressed to make payment at the banks. Witness understood Jacks was much pressed both in Philadelphia and Charleston for the goods he had brought out, though he had made considerable remittances in bills, &c. Opposed to this testimony, is that of Mr. Patterson, on the part of the defendants, who had been retained as an assistant to the master, in a case between Gibson and Jacks, and he had access to the co-partnership books, but knew nothing of Jacks' books. Mr. Patterson produced a statement of the debts due by Jacks & Co. by which it appears that in Feb. 1797, the debts due by Jacks & Co. amounted to about £19,000. The stock of goods in Charleston and those carried by Jacks to Philadelphia, with the lot and furniture, also, monies received by Gibson on Jacks' account for debts and goods sold (£2805. 14s. 8d.) amounted to about £18,730. somewhat less than what he owed; but upon adding some advance on goods carried to Philadelphia, which it is contended was omitted, and other sums on account of furniture, &c.; the balance will then be some hundred pounds in favor of Jacks. A great number of letters from Jacks to Gibson, and from Gibson to Jacks were read from which it appears that shortly after Jacks went to Philadelphia, his difficulties commenced: sometimes his affairs were in a prosperous way, but he was more or less embarrassed from 1797 to 1800, and finally became a bankrupt. The causes of his embarrassment are mentioned in these letters; particularly the situation of public affairs; the new loan effected by government which occasioned a scarcity of money; the yellow fever; his building a large house in Philadelphia; the removal of congress from that place, and the consequent fall in

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*the value of property. In the statement of his affairs which he gave to the commissioners of bankruptcy, he has also enumerated a variety of losses, which he sustained. All those causes combined, tend to shew that had they not occurred he would have been in very good circumstances. The certificate of the commissioners of bankruptcy, and the consent of his creditors to his discharge, (of whom the defendant J. M. Davis was one, Andrew Gow, since deceased another) were read by which he is discharged from all his debts then due or owing by him. From the whole of the evidence it is plain that Jacks' conduct was perfectly free from any apparent intention to deceive or defraud his creditors: a strong proof of it, is his recording the titles to the lot immediately after they were executed; from that circumstance he evinced a perfect conviction in his own mind that he was competent to do the act; and Mr. Scott's testimony corroborated it, when he says, he thought Jacks was worth £7000 or £8000. clear of debt; also that Jacks acquainted him with the purchase. It is likewise more than probable that the defendant Davis was privy to the purchase, as he continued Jacks' principal endorser, long after the house was built, and even till Jacks' bankruptcy.

Mr. Scott in his testimony says that when Jacks went to England in the spring of 1796, he left a stock of goods of upwards of £4000. value, to be sold by Gibson, besides £2000. of debts to be received. There is no evidence to shew what became of the goods; they are not included in the £14,200. for in the account of stock taken in May 1797, they are said to be the goods imported in the fall of 1796. There is a chasm therefore in this part of the evidence. If those goods were accounted for, the balance would be very considerable in favor of Jacks. With respect to the law on the subject, how far voluntary conveyances for the benefit of a wife and children should be valid or not, when creditors are concerned, the determinations are various as to the quantum in which a person must be

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indebted to make the act fraudu*lent; and the last case fixes it to insolvency. I am not for fixing it to so late a period. There is also a difference of opinion as to pre-existing and subsequent debts; whether the latter are to have any influence. That must I think in a great measure depend upon circumstances; and our local circumstances make it frequently necessary to differ from foreign adjudications. Suppose for instance a person in this state being indebted, though to a considerable amount, is possessed of a large estate in houses in the city, gives a small part of that property to his child or children; or one similarly circumstanced and indebted, possessed of a considerable estate in lands and negroes, gives a few negroes and some land to his children, and either the accident of fire in the city, or the death of negroes, should reduce his estate so considerably as to occasion his insolvency, would this court under such circumstances, merely because the person was largely indebted at the time of the gift, consider such gift as fraudulent and set them aside, because creditors were interested. I should apprehend not. Must there be one law then for the land holder and another for the merchant or trader? Fraud or the intention to defraud is the object of the law, and which it means to guard against: not accidents

which perhaps it is not in human foresight to prevent. The fraudulent intent is to be collected, from the magnitude and value of the gift; and surely no one will say that a gift of £700, to two daughters, when the father was believed to be worth 7 or £8000, in prosperous circumstances, and very high credit, could possibly be considered as an extravagant donation. It was urged as a circumstance or badge of fraud, that Jacks remained in possession of the house, returned it as his property and offered to mortgage it. In this case possession and payment of taxes cannot be considered as badges of fraud, for the complainants were infants of tender years, and therefore incapable of taking charge of the property; and as to his offer to mortgage, if that proves any thing, it proves the honesty of the man, who was willing

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to secure *his creditors, as far as it was in his power. Although I do not think there is any evidence whatever of an intent on the part of Jacks to deceive or defraud his creditors, I should nevertheless have directed an issue to take the sense of a jury on the question of fraudulent intent, if my mind had not been fully satisfied that the consent of the creditors (two of whom are defendants in this suit) to his discharge, and the certificate of the commissioners of bankruptcy had put an end to the question; for upon considering the various clauses of the bankrupt law, it is plain, that the commissioners of bankruptcy (two of whom are professional men) were fully competent to enquire into this transaction, and if they omitted to do so, any of the creditors might have instituted an enquiry, and if they had entertained any doubt as to the fairness of the business, they might and certainly would have had the fact of fraudulent intent tried by a jury: not having done it, I must presume they did not consider the transaction fraudulent, and therefore decree for the complainants, and that each party do pay their own costs.

[There was no appeal from this decree.]

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3 Desaus. 6

Case II.

CHARLESTON INSURANCE COMPANY v. JOHN POTTER.

[Tried before Chancellor Hugh Rutledge in February, 1809—Decree in November, 1809.]

[*Equity* ⇐15.]

The Court of Equity does not interfere in Insurance cases, unless in some extraordinary cases.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 27–36; Dec. Dig. ⇐15.]

[*Equity* ⇐364.]

[Where a plain defect of jurisdiction appears at the hearing, the court will not entertain the suit, though defendant waives the objection.]

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 767; Dec. Dig. ⇐364.]

[*Insurance* ⇐601.]

[A bill in equity will not lie to recover money paid by an insurance company upon a policy alleged to have been void by reason of fraud on the part of the insured.]

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1501; Dec. Dig. ⇐601.]

In this case there was a great deal of evidence given on both sides, and the cause was very fully and ably argued by the counsel. But the ground upon which the Judge rested his decree, renders it unnecessary to detail the evidence, or state the arguments of counsel.

The complainant's bill charges defendant with gross fraud, misrepresentation and concealment, in obtaining an insurance in his

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own name on goods which were not *his property; also with a breach of the warranty contained in the policy that warrants the property to be American or neutral property, whereas in fact they were the property of J. Fletcher or some other persons subjects of a foreign state, and subject to capture and condemnation:—That the policy was therefore void. The bill states the loss by shipwreck of the goods, and that complainants have paid the loss to the amount insured on the policy which has been cancelled. The complainants pray a discovery on oath of the defendant of these facts, and likewise the production of all letters and papers in his possession relative to the transaction, and restoration of the money improperly paid to the defendant, with interest. The defendant, in his answer, admits the policy, and that the goods were insured as American or neutral property; and states that upon the receipt of a letter from Fletcher, dated at the Havana, ordering insurance on a large quantity of sugar, to be shipped from thence, he went to Davis and Reid (insurance brokers) to cause it to be done, and delivered the letter to Davis, one of the partners, who (defendant believes) laid it before D. Desaussure, the president, and other officers of the insurance company, with the memorandum or offer for insurance; and he believes they were all left with them, and still remain in their possession, if not lost, mislaid or destroyed: That to the best of defendant's information, knowledge and belief, Fletcher was really and bona fide an American citizen, as he was then and afterwards reputed to be; and not a legally naturalized subject or citizen or domiciliated resident of the crown of Spain. Defendant also swears that one M'Evoy and himself, together with Fletcher, were interested in the cargo, and admits that the policy was only made out in defendant's name, as was then customary and usual, although several others might be interested in the cargo. Defendant denies that the fact of Fletcher's being interested, was concealed from the insurance company or the mercantile public

generally: on the contrary, that his letter was shewn to the officers of the company

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when the insurance was ef*fected; and when the payment of the loss was demanded, it was known generally that Fletcher was interested, and that he was a citizen of the United States, and particularly to the president of the company, who personally conversed with Fletcher on the subject. Defendant admits that he received the money when the loss was settled, and swears that he acted merely as Fletcher's agent, and immediately paid over Fletcher's proportion, by his order, to T. Stewart, and did not charge one cent commission for his trouble in the business. Defendant denies all fraud, misrepresentation or concealment.

After the bill and answer were read I strongly inclined to think it was a question properly determinable at law. I however permitted the evidence and arguments to be gone into, in order to see if there were any peculiar circumstances in the case, to give this court a jurisdiction by which complainants might have more complete and adequate remedy here than they could have at law. After the arguments were closed, I suggested that it was not improbable I should direct an issue. Since the last term I have maturely considered the case, and have reviewed the history of marine insurances; from which it appears that all disputes relative to them were originally settled by a particular tribunal, and that suits were never brought in the courts of equity, and rarely of law, till the end of the 17th century, when that particular tribunal fell into disuse. Still few cases were determined even at law, till about the midde of the last century, when Lord Mansfield presided in the Court of King's Bench; since which, causes of this kind have been universally decided in that court, as appears by the books of reports. I am therefore of opinion, that a court of law is the proper and only tribunal for the determination of questions of this sort; and that complainant may have complete and adequate remedy there by an action for money had and received. And that being the case, this court is expressly enjoined by law from entertaining the suit; and although the defendant himself shall wave the objection to the jurisdiction by answering, yet a court

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of equity, *if a plain defect of jurisdiction appears at the hearing, will no more make a decree, as Lord Hardwicke says, than where a plain want of equity appears. To be sure several cases are to be found where this court has so far interfered, as to grant injunctions to stay proceedings at law, where complainant in his bill calls on defendant for a discovery of certain facts only within his own knowledge, and for the production of papers in his possession, until the defendant has answered, and produced the papers; also till witnesses abroad can be examined on commission. But where those objects of the bill are accomplished, the court will proceed no further. So in the present case it might be necessary to bring suit merely to obtain a discovery relative to the policy of insurance and the nature of it; it being alleged by the bill that the policy was cancelled and destroyed; and also to compel the production of letters and papers in defendant's possession, which could throw light on the subject. That being done, it was no longer necessary to proceed here, because the complainants might then have gone on with their action at law, and under our act of assembly might have obtained commissions at law, to examine their witnesses. The case of Carter v. Boehme, in 3d Burr, p. is an authority in point. In that case the bill was filed to obtain a discovery of certain facts in the knowledge of the defendant. After answer and examination of witnesses, the cause was sent to law, and tried before Lord Mansfield in 1766. After the most diligent researches, I cannot find a single authority to warrant the courts of equity exercising jurisdiction in cases of this kind: on the contrary, there is one case determined in 1729, De Getoff v. London Assurance Company, upon a demurrer to the jurisdiction of the court, on a bill of this sort, in which case, Lord Ch. King sustained the demurrer and dismissed the bill. (Mosely, 83. 4.) His decree was appealed from, but it was affirmed in the house of lords. (No charge of fraud.) Since that decision, say the books, it has been settled that courts of equity have no more jurisdic-

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*tion in cases of insurance than in those of the purest common law cognizance; for, says Lord Hardwicke, "If on a suggestion of slight grounds of equity, bills of this sort were to be encouraged, it would bring all policies and other matters of property to be determined here, and the parties would be effectually deprived of the benefit of the trial by jury." From the above authorities, and a series of cases determined at law for half a century, it is plain and manifest, that they are properly and exclusively determinable at law; that the parties have had and can always have complete & adequate remedy there; and therefore that this court ought not to take cognizance of them; and also because it is restrained by the law which establishes it, from entertaining suits in all such cases. Bill dismissed with costs.†

† There was no appeal from this decree. The case of De Ghetoff v. the London Insurance Company, decided by Lord King, in 1729, (Moseley's Reports, p. 83,) and whose decree was affirmed by the House of Lords in 1730, (see 3 Bro. P. C. 525) does certainly establish the doctrine that the subject of Insurance is of legal cognizance, and that as in general, complete and adequate remedy at law can be had, this Court will not in general interfere. It must not, however, be inferred that the Court will not under

any circumstances interfere in Insurance transactions, and give relief on a proper case being made out. For on this as well as on every other subject in human transactions of a civil nature, where it is necessary for the prevention or detection of fraud, or for a discovery, or for any other essential purpose of justice, otherwise unattainable, this Court will interpose. In the case of Da Costa v. Scandret, reported in 2 P. Williams, p. 170, Lord Macclesfield relieved against a policy of Insurance, and decreed that it should be given up, on the ground that the insured had not disclosed all that he had heard of the state of his ship, at the time he effected his policy. It was an improper concealment, which would draw the interposition of this Court. In the case of Green v. Suasso, reported in 2d Atkins, p. 229, Lord Hardwicke granted and continued an injunction to restrain proceedings at law on a policy of Insurance, to enable the Insurer to examine witnesses abroad, and to be fully prepared for their defence at law. So in the subsequent case of Chitty v. Selwin and Martin, 2 Atk. p. 359. In another case, that of Motteux v. the London Insurance Company, 1 Atk. 545—6. 7. 8, Lord Hardwicke entertained the bill, so far as to direct and prescribe the particular issues to be tried at law. In the case of Pringle v. Hartley, 3 Atk. 195, decided in 1744, Lord Hardwicke refused to grant an injunction, to stay proceedings at law, after verdict obtained in a suit, on a policy of Insurance. But he did it on the merits which he went into the consideration of, and he prescribed terms to the insured, who had recovered at law; direct-

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*ing him to assign to complainant, the insurer, all his right in the ship, and the benefit of the decree in the Admiralty for salvage. Woodeson in his Lectures, 3d vol, p. 410, sec. 56, expressly states that it is a good ground for obtaining an injunction against an action at law, commenced on bond, notes, policies of insurance, or the like, to alledge that such instruments were obtained unfairly, and by misrepresentation. And in Insurances against fire, the Court of Chancery has proceeded to decide on the merits of the claimant, under the policy, without scruple. In the case of Lynch & al. v. Dalzel & al. decided by Lord King and affirmed by the House of Lords, (see 3 Bro. P. C. 497 to 503,) he decreed that the assignee of the insured cannot recover on the policy, and that the insured must have an interest at the time of the loss; and so decided by Lord Hardwicke in 1743. See 2 Atk. 554 to 557, Saddler's Co. v. Badcock & al.

3 Desaus. *11

*Case III.

GIBSON and Others v. BROADFOOT.

[Tried before Chancellor Rutledge and decree pronounced by him February 10, 1809.]

[*Arbitration and Award* ⟸65.]

So much of the award as exceeded the submission set aside.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 329; Dec. Dig. ⟸65.]

This is a motion on the part of complainant, to set aside the award of arbitrators, so far as it relates to the ship Connecticut, for that the arbitrators exceeded their authority in determining on this subject, which was not submitted to them, and have determined contrary to law.

I have perused the bill in this case, and find that the matters in controversy between the parties are merely relative to the copartnership concerns; and the ship Connecticut is not at all noticed in either of the bills. The order of the court refers the controversies of the parties to arbitrators. They both, in their letters to the arbitrators, expressly inform them that the business respecting the Connecticut is not referred to them, but will be submitted separately. The arbitrators have nevertheless decided on the subject. I have perused all the letters which were written by Messrs. McLure and Robertson; those of Mr. W. Broadfoot, in the first instance, when the vessel was sent to Liverpool, wherein W. Gibson & Co. were directed to sell her if a certain price could be obtained; and the letters from W. Gibson & Co. to defendant, then in London, on

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the subject of an ad*venture to Buenos Ayres in this vessel, if a license could be obtained for that purpose: but I do not find a single word in them which can make complainants liable to be charged as partowners or as any way concerned in her: on the other hand, in the letter from W. Gibson & Co. in 1806, when it was found impracticable to obtain a license, they acquainted defendant that she could not be considered as belonging to the new concern. Defendant was to commence in January, 1807. After the notice arbitrators had received from both complainant and defendant, that this vessel would be the subject of another submission, it appears to me that they have exceeded the powers delegated to them by the order of reference; and therefore, that part of the award should be set aside.

[There was no appeal from this decree.]

3 Desaus. 12

Case IV.

The Executors of CHOULER v. the Assignees of JOHN HOLMES SMITH.

[Tried before Chancellor Gaillard, and decree pronounced by him, on the 24th November, 1809.]

[*Fraud* ⟸58.]

The Court will not impute fraud on slight evidence; especially after a great length of time.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 55–59; Dec. Dig. ⟸58.]

[*Subrogation* ⟸31.]

[Where A. lent his notes to the purchaser of land from B. for the purchase money, A., on paying the notes, was entitled to an assignment from B. of a mortgage by which the purchase money was secured.]

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 74; Dec. Dig. ⟸31.]

On the 7th of August, 1795, William Fiddy sold a house and lot of land in Broad street, to John Holmes Smith for £1120 and took from Smith three bonds, each for £300 and a mortgage of the premises to secure the

payment of them; the first bond was payable on the 8th of August, 1797, the others on the 8th of August, 1798 and 1799, with interest; the interest on the two last was payable annually. On the 8th of July, 1797, Fiddy obtained a judgment on these bonds; on the 30th of November, 1797, he entered into a deed, which after reciting Smith's mortgage, the judgment obtained, that an execution had been issued and a levy made on the mortgaged premises, and John Holmes Smith's liability to pay the debt, goes on in

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the following manner—"And *whereas the said lot of land is also mortgaged to Mrs. Ann Lockwood by the said John H. Smith for a considerable sum of money, which she is apprehensive she may lose altogether unless she can come in for a proportion of the said lot; and whereas it is apprehended she may save more by taking the lot to herself and satisfying the said William Fiddy the amount of his mortgage thereon; and in order to do which with safety she is desirous of having a good and sufficient assignment and transfer or conveyance from the said William Fiddy to the said Ann Lockwood, or such other person as she may choose or nominate, and to her or his or their heirs, executors, &c. of the said three bonds, judgment thereon, and mortgage, and all his right and title thereto." That Fiddy, in consideration of £458 6d. 7s. paid to him by Ann Lockwood, and good and approved notes for the balance of the debt due, (after deducting £100 on account of the cash payment and the short time the notes had to run, viz. 60, 90 and 120 days) agreed to accept as full payment of his mortgage and claim on the lot and house; and on the said three notes being all fully paid and satisfied, but not before, to assign and transfer over the said judgment, mortgage, bonds and all his right and title to the same, to such person as aforesaid, with full and absolute authority to receive the same and act in the premises as the said assignee should think proper. He then enters into a covenant to execute the assignment according to the agreement. This deed, executed in the presence of two witnesses, was recorded on the 13th of January, 1798. On the 8th of December, 1797, Ann Lockwood signed the following paper:—"Whereas Dr. Chouler has lent me his name on three notes for 50*l.* 8s. 11d. which I am to take up as they become due; and in case I should not have fully sufficient to pay the same, know all whom it may concern, that I hereby agree to reimburse the said Dr. Chouler whatever disbursements should be incurred by him to obtain the money necessary to make up the deficiency of what I may have to advance towards the payment of the

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said three *notes; and I further agree that the assignment of mortgage bond and judgment, agreed by Mr. Fiddy to be made to me or such person as I shall nominate, be made to the said Dr. Chouler, for his indemnification in the premises. Dec. 8, 1797." (Signed,) "Ann Lockwood."

On the 8th March, 1798, Smith took the benefit of the insolvent debtor's act, and in his schedule which contains but little property, inserted the house and lot as under mortgage to William Fiddy and Ann Lockwood. The mortgage to Ann Lockwood is dated in 1796, and was recorded in the same year. Fiddy having received payment of the balance of the debt due to him by Smith, the notes which Dr. Chouler had given for this balance having been taken up by him, assigned to him, Dr. Chouler, Smith's bonds, mortgages and judgment by deed, dated on the 9th of May, 1799, and recorded on the 10th of July following. The four notes given by Dr. Chouler amounted, according to a statement in Fiddy's hand writing, to £506 8s. 9d. It was stated by the complainant's counsel, and assented to by the counsel for the defendants, that Fiddy had been absent from this country, and that it was after his return from the West-Indies he executed the deed dated 9th May, 1799. The examinations in writing of Judge Johnson and Mr. Booth were read, and Mr. Marshal and Mr. Lowe examined as witnesses. Mr. Booth having mentioned in his examination a book of Dr. Chouler, a long shop or day-book, one of Chouler's executors, who was in Court, and whose declaration the defendant's solicitor agreed to receive, said that he had come into possession of all Dr. Chouler's books, and that there was not among them any one of the description mentioned by the witness. Mr. Neilson, a witness on the part of the complainants, said that in 1799 or 1800, Fiddy went into the Clerk's office, to enter up satisfaction, but notice having been given not to enter it, Mr. Drayton refused to do it. That after Smith's failure, Ann Lockwood signed Ann Lockwood although she went by the name of Ann Smith. Mr. Marshal, ven-

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due master, says that *in 1797, Smith was a man of credit, had a store of goods, and that Booth trusted him. Witness sold the house by order of Mr. Booth on the 11th of September, 1800.—Ann Lockwood bought it and refused to comply with the terms of sale: it was afterwards resold. Judge Johnson says he has but an indistinct recollection of the transactions, stated in the interrogatories put to him; that Chouler told him he knew Ann Lockwood and Ann Smith to be the same person. Mr. Booth says that soon after Smith was admitted to the benefit of the insolvent debtor's act, he had a conversation with the late Dr. Chouler in relation to the claim in dispute; that Chouler shewed him a long shop or day-book containing an account of the transaction relating to the notes; that he acknowledged to have received monies at different times which

amounted to the extinguishment of three of the notes; that the witness offered to pay the note said by Chouler to be due with simple interest; that Chouler refused to receive payment, saying that he had paid five per cent. for money he had lent to Smith; that the claim of Chouler was not rendered to the assignees until March, 1804, nor until the assignees advertised a dividend; that Fiddy executed satisfaction in due form of law on his judgment against Smith prior to the month of May, 1799; that the Clerk would not enter it on account of a notice from Mr. Pringle, defendant's attorney, forbidding him to make the entry; that Chouler has not uniformly claimed the same sum of money; that Lowe was present with him at Chouler's house, when Chouler shewed him the book mentioned, and said he had received sundry monies to pay the notes given by him to William Fiddy. Lowe being examined, says he recollects having been at Chouler's house with Mr. Booth, but recollects nothing of the book or the conversation said to have passed respecting the three notes. Chouler received the judgment he obtained from Fiddy and sold the house under it on the 7th of January, 1800, and bought it himself. The sheriff refused to make him titles: a rule was served on him to shew

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cause *why he did not make them: the rule was dismissed. The assignees of Smith brought an action against Moret to try titles to the house; Moret held under Chouler and vouched him; a verdict was given in favor of the plaintiffs; on the 31st of January, 1804, the assignees recovered rent for the house from Chouler; Chouler had been put into possession of the house by Smith; had let it to Moret and received rent from him, which he had afterwards to pay over to the assignees. The complainants claim reimbursement of their testator's notes with interest, and also certain sums expended in building a kitchen, and repairs laid out on the mortgaged premises during the time they were in the possession of their testator.

It is contended on the part of the defendant, that the complainants are not entitled to any thing. That the agreement between Fiddy and Ann Smith, is fraudulent and void, it having been entered into with the privity of the complainants' testator for the purpose of defrauding the creditors of Smith. That admitting the fairness and validity of this agreement, Ann Lockwood, alias Ann Smith had no right, being a feme covert, to direct or appoint the execution of the agreement to be made to the complainants' testator. That Fiddy having previous to May, 1799, received full satisfaction of the judgment obtained by him in 1797, the house and lot vested in 1798 in Smith's assignees; and could not be affected by the subsequent assignment of Fiddy; that Chouler's claim was not rendered in due time to the assignees and is therefore barred. That the question of fraud or no fraud has been already before a court of common law and there decided.

THE COURT thinks it immaterial to enquire into the character of the transaction between Ann Smith alias Ann Lockwood and John H. Smith, or whether she was or was not his wife. Mrs. Lockwood or Smith took the deed of assignment from Fiddy, with a view it is stated, to save a sum of money

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which she says he owed her. It *is admitted that she did. If Chouler really knew Ann Lockwood to be Ann Smith and that she was the wife of Smith, it would not follow that he should lose any sums of money advanced on the bona fide debt due by Smith to Fiddy, and assigned by Fiddy to him: If Fiddy had not assigned his debt, would he not be entitled to the payment of it? Chouler is his assignee, and as such entitled to all the rights Fiddy would have had under the mortgage, if no assignment of it had been made. Chouler advanced money, or gave his notes which he afterwards took up, which is the same thing, on the security of the mortgage to Fiddy. The notes were paid before satisfaction was given by Fiddy of the judgment on the bonds secured by the mortgage. Having received payment of the notes, Fiddy had no right afterwards to execute satisfaction on the judgment. Shall this tortious act, done probably at the instance of the assignees, or one of them (for Mr. Booth says that the satisfaction executed was left by him in the clerk's office to be entered) enure to their benefit? The notes were given in 1797 at short dates: The assignment from Fiddy to Chouler, made in conformity with the deed of assignment from Fiddy to Ann Lockwood, was not executed until May, 1799; but the notes had been paid long before. The moment they were paid, Chouler could in this court have compelled Fiddy to assign the mortgage; he had then an equitable lien on it. It was probably owing to Fiddy's being out of the state that this assignment was not made sooner. The assignees of Smith knew in 1798, shortly after Smith swore off, of Chouler's claim. Mr. Booth's answer to the 2d interrogatory, shews this: He says too that at this time, Chouler acknowledged to him that three of the four notes given by him had been extinguished by monies received from Smith or Ann Lockwood. Mr. Booth's testimony was not taken until the 23d of February 1809, it cannot therefore be so much relied on as if it had been taken earlier. Lowe who is said to have been present when this acknowledgment was made by Chouler, recollects nothing of it, nor of the

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*book. The declaration of Chouler's executor (which was agreed to be received as evidence, by the counsel for the defendants) that he did not find such a book as the one men-

tioned by the witness among the books of his testator; the acknowledgment in the hand writing of Fiddy of his having received payment of Chouler's notes from himself; the claim Chouler has preferred to a certain sum exceeding that mentioned by the witness, and which does not appear to have varied except when he received monies from Moret and had afterwards to pay them over to the assignees; are circumstances which will not justify the court on the testimony of a single witness, under the circumstances attending it, in imputing fraud to a transaction which took place so many years ago. If Chouler received the monies he took up his notes with, from Smith or Mrs. Lockwood, it has not been proved.

Let it be referred to the master to report the sums paid by Chouler upon the debt to Fiddy, and the sums expended in building the kitchen and in necessary repairs. The sum of £264 3s. 4d. is not to be brought into the account.

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3 Desaus. 18

Case V.

ANN HUGER and Others, Executrix and Executors of JOHN HUGER, Deceased, v. DANIEL HUGER and Others, Devisees of John Huger.

[Tried before Chancellor Desaussure, Circuit Court of Equity, Charleston, November, 1809.]

[*Infants* ⊂⊃33.]

The Court will authorize a change of the property of minors, when it is for their benefit.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 66; Dec. Dig. ⊂⊃33.]

[This case is also cited in Threewits v. Threewits, 4 Desaus. 571, as an example of the rule that equity will take jurisdiction of all cases where no adequate remedy at law exists.]

This is an application to the Court to sanction an arrangement desired by all the members of the family, who are of competent age to form a correct judgment of their interests, and to express their assent. The arrangement desired is, that the assessment made by the appraisers of the real estate of the late

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Mr. John Huger, *conformably to his last will, by which the son Daniel is directed to pay the sum of £3467 to his brother Benjamin, in order to equalize his real estate to his brothers, should be settled by an allotment of part of the tract of land called the Hagan, devised to Daniel Huger. Many facts have been stated and agreed to by the parties, which shew clearly that it would be highly oppressive upon Daniel to raise the money in any other way; that his personal estate is moderate, and the crops small, so that he could not possibly work out the debt; and that a too strict or literal adherence to the words of the will might defeat the beneficent intentions of the testator towards his eldest son. The Court is satisfied by the facts stated and the arguments founded on them, that it would be highly beneficial to the son Daniel to sanction the family arrangement, by which he is to be permitted to pay the assessment to Benjamin, by conveying to him part of the land; and the Court is highly desirous, as it always is, to support family arrangements which tend not only to benefit the interests of the parties, but to introduce or preserve harmony in the family; but this inclination must be regulated by the rules of law. Upon examining the will of the late Mr. John Huger, there appear to be some difficulties, which may be removed, but which it is proper to state, that it may appear hereafter, (more especially as the decree in this case must be nisi) that they were considered. The first difficulty is that the land called the Hagan, is not devised to the son Daniel in fee, but merely for his natural life, and at his death to the heir or heirs of his body lawfully begotten. If Daniel should be considered to hold a mere life estate, it would be impossible for the Court, and illusory to the son Benjamin, to decree that Daniel should convey any part of the land in fee simple; but by a series of well considered cases, beginning with Shelly's case, scarcely ever doubted, (and questioned only in a few other decided cases, which themselves have been held to be anomalous,) it has been settled that "Where the ancestor takes an estate of freehold either mediate or im-

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*mediate, to his heirs, or the heirs of his body, the word heirs is a word of limitation and not of purchase;" consequently the estate in fee, or fee tail, (according to the words used) rests in the ancestor, (see Fearne on conting. remain. & ex. devises, 103,) and this is the case, whether the estate arises under a deed or a will, (see same author, p. 123.) By applying this rule to the devise to Mr. Daniel Huger, it will appear that notwithstanding the devise is for life, yet the superadded words of limitation to the heirs of his body, vests in him a fee, not indeed a fee simple, but a fee conditional at common law; and as such, tenant can defeat the interest of his children, by alienating the same after he has issue; and as Mr. Daniel Huger has issue, and he consents to make a conveyance, it appears to the Court that this objection does not stand in the way of the desired family arrangement.

The next question which arises is, whether the contingent limitation of the Hagan plantation to the next eldest son of the testator and his heirs, in case of Daniel's death without leaving lawful heirs of his body; and whether the subsequent limitation to the two younger sons or the survivors of them, in case both Daniel and John should die without issue, presents any insuperable difficulty

in this case; and certainly the Court would have been very much embarrassed, if Mr. John Huger and Mr. Alfred Huger, had not in a liberal manner, well calculated to lay the foundation of a lasting friendship between all the brothers (which is so earnestly recommended by the testator to his sons) proffered to release their contingent rights in the Hagan tract under the will. By this offer, which forms part of their answer, the Court is relieved from the necessity of being astute to remove the difficulties. The contingent interest of Benjamin himself cannot stand in the way of the arrangement, because that interest is very remote, and because the family arrangement is intended to vest part of the very land in him, in fee simple.

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*The next question is of less difficulty.—It is whether the Court can, and if it can, whether it will, under the circumstances of this case, authorise the investment of the sum assessed, to be paid by Daniel Huger to his brother Benjamin, in the purchase of part of the Hagan tract of land. The Court has no doubt that it possesses the power to sanction such investment. The reason and necessity of the thing requires the exercise of this power for the benefit of minors, otherwise they would suffer very materially; and the decided cases shew the constant exercise of this power in proper cases, (see the cases of Winchelsea v. Norcliff, 1 Vern. 436, and Inwood v. Turner, in Ambler, 419,) and there is less reason for hesitating in this country, than in England; for there the chief reason for reluctance on the part of the Court, was, that by changing the nature of the minor's estate, from real to personal, or from personal to real, the rights of third persons, who might be entitled in case of the death of the minor, would be materially affected, as landed and personal property go in very different channels. But in this country, both species of property go to the same persons precisely. The interference of this Court therefore, by sanctioning changes, will not vary the rights of the parties who may be interested.

If Mr. Daniel Huger actually paid the assessment in money, the only question would be, which is the most beneficial method of investing it for the benefit of Benjamin? That is substantially the question now; and from the representations of the family, and from the petition of the guardian, I have no doubt that it will be to his interest to invest the amount, in the purchase of part of the Hagan tract; but as it is the course of the Court to refer such questions to the master, let it be referred to the master to enquire and report whether it is for the interest of the minor that the money to arise from the assessments in bill and petition mentioned, be invested in the purchase of the land and stock in bill mentioned, and at what price; and that in so doing he cause the

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fa*mily of the testator and the executors to appear before him, and that he do report thereon, and also what conveyances may be made thereupon. Upon the coming in of his report, if the same be favorable to the purchase, the Court will make a decree conformably to the principles above laid down, reserving the rights of the minor to come in within six months after he attains twenty-one years of age, to shew cause against the decree.

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3 Desaus. 22

Case VI.

JOHN STAPLETON and Wife, and THOMAS C. VANDERHORST and Wife, and the Children of the said Catherine Who are Minors, v. B. LANGSTAFF, Trustee and Executor under the Will of John Beale.

[Tried before Chancellor Desaussure, Circuit Court of Equity, Charleston, November 9, 1809.]

[*Infants* ⟸33.]

The Court will authorise sales of Estates in which minors have an interest, when for their benefit.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 66; Dec. Dig. ⟸33.]

This is an application to the Court, on two distinct subjects: First, To raise pecuniary legacies bequeathed by the late Othniel Beale to his grand-daughters Catherine Beale and Mary Hannah Beale, the only children of his son John Beale, whom, with others long since dead, he nominates his executors, and to whom and his daughter Mrs. Bull he devised and bequeathed his estate. It appears that the executor John Beale, who qualified on the will and took possession of the estates of the testator, did not place out the legacies to interest, as directed by his father's will, but hath died without paying one shilling thereof. There can therefore be no difficulty in decreeing that these legacies be raised. Let it therefore be referred to the master to state the amount of said legacies, calculated according to the directions in the will.

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*The second object of the present bill is to obtain a sale of the real and personal estates whereof the late John Beale was seized and possessed, and which he devised and bequeathed as follows: "I will that the whole of my estate real and personal (except the following legacies) be disposed of in the manner following, to wit: to Joseph Manigault, F. C. Mey and Benjamin Langstaff, their heirs, executors, administrators and assigns, and the survivor or survivors of them, in trust, nevertheless to receive the rents and profits of said estate, to and for the sole use and benefit of my two daughters Catherine Stapleton and Mary Hannah Vanderhorst,

and their children respectively, to be equally divided between the said Catherine and Mary Hannah; and with this further trust, that in case the said Mary Hannah Vanderhorst should die, leaving no issue living at the time of her death, then the whole of said rents and profits, to go and enure to the sole use and behoof of the said Catherine Stapleton, her heirs and assigns forever."

It is alleged that the bulk of the estate left by the said John Beale is real estate, consisting of a wharf and house in the city and uncultivated lands in the country, all of which are very unproductive; and the wharf and houses are in a ruinous state, and require very considerable repairs and improvements to make them productive; which from the trifling amount of the personal estate, and from the peculiar arrangements of his will, cannot easily be accomplished, if at all. And the trustee in his answer admits the truth of these allegations, and all parties interested and competent to judge concur in desiring a sale of the estate. Upon a reference to the master, he has reported that the allegations are correct and that the interests of all concerned would be greatly promoted by a sale of the estates and by investing the proceeds, as the money may be paid in, in other more productive property.

THE COURT therefore can have no doubt as to the facts. The only difficulty is that the children of Mrs. Catharine Stapleton are said to have certain rights in the property, of which the Court will be tender. I am

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*not however sure that under the words of the will, the children have any estate, independent of the mother's rights. The will devises the estate in trust for the two daughters of the testator, and their children, to be equally divided between the said two daughters Catharine and Mary Hannah; and in case of the death of Mary Hannah without issue, then in trust for Catharine and her heirs and assigns for ever. These words might be construed to be words of limitation and not of purchase, and then the estates vest in the mothers. But as this question has not been made, and as in fact it is a doubtful construction, I will not decide wholly on that ground. The objection usually made to the Court ordering such sales is that it changes the property from real estate, which is solid and more durable, to personal, which is more fleeting and subject to more casualties. This objection is certainly entitled to great weight and will influence the court to forbear the exercise of its authority, (which it seems by a search for precedents has been exercised in a multitude of cases of this sort) unless it be made manifest that the real estate is very unproductive and that there are no means of improving it; and that the sale of it would be greatly beneficial; and that the parties interested, who are of sufficient age to form a judgment, all desire the sale. All these circumstances concur in this case, and therefore I will not refuse to sanction the application; more especially as the great objection which exists in England against the change of property from real to personal, or vice versa, does not apply here; for there the court is reluctant to make the change, because, as these two species of property go in very different channels, the rights of parties may be very materially affected by the change, whereas real and personal estates go, by our laws, in the same channels. Let the master's report therefore be confirmed. And it is hereby ordered and decreed, that the master do sell at public auction, on the 22d January next, or the first convenient day thereafter, the Wharf called Beale's Wharf, together with all the stores

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thereon, after dividing the *wharf into convenient lots, on the following terms: 5 per cent. cash on the purchase money, and the remainder on a credit of 1, 2, 3, 4, 5, 6, and 7 years, with a mortgage of the property, and personal security, if the latter be required by the executor and trustee. The tenements on the bay, and the remainder of the real estate of John and Oth. Beale to be sold on the same day by the master on the following terms, viz. 10 per cent. cash, and the remainder on a credit of 1, 2 and 3 years, with mortgage and personal security. The bonds in all the above cases, to state in the body thereof, that the same are payable to the executor and trustee for the use and benefit of Catharine Stapleton and Mary H. Vanderhorst. And it is further ordered that the master do report at the next court on said sales. And that after satisfying the debts and legacies, the said master shall also report on the same, and state the balance of bonds and monies in the hands of the said executor and trustee, and ask the direction of the court as to the investment thereof, to be held to the same uses, and for the benefit of the persons to whom the same were directed by the will of J. Beale.

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3 Desaus. 25

Case VI.

EDWARD MATHEWS and Wife, Executrix of ISAAC TEASDALE, v. PIERRE DRAGAUD and Others.

[Tried before Chancellor Desaussure, Circuit Court of Equity, Charleston, November 9, 1809.]

[*Trusts* ⟸198, 277.]

Trustee cannot buy up securities for his own profit, but may take mortgage for money advanced, or incumbrances paid off.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 258, 396; Dec. Dig. ⟸198, 277.]

Some testimony was given in this case relative to the former and present value of

the premises in question. But it is not material in the view which I have taken of the subject, to detail it.

It is contended on the part of the complainants, that the late Mr. Isaac Teasdale, having taken up the incumbrances on the land, was a fair purchaser, for a consideration equal in value to the premises, including the money paid to Mrs. Dragaud. And that Mrs. Dragaud (now Mrs. Abrahams) as-

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signed all her rights and her chil*dren's, in the premises, to him. That the deed from Dragaud, in favor of his wife and children, was only a mortgage to secure £500 and that if she was satisfied in that or any less sum, she had a right to assign their interests. And having upon the receipt of £100 actually assigned all their interests to Isaac Teasdale, this was equivalent to a release of the equity of redemption; and therefore that his representatives are entitled to a decree, barring the equity of redemption and quieting the complainant in possession of the premises. Or at any rate, that they are entitled to a foreclosure in the usual way by a sale on credit to raise money to pay off the mortgage, which he took up and has an assignment of; and finally that if the Court ordered an account, an allowance should be made to Teasdale for the buildings he put up.

The first ground is opposed on these principles: that Mr. Teasdale was a trustee and availed himself of the confidence reposed in him, to obtain from this unfortunate woman, abandoned by her husband, an assignment of her own and her children's interests in the premises, on the payment of a small sum of money far below the value; that this is a fraud which is more atrocious in a trustee, and will be discountenanced by the court, more especially as the assignment by Madame Dragaud attempted to transfer the rights of her children as well as her own.

The demand of a foreclosure, in the ordinary way, is also resisted on the ground that the trustee had no right to purchase outstanding incumbrances; and that such purchase should enure to the benefit of the cestui que trust. And that if the court should deem it necessary to order an account, Isaac Teasdale who has had the possession of the premises from 1800, should be obliged to account for the rents and profits, or for a reasonable rent as an offset against the demands of complainants.

I am not inclined to think that the late Mr. Teasdale intended a fraud on the defendant, Mrs. Dragaud. He appears to have advanced her money when her husband

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*abandoned her and to have paid as far as comes to our knowledge a full price for the mortgage and judgments which bound the land. And if he had not done so, but had suffered them to have been enforced, the land must long since have been sold, probably to a total loss to Mrs. Dragaud and her children. His forbearance in this respect, as well as his general character, entitle him to protection from the imputation of fraud. He doubtless believed that the money he paid on the bonds and notes secured by mortgage, and the sum he advanced to her was the fair value of the premises, and that he did right in taking the assignment from Mrs. Dragaud as a just indemnity. But whilst I acquit him of any positive fraudulent intent, I cannot forget that wise and provident jealousy with which this Court always watches the conduct of trustees, especially where helpless women and children are concerned; and I must say that I think Mr. Teasdale went too far in his anxiety to be secured, when he took an assignment from Mrs. Dragaud which went to renounce the interests and rights of her children. She had no power to do this, and he was indiscreet, to say the least, in urging her to an act which might strip them of their possibility of advantage in the premises. It was said in argument that this was only a mortgage of the premises to secure £500 to her and her children, and that if she upon the receipt of £100 was satisfied to make such renunciation, she was at liberty to do so, under the proviso of the deed. Doubtless it had the form of a mortgage; but the court will look at the substance. It was intended as a provision for herself and her children; and she was not at liberty to renounce their interests without an actual satisfaction to the amount of the sum stipulated in the deed, which might be invested for their benefit. If from the pressure of the incumbrances she was prevented from obtaining that sum, she should have held her hand, and not attempted to have taken away the only chance of relief left them, from the increasing value of the land. I cannot therefore give effect to the deed or assignment of Mrs. Dragaud as a release of the equity of redemption.

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*The complainant next claims a foreclosure of the equity of redemption in the usual way, by sale on credit, to raise money to pay off the mortgage paid by Mr. Teasdale and assigned to him by Mylne and Stoops. It is objected to this that he as trustee, had no right to become the purchaser of incumbrances on the trust estate, and such purchases enure to the benefit of the cestui que trust. The rule is that if a trustee buys up incumbrances at an under price, the cestui que use shall have the benefit of the purchase. But it has never been pretended that the trustee was not entitled to be reimbursed what he paid. In this case it does not appear to the Court that the late Mr. Teasdale gave less than the actual amount of the sums due on the face of the bond, notes and mortgage, and it is probable his forbearance in not enforcing them, saved the estate. His representatives are therefore entitled to a

foreclosure. This brings it to the common case of a mortgage, where the mortgagee has been in possession.

It must be referred to the master to enquire and report what is due to the representatives of Mr. Teasdale on the bond and notes taken up by him, and interest thereon; also the advances made by Mr. Teasdale to Mrs. Dragaud and interest thereon; and that the master should enquire and report what is the present reasonable value of the buildings put up by Mr. Teasdale on the premises. That on the other hand the master report what reasonable rent should be allowed by Mr. Teasdale's representatives for the premises from the time they came into his possession, allowing interest thereon from the end of each year.

Cheves, solicitor for complainant.
W. L. Smith, for defendant.

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3 Desaus. *29

***Case VII.**

Surviving Executors of Colonel BARNARD ELLIOTT v. JOHN DRAYTON, Trustee for the Children of Glen Drayton, THOMAS DRAYTON, Administrator of Glen Drayton, and ED. LYNAH, Adm'r of B. Elliott.

[Tried before Chancellor Desaussure, Circuit Court of Equity, Charleston, November, 1809.]

[*Wills* ⇐847.]

The Court will stay proceedings till all necessary parties are brought before the court.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2161; Dec. Dig. ⇐847.]

[*Wills* ⇐872.]

Executors must be called on to account before legatees can be forced to pay creditors.

[Ed. Note.—Cited in Gregory's Ex'rs v. Forrester, 1 McCord, Eq. 325; Trescot v. Trescot, Id., 453.

For other cases, see Wills, Cent. Dig. §§ 2221, 2223-2225; Dec. Dig. ⇐872.]

The bill was filed by the executors of Colonel Barnard Elliott, to oblige the defendants to pay a debt due by the late Samuel Elliott to George Somers, in which Colonel B. Elliott had been joined as security in the year 1771; and which debt his representatives had been obliged by suit to pay since the revolutionary war.

The defendants admitted the statement in the bill; but insisted that the complainants were not entitled to reimbursement from them, until they had made the representatives of the executors of Samuel Elliott parties to the suit, and endeavored to recover from them. The facts appeared to be, that upon the death of Mr. Samuel Elliott, the testator, in 1777, Colonel B. Elliott himself and Mr. Benjamin Elliott qualified as executors of his will and took possession of his estate. By his will he subjected his estate to the payment of his debts, and devised and bequeathed the remainder among his widow and three children, Thomas, Benjamin and Eliza. Col. B. Elliott died in 1778. The other executor, Benjamin Elliott, continued to act, and divided the estate, soon after the war, among the widow and children, according to their respective proportions, without, as is alleged, having paid all the debts. The executor, Benjamin Elliott, died in 1786. Thomas Elliott, the son of testator, died insolvent. The widow (who was not an executrix,) took a bond and mortgage from her other son Benjamin, and another from Glen Drayton (who had married the daughter Eliza) for the payment of a debt due to her by her son Benjamin, and to pay outstanding debts of her husband, the testator Sam-

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uel Elliott. The *widow afterwards died, having first bequeathed her proportion of the estate to John Drayton, in trust for her grand children, the children of Mrs. Glen Drayton. Benjamin Elliott the son is since dead, nearly or wholly insolvent, and Dr. Lynah is his administrator, with a small fund in his hands. Glen Drayton is dead insolvent; but part of the mortgaged negroes remain in the hands of the trustees for his children; and the object of the bill is more particularly to make them liable to reimburse the estate of Col. B. Elliott, the amount of the debt of Samuel Elliott, paid by his executors. The defendants insisted that the representatives of Benjamin Elliott, the executor, should be made parties to the suit, and accountable for the estate of that testator; that it was not probable he would have divided the estate, without paying the debts, or reserving funds to pay them; that it would be very hard on legatees and distributees of an estate, among whom a division of the estate had been voluntarily made by the executors, to be made accountable to creditors, without their resorting to the executors; that the legatees were ignorant of the affairs of the estate; they had no vouchers and could not set up the defence of entire or partial payments, or any other defence which executors might do; that the presumption was the executors had either paid the debts, or had reserved funds to do so, before they made a division: They therefore insisted that though ultimately liable, to the extent of the funds of the estate in their hands, they were entitled to have the executors made parties to the suit, to defend the estate, before they should be compelled to pay the demand, more especially after so great a lapse of time.

After full argument, the Court was of that opinion, and decreed that the complainant be directed to make the representatives of Benjamin Elliott, the executor of Samuel Elliott, defendants in this case; and that the present proceedings be stayed until that is done; that the representatives of Col. Barnard Elliott, the other executor, being

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already before the Court (in the charac*ter of complainants) the enquiry of assets of the estate in his hands, should be made at the same time.

W. L. Smith, solicitor for complainant.
Parker, Pringle and Ford, for defendants.

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3 Desaus. 31

Case VIII.

Rev. MILWARD POGSON and Wife v. JOHN OWEN, W. L. SMITH and Wife, and Miss ELIZABETH WRAGG.

[Tried before Chancellor Desaussure, Circuit Court of Equity, Charleston, Nov., 1809.]

[*Equity* ⇐111.]

One coparcener files a bill against the agent of the estate, for an account; and against the other coparceners, requiring them to answer whether they had not refused to join in the suit. Demurrers were put in, and overruled.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 274; Dec. Dig. ⇐111.]

[*Equity* ⇐315]

[An answer, in support of a demurrer, denying combination, should be under oath.]

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 617; Dec. Dig. ⇐315.]

The bill sets forth that the three Miss Wraggs, one of whom has intermarried with Mr. Pogson and another with Mr. Smith, were coparceners in a considerable estate, consisting of lands, negroes, debts due to them, &c. That before the intermarriage of the said ladies, and since, Mr. Owen was employed as the factor of the estate, received the crops and sold them and received the money, and also recovered part of the debts due, and hath appropriated and laid out part of the monies thence arising to the use of the parties interested. But that these appropriations and payments fall far short of the monies received by him.

The bill further states that the complainants have requested the said John Owen to render a fair and full account, charging them with their share of the payments or appropriations made by him and to pay over to complainants whatever balance may be due to them, which he has refused to do. That complainants have applied to Mr. Smith and his wife, and to Miss Wragg, to become parties in this suit and join them in the prosecution of their suit; but they have refused to do so. The bill therefore prays that Mr. Owen may be decreed to render a full account, and to pay to complainants what may appear to be justly due them. To this bill Mr. Owen has demurred, and for cause of demurrer sets forth that it appears

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by the bill itself that the complainants *Mrs. Pogson and Miss Wragg and Mrs. Smith are coparceners in the estate in question, and jointly employed the defendant to sell and dispose of the crops, and collect the money due to the estate. And that complainants at the time of filing their bill had no separate interest in said crops or choses in action; but a joint and undivided interest with the other coparceners: and that the said J. Owen accepted the agency for all the coparceners and not for the complainants alone; therefore the defendant demurs for want of parties as complainants, and he denies combination with the other defendants. Mr. and Mrs. Smith and Miss Wragg, also demurred to the bill and for cause of demurrer set forth, that there is nothing in said bill contained sufficient to call them into this court for the same, in as much as defendants have an adequate remedy by a different and appropriate bill, for the severance of the joint and several interests; and because the present bill is inadequate to bring all the matters in dispute before the Court, so as to enable it to decide fully upon the rights of all the parties, and to answer the purposes of complete justice; and because these defendants would be deprived of the benefit of any set off against the complainants; and because the bill has united as defendants persons in opposite interests; and because distinct and independent subjects are blended and confounded in the said bill, and several matters of different natures demanded against different defendants; and because in respect to the subject of the bill, there is no privity between the complainants and defendants, the defendants not being agents of, or accountable to complainants, but are only answerable in a bill for a severance of their joint interests as co-heiresses to which bill they might set off any discounts; and because these defendants are not liable to complainants' demands; and because complainants have not a complete title to institute a suit in relation to the subject matter set forth and claimed by their bill, the same being settled on trustees who ought to be parties as complainants; and these defendants deny combination with J. Owen.

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*I have considered this case and the authorities cited by the counsel on the argument. It certainly is not clear of difficulties, for the cases and rules of pleading do not favor suits brought by one of several persons equally and jointly interested. When we examine the reason of this, it is principally (as was properly stated by the complainant's counsel) to protect the defendant from being harrassed by as many suits as there are parties interested jointly; and also to prevent one coparcener filing a bill in his own name, perhaps clandestinely, against the joint agent, and obtaining a settlement for more than is due to him, to the prejudice of his coparceners. But when some of the parties interested will not unite in the suit, shall it be in their power to prevent their coparcener

from obtaining justice—nay, from proceeding to ask justice? I think not. It would be converting what was intended as a shield to protect the rights of some parties, into a sword to destroy the rights of others.

The bill states, and demurrer admits, that the complainants requested Mr. & Mrs. Smith and Miss Wragg, to join in this suit, but they refused: nor could the complainants oblige them to do so. But it is argued they might have a summons and severance of their rights and interests, and then a suit might be instituted without the concurrence of the other coparceners. Several answers might be given to this argument. It is doubtful (as the counsel candidly stated) whether such severance of the estate would affect the crops, the profits, in the hands of J. Owen, which came into his hands a joint estate and remains joint. Then the obstinacy of one of the parties interested might for ever debar the others of their just rights. This I cannot admit. And if it be conceded that by the summons and severance followed by the judgment, the party seeking it, may sue alone, this would shew that the right of the defendant to be protected from several suits for the same matter, yields to the higher claims of substantial justice. Now I deem the avowed refusal of one coparcener to join his companion in a suit against their joint

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agent, as *equivalent in this Court to a summons and severance at law. This Court which looks to substance and not to form, will consider that done, which ought to be done, and proceed accordingly to do justice, rather than turn the parties round and shut the doors of Justice against them. This Court will be astute to prevent such manifest injustice. Lord Hardwicke was of this opinion in the case of Seymour v. Bennet, and al. 2 Atk. p. 482, where he said he would do in the case then before him, as in a partition case, where there are parceners in an advowson who could not agree in the nomination of one person; the Court will direct the parceners to draw lots, who shall have the first presentation; the only remedy for the evil.

What is the object of this summons and severance? Lord Hardwicke states it clearly in the case of Darwent v. Walton, in 2 Atk. 510. He says, what is the method of proceeding at law, in case of a joint demand, if one of the creditors will not join in the action? He is summoned and severed. If he will not proceed jointly after summons and severance, then the other creditor has judgment quod sequatur solus. The object of this proceeding at law is to establish that one of the joint creditors will not join in the suit. A formal mode is prescribed to obtain that knowledge at law. Here the bill alleges that the complainants applied to their coparcenors to join with them in the suit, and that they refused. The demurrer admits this fact. It is then established. And can this Court, with that knowledge, now forming part of the record, turn the complainant round and say to him, It is true you may have just demands, and the defendants admit them, by their demurrers, but you cannot have any remedy, because your coparcener does not chuse to join you in the prosecution of your claims? I cannot bring my mind to hold that language to the suitors in this Court. Nor is there any good reason why the Court should lean in favor of these demurrers. What injustice can result to Mr. Owen from going into an account of his

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agency and stating his receipts and his *expenditures, and paying to complainants their proportion of the balance, charged by complainants to be in his hands, and admitted to be so by his demurrer? None can arise to him. He will have all just allowances before the master. What injury can result to the coparceners who refuse to join in the suit? None that I can perceive; and if any should result, would it not be from their own refusal to join in the suit? But it is said they might be deprived of the benefit of any discounts or demands which they might have against the complainants. That is, they wish to introduce other matters depending between the coparceners themselves, into this bill against the agent, filed to procure a settlement of his accounts. Surely this would be introducing various and discordant matter, standing in distinct rights, into a very plain case, and perplexing a simple demand upon a joint agent for an account, by mingling the transactions of the coparceners themselves. It seems to me that the discussion of these would be better in a distinct bill between the parties.

One of the grounds of demurrer is, that the defendants Mr. Smith and his wife and Miss Wragg are called upon and made answerable though they are not agents or accountable to complainants. This is manifestly founded in a misapprehension of the scope of the bill. The bill does not call on them for any account.—They are made defendants merely to answer to the charge that they had been requested to join in the bill and had refused; which it was necessary to do, to account for the complainant's suing alone. And no demand is made upon them by this bill, which is a simple bill against an agent for an account.

The demurrer also states that complete justice cannot be done to the parties in this suit, which is a great object to the Court. No doubt this is properly a great object with this Court. But the demurrer is founded again in misapprehension of this bill, which is not to call the coparceners to an account or settlement, but simply to have an account

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from their agent. And it would have *been a very forcible objection to the bill, if be-

sides demanding an account from their agent, it had demanded an account and general settlement with the coparceners. Upon the whole of this case, I do not think the decisions in the other cases come up to it. The complainants solicited the concurrence of their coparceners in the suit. They have refused. It would be monstrous to say in such case, the complainants can have no remedy, and that though the defendant Mr. Owen admits by his demurrer that he has money of theirs in his hands, they shall not be entitled to recover, or even to pursue their demand. For these reasons I feel obliged to overrule these demurrers. And I must add that as the defendants stand on strict pleading, they must expect the strict application of the rules of pleading to them. The defendants were aware of the necessity they were under of supporting their demurrer by an answer, so far as to deny combination. (See 1 Vernon 416—Hinde 157.) They therefore have denied combination; but they have not sworn to their answer; now as this denial formed no part of the demurrer, but is essentially an answer upon a most important point, it was necessary to be sworn to, as all other answers are to be. Not being sworn to, it is a mere nullity, speaking technically; and the demurrer stands unsupported by a regular and proper answer duly sworn to, denying combination, and the demurrer must be overruled on that ground. If the want of the names of the trustees be a defect, the Court will permit complainants to amend their bill and make the trustees parties, as is frequently done by the Court, even when the demurrer has been held good for want of parties, (Mitford, p. 146.) I feel the more satisfied with this decision, because I know that it cannot do the defendants any harm; for if upon the hearing of the case it should really appear that injustice would be done to them, or that full justice could not be done to them in this shape, it will not be too late to prevent those evils, for in equity you may take exception for want of proper parties at the

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hearing of the cause. (2 Atk. 510, *Darwent v. Walker.) On the other hand, if I sustained these demurrers, it might be shutting the doors of justice against the complainants.

Parker, for complainant.
Smith & Cheves, for defendant.

From this decree an appeal was made on the following grounds:

1st. Because one of several persons jointly interested cannot maintain a suit against a joint agent, and the refusal of his companions will not authorize such suit, not being tantamount to a severance of their joint interests.

2d. Because complainants have another more suitable remedy by bill against their copartners for severance and adjustment of their respective interests, and have no right to any specific and distinct property in the hands of the agent, until after such adjustment; and the agent may have, previously to the filing the bill, settled his accounts with a majority of the concern.

3d. Because if the bill be sustained, an agent may be harrassed with as many suits as there are copartners without being able to ascertain and liquidate the several shares or proportions claimed by the copartners to the funds in his hands; and he may thus appear a debtor to one individual partner, while he is in fact a creditor of the concern.

4th. Because serious injustice and injury might result from these separate suits to the copartners, defendants.

5th. Because the copartners, defendants cannot be parties in this suit to the settlement of accounts on a reference and may therefore be bound by the statements then produced; and yet it is just that prior to a settlement between the complainants and the joint agent, the other copartners should have an opportunity of bringing forward their demands on the joint stock, and should have a lien on the complainants' share in the hands of the agent, each separate partner having no separate interest in said stock, but only his liquidated share on a settlement of accounts with his coparceners.

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*6th. Because the decree overruling the demurrer is founded on the idea that the defendants have by their demurrer admitted that John Owen has in his hands funds exclusively belonging to complainants, which is expressly denied by protestation, and repelled by the very objects and purview of the demurrers, which are perfectly inconsistent with the idea of any such admission.

7th. Because the demurrers, though not on oath, are sufficiently good and effectual to deny combination, the same not being required to be on oath, and if they were, the complainants waived the objection and consented to admit them as good and effectual without oath; nor could an oath, without such acquiescence, be requisite, where there was no testimony on oath to disprove the answer and establish combination.

This appeal came on to be heard before the Court of Appeals, held at Charleston on the 14th of March 1810, at which were present, the Chancellors Rutledge, James, Thompson, Desaussure and Gaillard.

At the hearing, it was contended by Mr. W. L. Smith, for the appellant, that the doctrine as to joint-tenants and coparceners suing together, was the same in Equity as in the court of law; and that at law the demurrer in such case would be sustained. He cited 1 Vernon, 110, 463; Hinde's Practice, 146, 180, 223; 2 Atk. 510, 482; 3 Atk. 726; 1 P. Wms. 428; 4 Vesey, jun. 154; Watson on Partn. 96, 155, 173; 1 Salk. 32; 2 Salk.

440; 2 Hen. Black, 386; 6 T. Rep. 766; 7 T. Rep. 279.

After a full hearing, the Court of Appeals unanimously affirmed the decree of the Circuit Court.

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3 Desaus. *39

*Case IX.

WILLIAM BROADFOOT v. WILLIAM GIBSON.

WILLIAM GIBSON v. WILLIAM BROADFOOT.

[Tried before Chancellor Desaussure, Circuit Court of Equity, Charleston, Nov., 1809.]

[*Contracts* ⟸94.]

Parties agree by letter to vary their original proportions of interest in the concern. This agreement shall not be set aside, on allegation of being misled into the variation, unless there be clear proof of misrepresentation.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 420–430, 1160, 1164, 1165; Dec. Dig. ⟸94.]

This case comes on, upon cross-bills, for the settlement of accounts between two copartners. Upon mere matter of account, it is usual to make a general reference to the master. But there arises a question of the proportions to which the partners were respectively entitled. It appeared therefore to me necessary to give instructions to the master upon that point, before a reference was ordered, or he would be at a loss how to state the accounts.

By the articles of copartnership, dated the 31st July, 1801, Mr. Gibson was to furnish funds to the concern to the amount of £6000. and Mr. Broadfoot to the amount of £2000.; and Mr. Gibson was to draw two thirds of the profits, and Mr. Broadfoot one third.

On the 28th of February, 1803, Mr. Broadfoot wrote to Mr. Gibson, claiming a moiety of the profits: and Mr. Gibson, on the 20th August, 1803, answers the letter, and agrees to the proposition. Mr. Gibson now however insists that the new agreement was entered into by him under a mistake, into which he was led by the misrepresentation of Mr. Broadfoot, who had stated to him that he (Mr. G.) had not advanced as much to the capital of the company as had been agreed upon. To this Mr. Broadfoot answers, that no misrepresentation had been made; for, in fact, Mr. Gibson had not placed in the copartnership funds the proportion of capital agreed upon, whilst he (Mr. Broadfoot) had complied with the contract.

Much collateral matter, both of evidence and argument, was gone into, which I shall not notice, because unnecessary, in the view

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which I take of this question: *nor indeed is it necessary, or perhaps practicable, within reasonable limits, to state the whole of the evidence, which really had relation to the principal point. I shall notice and refer to the prominent parts of it as I proceed. On a careful examination of the two important letters above mentioned, (of 28th February and 20th August, 1803,) it does appear Mr. Broadfoot did insist upon an equality in the concern, principally though not wholly, on the ground that Mr. Gibson had not placed his stipulated proportion of capital in the funds of the company. He puts it broadly to Mr. Gibson, that he had failed in that respect generally; but he does not in that letter make any representation to Mr. Gibson of the state of his private funds in this country. Mr. Gibson in his letter answering the letter of Mr. B. at the distance of nearly six months, and after deliberately consulting with his friend, Mr. Moffat, explicitly acknowledges that he had failed in complying with his agreement;—and in doing so he makes no reference to any representation of Mr. Broadfoot, respecting the failure of his funds in this country, but attributes his incapacity to comply with the terms to the enormous losses he had sustained, by the ill conduct of the Johnsons. He declares himself perfectly sensible of the justice of Mr. Broadfoot's demand, and willingly consents that he should enjoy half the profits of the concern, and to be subject to half the losses.

It is of very great consequence to remark here, that Mr. Gibson, who received regular accounts of the copartnership transactions, and transmitted regularly the accounts, acted upon the basis of a mutual and equal interest in the concern, during the whole of the copartnership, which lasted several years. Upon this fact, a very important consideration arises. Suppose the concern had been a losing, instead of being a profitable one, Mr. Broadfoot would not have been at liberty, and Mr. G. would not in all probability, have been willing to have limited his proportion of loss to one-third. Is it equitable then that Mr. Gibson should be at liberty to wait

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*events, and to admit or reject the equality of interest according to circumstances? I think not. It would require a very strong case to be made out, of great misrepresentation, evidently leading Mr. Gibson to acquiesce in the proposal of equality of interest, before I could consent to change the ground on which he voluntarily and deliberately placed himself. This leads us to the consideration of the 2d question, whether Mr. Broadfoot did make such representations to Mr. Gibson, of the state of his funds here, as were grossly erroneous, and led him to the acquiescence he so readily gave to Mr. Broadfoot's proposal?

It is agreed by both parties that Mr. Gibson left goods, inventoried on the 31st of July, 1801, at £4197 8s. 7d. in the hands of Mr. Broadfoot, and that afterwards a ship

then valued at £1000 (which afterwards when completely repaired and fitted out, sold for £2500) was put by him in the copartnership stock, and that other goods of some value, though not accurately proved, were also left with Mr. Broadfoot; all which might be said to be not a great deal short of the £6000 he was to place in the copartnership funds.

Mr. Gibson insists upon it, that he would not have relinquished the advantage he had of a superior interest (2-3) in the concern, unless he had been misled by the information which Mr. Broadfoot erroneously gave him, that the proceeds of these goods were not brought into the copartnership funds, but were expended in paying his private debts. What is the evidence that such representation was erroneous? The witnesses say there were some errors, but they were too trivial to affect this question.

Mr. O'Hear who examined the private account of Mr. Gibson, in the book kept for the purpose by Mr. Broadfoot, did it under the direction of Mr. Gibson himself; and he informs us that he could not find errors to a greater amount than $1469, and that he thinks the sum of $955, ought to be deducted, even from that sum; and that whatever er-

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rors there were, were comprehended in *the balance sheet of Mr. Gibson's account transmitted to him, in Liverpool; notwithstanding which he continued to transmit the accounts, crediting Mr. Broadfoot with a moiety of profits. Mr. Hagood proved that the private accounts had been sent on the 18th May, 1813, comprizing the transactions from July, 1801, to the 31st of Dec. 1802.

It is impossible to pursue here the great chain of evidence, without transcribing the whole of it from my notes. But after the most mature consideration which I have been able to give it does not appear to me that there was any misrepresentation or error which should induce me to set aside the agreement of the parties. The great weight of testimony establishes that Mr. Broadfoot had expended a larger sum in paying the private debts of Mr. Gibson, than the amount of his funds in this country; so much larger indeed, that if most (if not all) of the items objected to by Mr. Gibson, were conceded, still it would appear that his private funds were exhausted in the payment of his private debts; and would leave little or nothing to be carried to the copartnership fund. The great weight of testimony founded on the accounts, shews, that the annual balance of the copartnership accounts, were in favor of Mr. Broadfoot, from the beginning, and generally throughout the continuance of the copartnership, without reckoning his share of the profits.

It must be repeated that the accounts were mutually transmitted, crediting each other with a moiety of the profits. And though Mr. Gibson did complain in his letters of the obscurity of the account of his private affairs transmitted to him, and did object to some of the items, he never once hinted that his objections were of a magnitude to lead his mind to suppose himself entitled to rescind the agreement; nor has Mr. Gibson by any subsequent examination been able to shew such errors, as ought to produce that effect.

With these impressions on my mind, I cannot hesitate to say that I see nothing to induce me to believe that Mr. Broadfoot made

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such erroneous representations *of the state of the private funds of Mr. G. as should authorize a recision of the agreement under the letters; and this being my opinion I do not feel myself obliged to travel into the testimony relative to the support given to the copartnership, by the commercial friends of either party. That was a collateral question which might have been important if the mind had been left in doubt on the other point.

The conclusion to which I have been led, makes it necessary that this case should be referred to the master, to examine and report upon the accounts, on both sides; and that in making his statements he shall credit each of the partners, with a moiety of the profits, and debit him with a moiety of losses.

At the same time I feel it proper to add that I do not think my decision upon this point ought to be considered final; for though much time and pains have been bestowed upon this subject, the opportunity for examining, sifting and comparing the great mass of evidence in these causes was not so great at the trial, nor has it been since, as to authorize implicit confidence in the opinion I have formed. A more deliberate examination before the master may throw new lights on the subject. If therefore in the further process of this cause it should appear that the facts were not fully developed, or the conclusion incorrectly drawn, I consider this question still in some degree open.

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3 Desaus. 43

Case X.

M. R. C. MENUDE v. J. DELAIRE, executor of Dr. Polony.

[Tried before Chancellor Desaussure, Circuit Court of Equity, Charleston Decree, 22d Nov., 1809.]

[*Judgment* ⇐649.]

Plea in bar, overruled, as the subject did not appear to have been decided by former decree.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1161; Dec. Dig. ⇐649.]

This is a plea in bar, on the ground that the cause of action has been already decided upon by a former decree of this Court.

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*The question is within a narrow compass. If the former decree did decide upon the demand now made, then the plea must be sustained, for that decree cannot be examined by a new original bill. It must be by a bill of review, or perhaps as the Court is now constituted, by an appeal. To ascertain whether the former decree did decide on the present demand, it is necessary to resort to the decree itself. The words of it applicable to the present question, are as follow.—"And as to the one thousand dollars, another item reported by the master, which was not mentioned in the complainant's account, the Court refer her (the complainant) to her action at law." The law upon the subject is extremely clear. Mitford p. 194, 195, lays it down that pleas in bar of matters recorded, or as of record, in the Court itself, or of some other Court of equity, may be,

1. A decree or order of the Court by which the rights of the parties are already determined, or another bill for the same cause dismissed. And again a decree determining the rights of the parties, and signed and enrolled, may be pleaded (in bar) to a new bill for the same matter; for a decree enrolled can only be altered by a bill of review. But the decree must be in its nature final, or afterwards made so by order, or it will not be a bar. Upon a plea of this nature, so much of the former bill and answer must be set forth as is necessary to shew that the same point was then at issue. A decree or order dismissing a former bill for the same matter, may be pleaded in bar to a new bill. But an order of dismission is a bar only where the Court determined that the plaintiff had no title to the relief sought by this bill. These principles are illustrated by the case of Gregory v. Molesworth, cited from 3d Atkins, 626, by the defendants' counsel. It is there stated that the question is, "whether the decree is a determination of the points between the parties." And it appears from that case that if the Court did decide on the point, it will be conclusive, though the Court may not have given reasons for the determination. With these lights to

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guide us *let us examine whether the former decree, pleaded in bar, did decide the point now brought into question by the new bill. The case came before the Court upon the master's report, and upon exceptions thereto. The master had reported amongst other things in favor of the complainant's claim to $1000, charged to have been received by Dr. Polony from Mrs. Condy in trust for Mrs. Menude, and invested by him in the purchase of three negroes, who are named. The defendant's counsel excepted to the report in these words:

3d exception.—"That the master has allowed demands, particularly one for $1000, said to be received by Dr. Polony in 1792, although no notice is taken of these demands in the paper called an acknowledgment made by Dr. Polony in 1801, and confirmed in 1804, or in the account filed as an exhibit in this cause."

In decreeing upon the report and exceptions, the Court said, (as above stated) that as to the $1000, reported by the master, which was not mentioned in complainant's account, the Court refer her (complainant) to her action at law. Was this decree a decision upon the merits of the claim? I incline to think not. The point made was, that the demand was not included in complainant's account. It was therefore a surprise upon the defendant. The Court says it was not included in the account: Therefore it did not decide upon it, but referred the complainant to her suit at law. That very reference to a suit at law, shews that the Court did not decide on the merits of the claim; for if it had, it would have been final and conclusive. But we have seen from the authorities cited, that even a dismission, is not a bar, unless the Court determined that the plaintiff had no title to the relief sought; and we have also seen that the Court did not decide on the merits. It is insisted however that the referring the complainant to her suit at law is an evidence that the Court did not consider the parties entitled to relief before this tribunal, let the merits of the claim be what they might. The words will certainly bear that interpretation; but they do not

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necessarily im*port so much. For having refused to decide on the merits of the claim, because as alleged by the exceptions, the claim for these $1000 was not in the account filed, (which explained and limited complainant's demands,) the Court might suppose the demand susceptible of sufficient proof to be maintained at law, and therefore referred the party to a suit at law. But that point was not before the Court; it was sufficient for it to have pronounced that it could not make any decree on the claim, because it was not regularly before it. The addition of the words of reference to a Court of law, were superfluous and not demanded by the occasion, and do not amount to a bar, if the party should be able to substantiate the claim in a new bill really bringing the demand before the Court, which the former bill and account had not done. Instead therefore of a plea in bar to this bill, I apprehend the question now to be made is whether complainant has such plain and adequate remedy at law, as sought to preclude her from coming into this Court. But that question cannot be decided on this plea, which relies upon a former decree, deciding upon this claim, which in my opinion has not been the case. When this plea is overruled, that question may be made, and it will involve the consideration whether the money alledged to have been received by Dr. Polony was not

received by him as a trustee, and in that character invested in the purchase of negroes, which ought to be deemed the property of the complainant. But that question is not now before me. I shall not therefore undertake to decide it. The plea in bar must, however, be overruled.

W. L. Smith, for complainant.
Geddes & Cheves, for defendant.

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3 Desaus. *47

*SAMUEL WARREN, Executor of Samuel Wigfall, v. LEVI D. WIGFALL, CONSTANTIA WIGFALL, S. M. GREGOR and others.

[Tried before Chancellor Desaussure, Circuit Court of Equity, Charleston, Nov., 1809.]

[*Wills* ⇐753.]
Legacy to wife protected from contributing to the other legacies.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1941; Dec. Dig. ⇐753.]

[*Wills* ⇐756.]
A bequest of 20 negroes is specific only in the 2d degree, and liable to abate with pecuniary legacies; according to the opinion of the Court of Appeals.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1949; Dec. Dig. ⇐756.]

[*Wills* ⇐576.]
[Where a husband bequeathed to his wife all the property she brought with her at the marriage, it was *held* that a debt due the wife, before marriage, for which judgment had been recovered by the husband, belonged to the wife.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1256; Dec. Dig. ⇐576.]

[*Wills* ⇐576.]
[*Held*, also that a debt due the husband, at his decease, for a portion of the property sold by him, did not pass by the will.]

[Ed. Note.—For other cases see Wills, Cent. Dig. § 1256; Dec. Dig. ⇐576.]

The questions in this cause arose out of the will of S. Wigfall. In that will he says, "After my worldly debts are paid, I give and bequeath to my beloved wife Catharine, the whole of my estate, real and personal, during her widowhood; after which I leave her the whole property that she brought me (except two negro slaves John and Maurice) to her and her heirs for ever." He then devises to his nephew Samuel Wigfall, in fee simple, his plantation called Richland, in St. James, Santee; and to his nephew John Wigfall, his island, called Fairfield, on North Santee, and twenty negroes." The testator then bequeathed 500*l.* to Susannah M'Gregor; and the remaining part of his estate to be equally divided between the heirs of Thomas Wigfall, sen. The testator died in 1805, leaving his said last will unrevoked. But it had been executed in the presence of two witnesses only: consequently it could not pass real estate: and the testator leaving no issue, the real estate became the property of his wife and mother, under the statute of February, 1791, for the more equal division of the estates of intestates.

The residuary estate was sold by the executor, but did not produce a sum of money sufficient to pay the debts. There were many facts in the case, and some questions arising out of them not now necessary to be stated. The principal questions were,

1. Whether the property bequeathed to the wife, (to wit, what she brought the testator in marriage,) is so specific, as to be protected from abating with the pecuniary legacies? Subordinate to which arose a question, what did pass to the wife under that bequest?

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*2. Whether the bequest of twenty negro slaves to the testator's nephew, John Wigfall, was so specific as to be exempted from abating with the pecuniary legacies?

This case was fully argued in the Circuit Court, upon all the points, except the last, which was not much discussed.

The Circuit Court delivered the following decree:

The first question which arises is, whether the legacy to the wife of the testator is a specific legacy, and therefore not liable to the payment of debts till the rest of the property be exhausted. The words of the will are: "I leave her, (speaking of his wife,) the whole of the property that she brought me, (except John and Maurice,) to her and her heirs forever." Upon considering these words and the cases cited, I have no doubt that they constitute a specific bequest; and this construction is strengthened by the other circumstances of the case.—It is true that the general leaning of the Court is against considering legacies as specific, because of the consequences, as is laid down by Lord Hardwicke in the case of Ellis and Walker, Ambler 310. But if the words clearly indicate an intention to separate the particular thing bequeathed from the general property of the testator, this will make it specific and the intention shall prevail. Even pecuniary legacies may be made specific, as a bequest of a certain sum of money in a certain bag or chest, see the case of Lawson v. Stitch, 1 Atk. 508, or the bequest of a sum of money in the hands of B. see Hinton v. Pinke 1 P. Williams 540, or of £2000, the balance due to testator from his partner on the last settlement between them, provided testator did not draw it out of trade, Ellis v. Walker, Ambler 310. So a bequest of a bond or of testator's stock in a particular fund, Asburner v. Maguire, 2 Bro. Ch. Rep. 108, Aveylyn v. Ward, 1 Vesey 425; or a legacy to be paid out of the profits of a farm which testator desired to be carried on, Maquet v. Maquet, 2 Bro. Ch. R. 125, and

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*also see 2 Fonblanque 374, 5. Apply these doctrines and authorities to the bequest to the wife, and it is manifest that it is a spe-

cific legacy. "The whole of the property that she brought me," is plainly indicative of an intention to separate the thing bequeathed from the general property of the testator; and it is easy to ascertain what the wife did carry in marriage to the testator. The maxim, "id certum est quod certum reddi potest," applies decisively to this case. The circumstance too that this is a bequest to a wife, who has nothing else given to her absolutely, (for whatever else is given is only for life,) would lead the Court to lay hold of any words which would bear out the construction of the bequest being specific. It is true that the bequests to the wife, not being in lieu and bar of dower, the wife does not stand on the strong ground of a purchaser. But there is enough to constitute this bequest a specific legacy, and consequently not to abate with the other legacies. But admitting this to be specific legacy two subordinate questions arise; first, as to a sum of money due to the wife of testator, for which he had obtained a decree in his lifetime, but had not received the money. It is contended that this does not pass under the words of the bequest to the wife, or partake of the specific character of the rest of the legacy. I am however of opinion that it does pass to the wife, (unless indeed it survived to her,) as not being reduced by the husband into possession. The words of the will are as broad and comprehensive as possible. "All the property that she brought to me," by which he clearly means all the property he acquired by her in marriage; and the very terms of the proposition relative to the sum of money for which a decree was obtained by the husband, shew that it was in right of his wife. This sum of money therefore due on the decree, if it did not survive to the wife on the death of the husband without actually receiving it, clearly passed under the bequest to her. Next, as to the value of one of the negroes which belonged to the wife and was sold by testator

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in his lifetime. *It was contended on the argument of the cause that the value of this negro still unpaid, would pass to the wife under the general and comprehensive words of the will, or as the counsel well expressed it, the fund would represent the negro. At the trial I was very decidedly of opinion that the wife was not entitled to the value of the negro sold. I consider the sale of the negro equivalent to the extinction of the property even by death, and the words of the will do not say that the testator bequeaths to his wife the value of all the property she brought him, but the property itself. Now if the property is gone, how can it be carried to her under these words? Nor does the circumstance of the exception on the face of the will exclude other exceptions. The counsel ingeniously argued that as the bequest was of all the property, except two negroes who were named, all the other property, besides these two so named must pass under the will, and no other exception could be admitted. To be sure all the property remaining must pass; but that which is dead or parted with could not pass; so that this forms an exception in the nature of the thing itself. Upon the whole, I think the value of the negro sold by the testator did not pass to the wife under the words of the will.

The next question is, whether the bequest by the testator to his nephew, John Wigfall, of twenty negroes, is a specific legacy. It was argued that there was no description or specification of the negroes. That this therefore was not a specific legacy, or that at any rate the negroes of the estate would be liable to the debts before the direct specific legacy given to the wife. I am of opinion that this bequest is a specific legacy. Lord Hardwicke in the case of Purse v. Snaplin, 1 Atk. 414, 416, 417, says there are two kinds of gifts included under the description of specific legacies; 1st. When a particular chattle is specifically described and distinguished from all other things of the same kind. 2d. Something of a particular species which the executor may satisfy by delivering

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something of the same kind, *as a horse, a diamond ring, &c. The first kind may be more particularly called an individual legacy; and if the thing so bequeathed be not found among the testator's effects, it fails, &c. "The second kind is of a more liberal nature; it is a legacy consisting of quantity and number, and is not confined to the strictness of the rule," and this is certainly the law; and the bequest of 20 negroes, comes within the second kind or class of specific legacies. I presume no question can arise between these two legacies, as to any abatement for payment of debts; as it is to be hoped the funds will be sufficient to pay the debts, and leave the property intended for the wife, as well as 20 negroes for the legatee John Wigfall, the testator's nephew. If there should however be a deficiency I am of opinion that the wife must be first satisfied the whole of her legacy. The general rule certainly is that specific legacies of distinct chattles must abate proportionately among themselves, on deficiency of general assets. But I apprehend that there may be and are gradations even among them, depending partly on the nature of the legacies and partly on the intent of the testator which rides paramount over all other principles, unless in violation of some rule of law; and it is manifest the testator intended to prefer the wife.

It is therefore ordered and decreed that the property bequeathed to the wife of testator (including the sum of money decreed, and excluding the negro sold by testator) be first paid or delivered over to her representatives, if there be sufficient assetts or funds to pay

the debts of testator without resorting to them. Then that the 20 negroes bequeathed to the nephew John Wigfall, be reserved for him, as a specific legacy, unless the failure of the other funds should make it necessary to resort to them to pay debts. That the land purchased by Samuel Wigfall, from Levy Wigfall and decreed to stand mortgaged shall be sold on the terms stated below, and the proceeds applied to the payment of the debts to Mr. Grainger, who shall stand as a

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general bond creditor if *the land be deficient. If any surplus, the same to be applied to the payment of other debts. That after exhausting the residuary personal estate, the lands of the testator (the devises of which did not take effect,) be also sold, and the money arising from the sales applied so far as may be necessary to pay the debts of the testator, and next to the payment of the pecuniary legacies. Should there be any surplus from the sales of the residuary personal estate, the same to be paid over of course to the residuary legatees. Should there be any from the sales of the real estate, the same to be paid over to the mother and representatives of the wife of the testator as heirs. And it is further ordered that the minor, A. W. Garden, shall have six months after his attainment of the age of twenty-one years to shew cause against this decree. It is also ordered that the costs of this suit be paid out of the estate generally.

From this decree of the Circuit Court the defendant, S. M'Gregor, appealed, on the ground "That the legacy of twenty negro slaves bequeathed to John Wigfall, is not a specific legacy, otherwise than as distinguished from a residuary bequest, and therefore is liable to be abated in average and proportion, in case of the insolvency of the estate, with the pecuniary legacy of 500*l.* to Susannah M'Gregor.

The appeal on this point came on to be heard before the Court of Appeals, on 17th March, 1810, before the Chancellors James, Thompson and Desaussure.

Cheves, for appellant, contended that the legacy in question was not specific. There are three kinds of legacies: specific, pecuniary and residuary. A legacy of 5000*l.* South Sea stock, of which testator is in possession is specific, and is exempt from contribution; but a legacy of 5000*l.* South Sea stock, generally, is liable to contribute with pecuniary legacies. Cites 1 Atk. 416, Purse v. Snaplin, 27 Viner, p. 458, 461, 2 Woodeson, 511, 529, 410, 4 Bro. C. C. 349, and argues from these authorities that there is a second class of the legacies called specific, but real-

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ly not correctly so. They *are legacies of quantity, subject to the same rules as pecuniary legacies, and bound to abate with them, in cases of insufficiency of assets to pay all. The case of Bagshaw v. Rogers, 4 Bro. C. C. 345, 7, 9, decided by the Master of the Rolls, is where testator bequeathed stock generally to one person, and a pecuniary legacy to another. It was decreed that both should abate proportionably, on a deficiency of assetts. And some of the cases go further. It has been decided that even bequests of stock of which the testator was in possession, are not necessarily specific. They are sometimes held to be so far pecuniary as to be bound to contribute. The bequest of 20 negro slaves now under discussion, is not specific. It is like a bequest of stock generally, and is bound to contribute with the pecuniary legacies.

Geddes, for respondent, contended that the intention of the testator was clear. He gives his plantation and the 20 negroes in the same sentence. The devise of the plantation is unquestionably specific; so must be the bequest of the negroes. They are inseparable, see the 1st Vesey, 422, Avelyn v. Ward. Wigfall's case is stronger than that of Purse and Snaplin, cited from Atk. for he died in possession of 20 negro slaves; but in that case the testator died without leaving so much stock.—Cites 1 Atk. 484, and 2 Domat 159.

Drayton, for respondent, admitted, that if the legacy did not come within Lord Hardwicke's idea of the specific legacies of the first kind, it is a general legacy and must abate. A specific legacy is a bequest of a particular thing; or of a thing, the species of which is mentioned, and from which the particular thing may be taken or separated. Either would be specific; as a particular diamond ring; or a horse, from a particular stud. The testator in this case coupling the 20 negro slaves with a devise admitted to be specific, (to-wit, the plantation) shews his intent. Having possession of the property bequeathed is also important: that indicates a specific bequest. The devise of the land was of little value without the negroes. The tes-

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tator knew they *were necessary to cultivate it. The specification resulting from testator's saying my stock, my negroes, makes it technically a specific legacy. But the intent may be shewn from circumstances, or other words. A bequest of 20 negroes, and the testator possessing 20, not otherwise disposed of, the legatee is entitled to those negroes particularly. The executor is not at liberty to buy others and deliver them to satisfy the legacy. Convenience is on that side of the question, and that has weight. The general provisions of the will, and the bequest of the residue shews that testator contemplated the bequest of the 20 negroes to be taken out of his estate itself. Compare the case of Avelyn and Ward, 1 Ves. 425, with 4 Brown 345. If the legacy be deemed specific, then he admits that if the testator had sold it or it had perished, it would be lost: it would be an ademption. If not specific, then not adeem-

ed.– See the case of Jeffris v. Jeffris, 3 Atk. 122, decided by the Master of Rolls. There is a difference between the cases of corn or sheep from stock in the funds. The death of sheep or negro slaves furnishes no indication of the intent of the testator to revoke, as the sale of stock does. Bequest of stock of which he had not possession, is directory to the executor to purchase so much stock: otherwise illusory. This would be a pecuniary legacy. 3 Woodes, 531. This accords with 3 Atk. 122. Bequest of negro slaves analogous to cases of stock in the funds, and to be governed by the rules applicable to them. The reasons for leaning against specific legacies not sufficient to justify such a leaning. Quote 3 Vesey 309, 310, Selwood v. Miley.

Mr. Simons, for respondent. He said he was not prepared to give up the distinction made by Lord Hardwicke in Purse and Snaplin, 1 Atkins. Examine the doctrine, see 2 Fonbl. 369, 371. In the case of Partridge v. Partridge, Cas. Temp. Talbot, 226, 7, a bequest of 1000*l.* So. Sea stock, was held to be specific; but it was not considered adeemed on account of the testator's selling out the

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stock; because he *bought in again, and left as much as he had bequeathed. If the selling out was held to be evidence of intent to revoke, the buying in again was evidence of the intent to restore, see also Ambler 57, Brown v. Winter, 3 Woodeson, Appendix 11. Sir Joseph Jekyl went even farther than Lord Hardwicke, for he calls such a bequest unqualifiedly a specific bequest. Specific legacies are not always adeemed by the destruction or calling in the thing bequeathed, 4 Bro. C. C. 349, Simmons v. Vallance, 1 Bro. 565, Ambl. 566, Attorney-General v. Parkin, 2 Vern. 681, 3 Woodeson 531, (in note.)

The result of the cases seems to be, that where the testator has not the stock, his bequest of so much in stock is not specific. Where he has it, it is. The use of the words my stock, in a bequest, is agreed to be evidence of intent to make the legacy specific. But the word my, preceding stock, does not strengthen the case, as evidence of intent, where the testator has the stock; for he must be supposed to mean his own stock: and so of negro slaves, see the cases in 2 Bro. C. C. 112, Ashburner v. Maguire, 2 Vesey, 623, Drinkwater's case, and 3 Atk. 308. The bequests of negro slaves are like bequests of specific valuables, rings, horses, &c. Quotes Ambler 57, 3 Woodeson, 531, 3 Vesey, 308, and examines these cases. It does not follow that the change of the property makes an ademption. Testator surely meant to bequeath the negroes he had, and not other negroes which he had not. He did not dispose of the 20 negroes he had on his plantation to any other person. His intention seems very clear, to give them with the plantation. It was equivalent to saying my negroes, which all the cases agree would have made it specific.

The 500*l.* legacy to appellant, was certainly meant to be paid out of the residue of the estate; which residue he bequeaths to the heirs of Mrs. Wigfall; and the devisee of the land and 20 negroes is one of those heirs.

Cheves, for appellant, (in reply.) The argument of the opposite counsel is that this is a specific legacy of the second kind; but ad-

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mit this, and the ques*tion still remains whether such legacy should abate; and Lord Hardwicke himself says it is a general legacy, and subject to abatement with the pecuniary legacies; see his explanation in Avelyn and Ward, 1 Vesey, 420, 2. The real question between the parties is whether the mere possession of stock and giving a legacy of stock, without any words designating and attaching the legacy to the stock in his possession, is a specific legacy or not. The leaning of the Court is against making legacies specific, on account of the prejudice to other legatees. The later cases say the intention of the testator to make the legacy specific, must be demonstrated.—There are no words in this case to shew such intention. The case of Avelyn and Ward is not so well founded as Purse and Snaplin. It turned on peculiar circumstances. In Bonsdon v. Winter the bequest was of £2000 and testator had exactly £2000 at the time. He sold out and bought in again. This was held not to be specific, see the cases of Bagshaw v. Rogers, 4 Bro. C. C. 345, 9, Keech v. Thorington, 2 Vesey, 560, and Selwood v. Mildmay, 3 Vesey, 628. The testator uses the possessive pronoun my, before the land, not before the negroes: presumptive of a different intent, 4 Vesey, 564. The inclination of the Court is against specific legacies; and to hold a legacy to be general, with reference only to the fund first to be applied to it. In 4 Vesey, 750, Kirby v. Potter, legacy of £750 to be paid out of my reduced bank annuities, was held not to be specific, though the words "part of my stock," or "in my stock," would make it specific. The particular circumstances relied upon in this case to make the legacy specific, do not shew it to be so. Not from the use of the word "my," for that is applied to the land, and omitted as to the negroes. Not as to the legacy being negroes, as contradistinguished from stock, and more readily taking the specific form; for negroes are deemed perishable here, more than stock in England; and being changeable and perishable, are not so much the subjects of specific legacy, by general words such as used in this will, see 3 Atk. 122.

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*After some deliberation, the Chancellors James and Thompson declared their opinion to be, that the bequest of 20 negroes slaves

in the testator's will to John Wigfall, was a specific legacy of the second class mentioned by Lord Hardwicke, in the case of Purse v. Snaplin, reported in 1 Atk. p. 414, and was liable to abate with the pecuniary legacy. Therefore they reversed the decree of the Circuit Court on this point. Chancellor Desaussure adhered to his opinion delivered in the Circuit Court. Chancellor Rutledge, having been prevented from attending, gave no opinion. Chancellor Gaillard having been counsel in the cause at the bar, did not give an official opinion; but he signified his assent to the opinion of the Judges James and Thompson, on the ground that if the testator had sold his negroes, or they had died, the legatee would have been entitled to receive 20 negroes from the estate, if the assets would have been sufficient, after payment of debts, to have purchased them. That this was the advantage which the general legatee had over a specific legatee, who would lose his legacy, if it were sold or lost by the testator. On the other hand the general legatee was bound to contribute in case of a deficiency of assets. It was a reciprocation of advantages and disadvantages.

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Case XII.

THOMAS LEE, Comptroller-General, v. BENJAMIN WARING, THOMAS WARING, CHARLES DRAYTON, and JAMES TAYLOR.

[Tried before Chancellor Desaussure, Circuit Court of Equity, Charleston, Nov., 1809.]

[*Officers* ⟸126.]

Demurrer to a bond taken contrary to law, sustained.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 220; Dec. Dig. ⟸126.]

[*Bonds* ⟸35.]

[Cited in Walker v. Crosland, 3 Rich. Eq. 30, to the point that a statutory bond, not duly executed, or not conditioned as required by statute, may be sustained as a common-law bond.]

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 40; Dec. Dig. ⟸35.]

The bill was filed by Mr. Cheves, the attorney-general, to recover certain arrears alleged to be due to the State by Benjamin Waring, late treasurer. It stated that in the year 1791, B. Waring was appointed treasurer of the State, and previous to his entering upon

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*the duties of his office, he together with three sureties, T. Waring, C. Drayton and J. Taylor, executed the bond legally requisite,† to the then governor, for the faithful performance of his duties; himself in the penal sum of £10,000 sterling, and each of his securities in £5,000 payable to the said governor and his successors. The condition of the bond was that if the said B. Waring should faithfully perform the duties of his said office, and should truly pay the monies in the treasury as directed by law, and should pay to his successor in office all such sums of money as he shall be in arrear to the State, then the bond to be void; otherwise to remain in full force. That on his going out of office it was apprehended the said B. Waring was in arrear to the State, and endeavors were made to bring him to a settlement, but without effect. That the original bond being lost or mislaid, a suit was brought at law against him and securities, on a certified copy of the bond, non est factum was pleaded, and the production of the bond was required, whereupon a nonsuit ensued. That the Legislature on the 10th of December, 1807, directed a bill of discovery to be filed against the said B. Waring to establish the existence of the bond; the arrears due by said Waring, and to overreach and set aside any voluntary conveyances made to evade the claims of the State. That the accounts of the said treasurer are erroneous, and he stands indebted to the State. The bill prays a discovery on all the grounds and facts charged in the bill, the existence and loss of the bond, the suit at law, the nonsuit; and the existence of the arrears charged by complainant to be due by said Waring. To this bill a demurrer was filed on the 16th of June, 1809, by the de-

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*fendants. It was stated for cause of demurrer, that at the time the said Benjamin Waring was appointed treasurer, there was no law of the State requiring the treasurer to give such bond, or any other bond for the due performance of his office as treasurer. Wherefore and for divers other errors and imperfections in said bill, defendants demurred and prayed the judgment of the Court whether they should be compelled to answer to such part of the bill as is demurred to.

The cause came on to be tried on demurrer, and it has been extremely well argued. I am obliged to the bar for the lights thrown upon the question by the production and examination of numerous authorities, and by the ingenuity of their arguments. As the case is important in its principles and of considerable magnitude in the interests at stake, I shall be very full in the examination of the decided cases and of the reasonings which are supposed to have any bearing on the questions which arise in the cause.

† The bond prescribed to be given by the State Treasurer, was under a Colonial law of the 23d of February, 1771. By this act it was ordained that the Treasurer should give bonds in the penal sum of £40,000. Proclamation money to His Majesty, his heirs and successors, for the due execution of the said office; "and give good security to the number of five persons or upwards, who shall be approved by the Governor and Council, and shall be bound, each security for a proportion of the said sum, equal to the number of such securities, and not each for the whole."

On the part of the State, it was contended by the attorney-general, 1st. That the bond in question is valid, independently of any statute on the subject, being neither to do a thing malum in se, or prohibited by common law or statute. 2d. That the bond is substantially though not formally, the bond required by the act of 1771, and may be supported at least to the extent of that act. 3d. That being a bond, good at law, but the legal remedy being lost by the bond being mislaid, the Court of Equity will supply the loss, and set up the bond either on proof or on admission; and that the demurrer in this case was an admission of the bond set forth in the bill. In support of these positions it was insisted that a bond given by one individual to another voluntarily, is good, and would bind the obligor; that the State consenting to try its causes with the same fairness and justice, and even equality as an individual was entitled to the benefit of this rule. That the bond given by Mr. Waring and his securities to the governor, was given voluntarily

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and ought to bind them; more *especially as (though not strictly according to law) it was for a valuable consideration, to-wit, a lucrative office, bestowed on him by the State. That the State assenting to take this bond so voluntarily given in lieu of that precisely prescribed by law, the act was complete and became binding on both. That the bond is not oppressive to individuals, nor malum in se, nor prohibited by any law, moral or political. That the act prescribing a particular bond did not prohibit another bond, which if given voluntarily, would be as obligatory as if prescribed by law; at any rate to the extent of the bond prescribed by law. That the differences of the bond taken, from that prescribed by the act of 1771 were not very material, and that in setting up the bond the Court could modify the liability so as not to exceed the liability under the prescribed bond. That this bond, though with a penalty, was in fact a covenant to do certain things just and proper in themselves; and equity requires it should be supported. That the law in no case declares voluntary bonds void, but on considerations of public policy, and surely the same policy ought to sustain an equity to make principal and his securities liable, for not doing what he engaged to do. That Courts of Equity do set up bonds against principals, and also make no discrimination between the security and the principal in doing so, if the principal was so bound that the bond would be set up against him. That there was no laches in this case on the part of the State; and if there had been, it ought not to avail the parties, as this is a fraud on the State; and at all events, this was not the proper time or stage to set up that defence. All these positions were denied, and all the arguments in their support were answered by defendant's counsel, who insisted that the bond was void at common law, and for want of conformity to the statute under which it professed to be taken. That it would be mischievous and dangerous, and tend to oppression to permit the governor or any other public officer to demand and take such bond as he chose to prescribe, from

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persons elect*ed to office, as a condition of permitting their entrance into office. That Legislative appointments might be defeated by the governor requiring bonds not demandable by any statute law. That no act authorised the governor to take such a bond, but prescribed a different one; consequently the one taken was void. And that the bond being void at law, the Court of Equity will not set it up, or assist in the discovery and relief. That the diversities between the bond actually taken and that prescribed by the act of 1771, are great, numerous and important, and so vary the engagements of the securities as to make an engagement totally different from those they would have entered into under the act of 1771; yet the bill charges that the bond was taken under the act of the Legislature. That securities are favored and not made responsible beyond or different from the engagement they did make, conformably to law. That those who ask equity should shew no default on their part. Whereas there has been great laches here. That securities not being bound morally, the Court will not in cases of bonds, when the legal remedy is lost, set them up against them. That where the Court has set up a bond, as a covenant, it is where both obligors had a benefit, not in a case of security. That the demurrer does not rest on the loss of the bond which may be supplied and revived by proofs; but on the ground that the bond was void at law.

In support of these various positions and arguments, many cases were cited by both parties, which I shall now proceed to examine. The attorney-general cited 1 P. Williams, 181, 9, Mitchell v. Reynolds. This is a leading case decided in the King's bench, (though reported by an Equity reporter) and it does shew that a bond given to restrain the party from trading in a particular place is good; because it is neither prohibited by law, nor malum in se, nor a general restriction of trading. But this case expressly turns upon there being a reasonable consideration given to the obligor to induce such bond. And upon an elaborate examination

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of the *cases and discussion of the doctrine, the result seems to be that the true distinction in such cases is not between promises and bonds, but between contracts of this kind, with or without consideration, and not being a general restraint. All the cases cited from Strange 739, referred to in 1 Bacon, 645, title K. look up to the above case as the leading case which settled the doctrine.

The cases cited in 1 Powell, 172, 3, relative to the sheriffs taking bonds, declare them void, unless the statute be followed, because such bonds may be abused to purposes of oppression. The attorney-general has cited the case of Ibs v. Boxall, 2 Bos. and Puller, by which it was decided that a bond taken from an individual (though not prescribed by law) by commissioners appointed under an act of Parliament, in order to indemnify them against expenses of suits, in which they are directed to be made defendants, is not void: though a fund was provided by the act out of which law expenses were to be paid in certain cases. But upon examining the case it appears that to the Judges it was very doubtful, or more than doubtful, that the case in which the commissioners took a bond from the party desirous to have a trial under the act, was not one of the cases provided for by the act, the expenses of which were to be paid out of the fund. Then it stood thus: A party whose interests required that a trial should be had under the act of Parliament, requested the commissioners to go into this expense. They refuse it unless he will indemnify them against the expenses. He consented and gave the bond, and the Court supported it. This surely cannot apply to the case before the Court. There was nothing immoral or prohibited in the commissioners taking this bond. The attorney-general cited the case of Bishop v. Church, 2 Vesey, 181, 373, which was a case of joint bond by two; one of them died and the other became a bankrupt. It was decided that the obligee may recover in Equity against the representatives of the deceased, though the legal lien was gone. In this case it must be observed that though the penalty

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was joint, the con*dition was several; and the money was borrowed by both as partners: so that it was not a case of securityship, and there was no doubt of the original legality of the bond. The same observation applies also to the case of Simpson v. Vaughan, 2 Atk. 31, 2, both joined in the borrowing, and the bond was made joint by fraud or mistake. In the case of Acton v. Pearce, 2 Vern. 480, a bond given before marriage to intended wife for £1000 in case she survived the obligor, was held to be good, and set up after his death, though extinguished by the marriage. But this case turned upon its being drawn by an unskilful person, the parson of the Parish; and the Court always favors provision for wife, as this was intended to be, and it is not a security case. In the case of Crosby v. Middleton, Pre. in Ch. 309 and Digest 337, the Court did hold security bound, though the bond could not be supported at law. But it was decided expressly on the ground that the omission of the security's name in the bond was a mere clerical error; for he had expressly agreed to be bound, and had signed and sealed the bond, and no illegality in doing so. The two cases from Croke Elizabeth, Clifton v. Webb, p. 808, and Blacbourn v. Michebourn, p. 852, are cases where the sheriff took bonds; the validity of which were questioned by the principal obligor, and held to be good, because the form of the bond was pursued, and the matter complained of was a regulation for benefit of the sheriff. The attorney-general cited Bagshaw v. Bosley, 4 Term Rep. 78, 9, 801, which was the case of a bond demanded by the patron of a living, on presentation, and given by the incumbent, conditioned to reside on the living or to resign, if he did not return to it after notice. This was held by Lord Kenyon to be good. This is certainly a strong case to shew that a bond may be taken, at common law, in a case not malum in se, not prohibited by positive law or by public policy. And it is supported by the ancient case of Dobson v. Carew, Croke Eliz. 705, where a bond was held to be good, the condition of which was that the obligor

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should be always ready to *give evidence in Court and testify the truth. But these cases do not appear to me to apply to the case before the Court. In the case of the presentment to the living, it moved as a free gift to the person, and the donor had a right to prescribe terms, and the patron had an interest coupled with his right. Besides the taking a bond in such cases was neither malum in se, nor prohibited, nor against public policy. It was contended by the attorney-general that there was no laches in this case, and if there had been laches, it could not be set up in the case as there was a fraud against the State, and if it could, this was not the place or stage to do so. The defendant's counsel contended that the bond was void. 1st. At common law. 2d. Because not made conformably to the statute on the subject, passed in 1771. In 5 Comyn's digest, title Officer, p. 148, which was cited, it was laid down that "no bond or writing may be exacted from the subject to the King or other person, to do that, which by law he was bound to do to the King, and such bond will be void, and defendant may plead duress." This is supported by Lord Coke in 3d Inst. p. 149, except the last words, "and defendant may plead duress," which are not to be found in 3d Inst. The defendant's counsel also insisted that the bond was not maintained under the act of 1771, because it differs materially from the bond prescribed by that act. These differences relate to the person to whom the bond is made payable, to the penalty, to the number of securities and the extent of their liability. Defendant's counsel contended that securities are always favored both at law and in Equity: not wildly or incautiously, but discreetly and under proper circumstances; and they cited the case of Shalton v. Rastall, 2 Term Rep. 366, in the King's bench, where in an action for money

had and received (which in that Court is analogous to a bill in Equity, and has been emphatically called a little bill in Equity,) against a security to a bond for an annuity which had become void for want of recording, the Court refused to make the security liable, because the security had not received

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the money *he had no benefit and was not bound morally. In 1 Vernon, 196, Radcliffe v. Graves, the Lord Keeper decided that he would not make the sureties liable further than they were answerable at law, in a case where the bonds had been got up and no remedy against them at law.

In Francis's Maxims 71, 2, the same doctrine is stated. In the case of Harrison, executor of Munge, v. Margt. Field, executrix, 2d Washington's Rep. 136, decided in the high Court of Appeals in Virginia in 1795, on an appeal from a decree in the Court of Chancery, it was determined by all the Judges of the Court present (one only absent) that a Court of Equity ought not to assist in setting up a bond against securities, where the legal remedy was lost. It was the case of a joint bond, by two persons, one of whom was security. The security died; the principal was insolvent. The Court of Chancery by its decree made the representatives of the security liable. The Court of Appeals reversed the decree, on the ground, that the security being neither the borrower nor the user of the money, ought not in equity to be further or otherwise liable than by his contract at law. That it was a joint obligation (not made so by any apparent fraud or mistake) and subject to the legal consequence, to-wit, the discharge of the security if he died before the borrower. That there was no moral obligation on the security to pay; he was bound only by the bond itself. There was no antecedent contract between him and the lender to the principal, whereon to found an equity for the interposition of the Court of Equity.

The same doctrine was held in the case of a joint note, decided in the Court of Appeals in Virginia, 1795. The case of Chandler's executors v. executors of Neal, 2 Henning and Mumford's Reports, p. 124, 131.

Several other cases were cited by defendant's counsel, which not appearing to me to have so strong a bearing upon the case before the Court, as those already noticed, it is unnecessary to advert to them, except one

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*which was cited by Mr. Bee, from 4 Dallas, 282, [1 L. Ed. 834,] the Commonwealth of Pennsylvania v. the Securities of Baynton, which shews the great caution of the Courts every where not to extend the liability of securities beyond the legal effect of the bond.

In this important cause I have sought light from our own decided cases, as far as I have been able to obtain them; for the industry of the bar had precluded the necessity of researches into the published cases.

I have found but two which seem to have any material connection with the one before the Court; one decided recently in the Court of Common Pleas. It was the case of C. B. Cochran, Intendant of Charleston v. Simpson Williams. In that case a suit was brought on a bond given by him, as Pilot, to the then Intendent. The defendant demurred on the ground that the bond was not taken under any lawful authority; and that it was therefore extorted by color of office and void. It appeared by an old act of the Legislature, (of 1734,) that pilots were to give bonds for the faithful performance of their duty under direction of the Commissioners of Pilotage. By the charter, the powers and duties of Commissioners of Pilotage were devolved on the City Council, and by an ordinance they had prescribed the giving bonds by Pilots, as under the act of 1734, without saying to whom they should be made payable. The whole Court were of opinion, that the bond was valid, and I should have no doubt of it; but this case only goes to show that the bond might well enough be made to the governor.

The other case is that of Executors of Shubrick v. Russell, Executor of Livingston, [1 Desaus, 315,] decided in Equity in March, 1793. It was the case of a joint bond, and the security died first; therefore it was contended he was discharged at law, and equity would not extend it. This ground does not seem to be so much relied upon as another, that obligee had varied the security and so released the original security. It was determined against the executors of the securities

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on both points. *This decision differs from the Virginia cases: but it should be remarked on both that the bonds were originally valid, and the legal remedy was lost by subsequent matter.

Having thus anxiously explored for information from every quarter, to guide us to a right conclusion in this case, I am now to state what appears to me to be the result of our enquiries.

The first question is, could this bond be considered good and valid at common law?

The doctrine quoted from 5 Comyn's, who refers to 3 Insts. and which declares it unlawful to exact bonds from the subject to the King, to do that which by law he was bound to do, seems to me to be bottomed on sound policy, whether it applies to individuals or to public officers. It would open the door to great abuses and oppressions, and even favoritism, if it were permitted. A person is elected to an office, and is by such election entitled to enter upon it, do the duties and receive the emoluments. The law requires no bond, or prescribes a particular one. The governor is to sign all commissions; he however undertakes to demand a bond where none is required by law, or with greater liabilities and security than the law directs.

The officer must either resist and be kept

out of his office to his own prejudice, and to the inconvenience of the public, or submit to an arbitrary power exercised over him, unknown to the constitution and the laws. This surely could not be called a voluntary bond. It would more correctly be called a submission bond.

The oppression and injustice to which this might lead, might be very extensive and mischievous.

There is no reason indeed to believe that any coercion was used in this case, and such is the constant responsibility of our great officers, under our admirable system of government, that it is not probable abuses would frequently occur. But the provident jealousy of the law guards against abuse, by forbidding the exercise of such ungranted powers,

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and declaring the acts done under *them to be invalid; else the line could never be drawn, nor the door to abuses ever shut.

I feel myself therefore bound to say, that in my judgment the public policy requires that a bond taken from a public officer, not warranted by law, as a condition of his entering on his office, should be considered null and void.

The next question is, can the bond taken from the treasurer, be supported under the act of 1771?

The differences between the bond prescribed by the statute, and that actually taken, consists, as has been stated, in four particulars. It is made payable to the Governor instead of the King. It differs in the penalty, in the number of securities, and in the nature and extent of their liability.

With respect to the first I should have thought that it was well enough that the bond should be payable to the Governor. He does not indeed succeed to all the King's prerogatives, but he is the chief executive magistrate. He transacts most of the important business of the state, and no prejudice could result to the parties from the use of his name; to whom payable was not an arrangement interesting to them or made for their benefit.

But this is not the case with the other differences, between the bond prescribed and that taken. The penalty is increased, the number of securities to divide the burthen is diminished, and the extent of liability is increased.

These are great and essential differences, operating injuriously upon the securities, and I cannot think that the bond actually taken can be supported as a valid one, under the authority of an act which prescribed one so essentially different.

If then this bond is not supportable at common law, or under the statute, this Court cannot set it up, or give it effect. There would be no equity in this: it would be to give effect to what the law prohibited, not to what it enjoined. It would be astute to

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make securities lia*ble, under the name and sanction of equity, when the law itself would not make them so.††

I do not wish to be understood to say that a Court of Equity would not set up a lost bond against a security, where the bond was originally a legal one, and no circumstance had occurred to put an end to the obligation; in such cases the surety is not discharged by the loss of the bond, and the Court by its interference would only relieve against the casualty, by setting up the evidence of the debt.

On the ground of laches, I shall say but little. There does appear to have been some laches, but I have not seen enough of the case, coming on as it did, on the bill and demurrer, to enable me to judge with any certainty on that point. I should not therefore feel at liberty to decree, singly on that ground. Upon the whole of the case however I feel myself obliged to sustain the demurrer, and to dismiss this bill. In doing so I have this consolation, that if the principal defendant, Benjamin Waring, the treasurer, has really committed any default in his administration of the finances entrusted to him, he is liable in a bill to be compelled to account and to pay to the uttermost farthing what he may be found to be in arrear. The effect of this decree will not be to absolve him from his responsibility, but to prevent his being made liable with his securities in a shape not warranted by the laws of the land; the maintenance of which in their integrity is of more value to the citizens than all the funds in the treasury.

I have also another high consolation, which is, that having done my duty to the best of

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my judgment, I have *the happiness of knowing that if I am in error, that error will be corrected by a higher and a wiser tribunal, to which I am always ready to submit my judgment.

From this decree an appeal was made on the following grounds:

1. That the bond was legal and valid, independent of the acts of the Legislature prescribing the bond to be given by the treasurer, not being repugnant thereto.

2. That though not in perfect accordance with those acts, yet to the extent of the pro-

†† I think this case is stronger than any which have been cited or examined; and differs from them in this essential particular: That according to the preceding reasoning, the bond in this case was never valid, never obligatory. In the other cases they were valid, but lost their obligatory power by matter ex post facto. It is impossible to set up the former. The cases are divided as to the latter. But I incline to think that even in them, where the bond was originally valid, as a joint bond, and the legal obligation ceases, by the death of the security, that is by operation of law, equity should not set up the bond, because the equity being equal, the law should prevail.

visions of the act of Assembly, it ought to have been declared obligatory and valid, as a covenant or engagement of the obligors.

3. That for other reasons the bond ought to have been supported.

(Signed,) Cheves, Attorney General.

The hearing of the appeal came on before the Chancellors Rutledge, James, Thompson, Desaussure and Gaillard, and the cause was fully argued.

Mr. Cheves, attorney-general, for appellant. Every bond given voluntarily is good and binding, unless malum in se, or against some principle of policy. There was a privity in this case between the person giving and the person taking the bond. The governor is the representative of the state, and is bound to take care of its interests; and he requires bonds to secure the funds of the state. The assent of the party interested may be implied, Pow. on Con. 8. The State has assented and accepted the bond; and there is no good reason why the State should not have the benefit as well as an individual would in a like case. The great question is, whether the bond is valid at common law, Cro. Eliz. 862, Cooper v. Goodrich. A stranger may receive a deed for a corporation, and the corporation assenting it is obligatory. There is no statutory prohibition against taking such a bond: no prohibition on the principle of common law; nothing immoral or impolitic. The usage has been for

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the state officers to take *such bonds. The act of 1771, prescribing the mode of taking bonds from treasurers, does not negative the mode pursued in this case of taking a different bond. The case from 5 Comyn's, title Officer, p. 148, 9, is supported only by Int. 3d p. 149, and that is founded on a statute (1 Edw. 3 Ch. 15,) not in force.

There is no temptation to the Governor to abuse this power, to individual oppression; and public policy requires that he should have this power, to require bonds of public officers. If the bonds taken differ a little from those prescribed by law, the Court will not declare them void, but rectify the error.

This is not like the cases of bonds in restraint of trade, see 1 P. Wms. 181, 9, Mitchell v. Reynolds; 2 Com. Con. 472; see 4 D. and E. 81, Bosford v. Bagshaw; Comyns on Contracts, 497, Cowper, case of Jones v. Randall. There is no foundation for the opinion, that all bonds taken as this has been are void. Each case should depend on its own circumstances. And if the bond is not held valid to its extent, it is valid as far as the law goes, 2 Vesey, 373, Bishop v. Church. A bond is an agreement, a covenant binding as far as it is legal. The penalty is only accessory to the principal obligation; and the nullity of the penalty will not affect the agreement, 1 Com. rep. 338, Pothier, 222, 225.

But it is contended that at all events the securities are not bound. But there is no principle of equity or morality, which should exonerate the security in such a case, 2 Eq. Cas. Abr. 188.

Mr. Bee, for respondent. Suppose a bond taken contrary to the statute, and not maintainable at law? Surely this Court would not set up such a bond against the sureties in the bond, Comyn's Rep. 441. An obligation taken colore officii, and oppressive, is void, 3 Wilson, 539, 2 Vern. 293; a son bound as security with the father, and the bond void at law: the son is not bound to pay.

If the Court doubts, the demurrer ought to be sustained, because the state officers took

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an improper bond, *and innocent sureties ought not to be bound, unless legally bound.

Mr. K. L. Simons, for respondent. The bond not being given under any lawful authority, is a nullity and void. It is widely different from the bond prescribed by the statute of 1771, to be given by the treasurer elect; and at all events the Court cannot hold the securities liable under such an irregular, unauthorised and void bond. Though there be nothing immoral in a bond, if it invades any principle of sound policy it is void. Such are marriage brokerage bonds; bonds not to engage in trade, &c. The bond taken from the treasurer is of this description. The public may confide an office to a man for his probity, and require no security, or a reasonable one. Yet a Governor may take upon him to demand securities not required by law, to any amount and with any number of securities, and on any terms his caprice may dictate, not only from treasurers, but Judges and all other officers. The weak, the timid, the poor would submit, rather than be kept out of office: only those of a strong character would resist. Great abuses may take place. It is said that there is no fear of abuse; but the constitution and the laws are apprehensive of abuses. They limit and regulate the acts of the chief magistrate, as well as others; and acts of power done contrary to or beyond the laws are not valid.

The principle laid down in 5 Comyn's, 148, 9, does not depend on statute, but on the common law principle. The statute mentioned in 3 Institute, came only in aid of the common law, 2 vol. Reeves's Hist. of the common law, p. 141, 2; 3 vol. Reeves, 143; 1 Powel on conts. 103. Sheriff taking bond for fees void. The common law principle is not denied even in the cases cited, 2 Bosanquet & Puller, 89, 4 Term. Rep. 78. Judge Peters has decided in Pennsylvania, that a bond taken different from that prescribed by law is void. The act of 1771 prescribing one mode of taking a bond, is itself an exclusion

of any other mode. The bond taken is substantially different from that prescribed.

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The act pre*scribes five securities, each answerable for a proportionate part. The bond taken has three securities, each answerable for the whole. The act prescribes one penalty; the bond taken is for a larger penalty. The act of 1771, was for the ease of the treasurer, and the securities to be so divided. The bond taken deprives them of that ease; see 5 vol. Co. rep. for the case of sheriff's bonds. A bond taken differently from that prescribed by statute is void; as a bond taken without securities where the statute requires them, 1 Sander's rep. Williams's edition, 161, note 1; Plowden's rep. 68. Any addition to a bond prescribed by law, makes it void.

With respect to the securities, there is a great and obvious distinction between them and the principal. The principal is morally bound to perform his duties in office, and pay over money entrusted to him, without a bond. The securities are bound only by the written engagement, by the bond, and if that be void, their responsibility is at an end. They made no contract but what is on the face of the bond: destroy that, and they are not liable. And not being morally bound, the Court will not set up a void bond against them, see 2 term rep. 366; 4 Bos. and Puller, 41; 2 Washington's rep. 136; 1 Vern. 196.

Mr. Cheves, attorney-general, in reply, admits that if the Court thinks it is against sound policy to permit such bonds to be taken, the demurrer must be sustained. But the Court will not readily decide on whole classes of cases. It will allow each case to stand on its own merits; and there is no pretence of any intended oppression or abuse in the case under consideration: admits the penal part of the bond taken, being different from that prescribed by the act of 1771, is not obligatory: yet it is good as a covenant, and operative to the extent of that statute. Relies on case on Cro. Eliz. 808, 862, where it was decided that a bond taken from the sheriff, with one security is good; though the statute prescribed two securities.

As to the exoneration of the securities, he

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insists, they *remain liable under the bond, as an agreement; and at all events they cannot prevail now; for they and the principal, who is plainly liable, have joined in a demurrer, and the decree sustaining the demurrer must be supported in whole or not at all. As it cannot be supported as to the principal, it cannot as to the securities.

The Court of Appeals delivered its decree, stating briefly that the bond ought to have been supported, and the demurrer overruled. The Court therefore reversed the decree of the Circuit Judge, and overruled the demurrer, and ordered the defendants to answer the bill. Judge Desaussure adhered to his opinion in the Circuit Court.

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3 Desaus. 74

Case XIII.

JAMES DELAIRE, Executor of Dr. Polony, and Dr. WILLIAM READ, v. THOMAS KEENAN, HOPKINS and Others.

[Tried before Chancellor Desaussure, Circuit Court of Equity, Charleston, Nov. 1809.]

[*Mortgages* ⟸28]

An imperfect agreement intended as a security will be supported as a mortgage even against judgment creditors.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 44; Dec. Dig. ⟸28.]

The bill was filed by complainants to have the benefit of an agreement which Thomas Keenan entered into on the 23d of March, 1804. It was in the following words: "Mr. Thomas Keenan agrees to sell his house situated at the corner of Church and Water streets, where he lives, on the following conditions: He engages to give the titles of the house and lot into the hands of Dr. Read and Dr. Polony, they paying him $3,000, viz. in his own notes endorsed by them, and the remainder of the money in three notes at 2, 6 and 8 months, with good endorsers. Mr. Thomas Keenan will be entitled to redeem the said house, at the expiration of three years by repaying to Drs. Read and Polony the same sum of $3,000, which condition said Read and Polony engage to fulfill bona fide." This agreement was signed by all three of

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the parties in the pres*ence of witnesses, and duplicates exchanged. Dr. Read had endorsed notes for Keenan for $1,700, which he was obliged to pay, with interest and costs. Dr. Polony endorsed notes for Keenan for $1,600, which he has been obliged to pay, with interest and costs. No part has been repaid. Complainants instituted suits and obtained judgments against Keenan; but previously to their judgments Hopkins and others obtained judgments for debts due to them; and they claim a priority of lien. The complainants pray that Keenan may be decreed to pay them what is due them; and in default, that the house and lot may be sold to pay their demand, and Keenan barred of his equity of redemption.

The defendant, Keenan, admitted the facts; but insisted he had made a partial payment to Polony. But he denies that the agreement had any validity, because Read and Polony had not taken up all the notes as they fell due, nor till compelled as endorsers; and when paid they did not deliver them up to the defendant, but kept them, and brought suits as creditors and obtained judgments: all which prevented their being

entitled to the security intended. Defendant admits that Hopkins and others have recovered judgments against him. Defendants, Hopkins and others, creditors of Keenan, state their judgments and insist on their priority.

A witness for complainants proved that he, as their agent, offered to Keenan his notes taken up by them, and demanded titles to the house, which he refused, and advertised the house for sale. Keenan also made a voluntary deed of the house and lot, for the benefit of his wife, in December, 1802, and on the same day that he signed the agreement with complainants, he carried it to be recorded; but they had recorded the agreement before he got to the office. The title deeds from the former owner to Keenan were in the hands of Dr. Polony, and produced by his executor.

It was proved that Keenan had paid $112 to Polony, and $105 to Read.

The complainants insisted that this agree-

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ment was *substantially a mortgage, and gave them an equitable lien. That this Court looks only to the intention, and will give that effect. This was meant as a security and would be considered so by the Court. The cases cited were Hattier and Etinaud [2 Desaus. 570], Menude v. Polony's Ex'r [2 Desaus. 564], and Read v. Simons' Adm'r [2 Desaus. 552], all decided in this Court. Also, 1 P. Wms. 292, 277, 280; 2 Vern. 564; 1 Bro. C. C. 26; 4 Bro. C. C. 64; 1 Ves. Junr. 162; 3 Ves. Junr. 582.

For defendant, it was insisted that the contract depended on a condition precedent, the taking up the notes. That the condition was to take up the notes as they fell due, and save Keenan's credit. This was not done as to some of the notes, and the condition not being complied with, the complainants have lost the benefit of the agreement. That they had abandoned the agreement, and sued as general creditors. That the object of the whole plan being to take up Keenan's notes as they fell due, and save Keenan's credit, and that not having been complied with, (for they did not take up some of the notes till they were dishonored and Keenan's credit destroyed) they were not entitled to the benefit of the agreement as a security. That time is material in such cases, and is of the essence of the contract: see Sugden. 244; 1 Vesey Junr. 450. And that as the legal estate was not divested out of Keenan the judgments attached.

For complainants, it was replied that this was plainly intended as a security, and was a mortgage. That there was no condition precedent; no time was limited. That Keenan refused to receive the notes when taken up; and complainants had a right on his refusal to make titles, to sue on the notes. That such suits did not forfeit the security; for mortgagees may sue on their bonds, and yet hold and enforce their securities, taking only one satisfaction.

THE COURT was of opinion that this agreement was substantially a mortgage. There was no condition in the agreement fixing a time to take up the notes, and declaring it void in case of failure. Time may be and

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*sometimes is of the essence of contracts; but it does not appear to be so here, so as to vitiate the security. Most of the notes had indeed been taken up when they fell due, though not all. His credit was destroyed even when the complainants made the agreement with him, and their taking up most of his notes when due, had not been able to keep it up.

As to their not delivering the notes to Keenan, they were offered and refused. Besides he had three years to redeem, and they could not safely deliver up the evidences of their having paid his debts, till they got the title, which he refused to give.

With respect to the claim to a priority set up by the judgment creditors, it appears that the equitable lien preceded the judgments, and is entitled to priority, see 1 P. Wms. 277, Finch v. Winchelsea, which is expressly in point. The Court there decided that if one agrees for a valuable consideration to convey lands to one person, and afterwards confesses judgments to others, the agreement to convey will bind the land in equity, and shall defeat the judgments; and this has been the settled doctrine ever since, see 3 Vesey, 582, where the Lord Chancellor says, that the Court has often decreed that where there is an incomplete agreement for a mortgage, this Court, after the death of the party, and when all his engagements are to be arranged, have given a specific lien, and that notwithstanding there were judgments. In the case under consideration the agreement was fair; the object was to give a security; the consideration adequate: the complainants ought to be protected.

THE COURT decreed that the house and lot should be sold by the master, on a credit to the 22d November, then next; the purchaser to give bond and mortgage. The title, to be executed by the master, but not delivered till the payment of the purchase money and interest; and if not paid when due, the premises to be resold on the account and at

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the risk of the former purchaser; *and that it be referred to the master to ascertain what is due by Keenan to complainants, on the notes in question; and the amount of their demands be paid out of the proceeds of the sale, with the costs of suit.

W. L. Smith, Pringle and Geddes, for complainants.

Parker and Cheves, for defendants.

3 Desaus. 78

Case XIV.

Assignees of DAVID RAMSAY v. THOMAS ELLIS, M. WHITE and Miss ELLIS.

[Tried before Chancellor Rutledge, Circuit Court of Equity, Charleston, March, 1810.]

[*Executors and Administrators* ⟸500.]

[The act of 1789, declaring that executors who do not render annual accounts under oath shall not be entitled to commissions, applies to the subsequent conduct of executors, though appointed before the act was passed.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2135; Dec. Dig. ⟸500.]

The bill filed in this case involved many important points, but chiefly relative to the management and settlement of an estate. One point only seems necessary to be reported. It related to the allowance of commissions to the complainant, for managing the affairs of an estate.

The Circuit Judge stated the point and delivered his opinion as follows:

This case was referred to the master to investigate the accounts of complainant, as executor of Ellis; also, his accounts against the defendants residuary legatees of Ellis, and to report thereon. It is now brought forward upon the master's report on various exceptions which were made by the defendant, and which the master has submitted to the determination of the Court. 1. That executor is not entitled to commissions subsequent to 1789, because he never rendered any account to the ordinary from the time of passing the executor's act in 1789, to the year 1799, when his transactions with the estate were closed, and the act expressly declares that executors shall annually, whilst the estate is in their care, render in their accounts upon oath, and if they neglect to do so, they should not be entitled to any commissions.

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Complainant's counsel contended *that the law was not retrospective, and was only applicable to persons who should become executors subsequent to that period; that it was an ex post facto law and varied complainants contract, inasmuch as he was not previously obliged to render in such account. I am of opinion that no law can be enacted to make an executor responsible for acts done or duties omitted where there was no law which enjoined him to the performance of them; nor could he be made subject to any penalty on that account; for where there is no law, there can be no transgression: consequently no penalty can be inflicted. But the law in question cannot by any means be deemed an ex post facto law; it imposes no penalty for past transactions, it only declares what shall be the conduct of executors hereafter, and what the consequences of their neglect to pursue the line of conduct therein prescribed. If the executor has neglected to render in his account as the law directs, subsequent to the enacting of it, he is undoubtedly subject to the penalty thereby inflicted. It would be a very extraordinary doctrine to lay down, that those only should be liable to the penalty who should become executors subsequent to the passing of the law, and that those who were executors anterior to it might violate it with impunity.

Decree that commissions be allowed on the accounts prior to the act of 1789; and disallowed on the accounts subsequent to that time.

From the decree given on the other points of the case, there was an appeal, and the decree was affirmed. But there was no appeal on the point of commissions.

Dr. Ramsay and Pringle, argued for complainant.

Ford, for defendant.

3 Desaus. *80

*Case XV.

WHALEY and Others, v. JENKINS and Others, Heirs and Executors of WHALEY.

[Tried before Chancellor Rutledge, Circuit Court of Equity, Charleston, February, 1810.]

[*Wills* ⟸601.]

No words of inheritance or perpetuity in a will, the devisees take only a life estate—But reversed by the Court of Appeals.

[Ed. Note.—Cited in Jenkins v. Clement, Harp. Eq. 83, 14 Am. Dec. 698.

For other cases, see Wills, Cent. Dig. § 1340; Dec. Dig. ⟸601.]

[*Wills* ⟸439.]

[Cited in Robert v. Ellis, 59 S. C. 156, 37 S. E. 250, to the point that the intent of the testator governs the court in construing a will.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 952, 955, 957; Dec. Dig. ⟸439.]

The only point made in this case was on the construction of the will of the defendant's testator. The case was as follows: Mr. Whaley made and duly executed his last will and testament, by which he made the following devises and bequests. "With respect to my wordly estate, I leave in manner following: Item—I give and bequeath to my beloved wife, Mary Whaley, the use of my plantation on Edisto Island, known by the name of the Old House Tract, adjoining Mr. James Clarke, Mr. John Jenkins and Mr. Charles Flinn's lands. This plantation, say the Old House Tract, and 20 negroes are given for and during her natural life only, and at her death, I give the said plantation and 20 negroes to be equally divided among my surviving children, share and share alike." He then proceeds to give to his wife, Mary Whaley, the use of his house in town, during her widowhood, after which he gave

the said house and lot to be divided between his then surviving children, share and share alike. The testator then gives his two tracts of land on Ashly river, (700 acres,) to be equally divided between his sons Thomas and Archibald Whaley, share and share alike. The testator then proceeds to give his plantation on Edisto (316 acres,) and his plantation on John's Island, (450 acres,) to be equally divided among seven of his children, to-wit, Joseph, Edward, Benjamin, William, Edward Wilkinson, John and Susannah, share and share alike. But in case of the death of either of them under age, (of 21 years) then to the survivor or survivors of them, share and share alike. Surplus of crops to be laid out in lands or other property for the benefit of the said seven children.

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*The testator died in May, 1805. Joseph, the son, attained 21 years, and applied for partition. The other children living are minors. Joseph, Edward and Benjamin were full brothers to each other; William, Wilkinson, John and Susannah are full brothers and sister to each other; Archibald was by another wife; he died on the 21st October, 1805, unmarried and intestate, leaving as nearest of kin a niece of the whole blood, named Mary Seabrook, the daughter of his full sister, Mrs. Seabrook, dec. leaving also his half brothers, Thomas, Joseph, Edward, Benjamin, William, Wilkinson and John and his half sister Susannah: Therefore the bill charges on his decease, that part of his father's estate devised to him, became vested in his niece, half brothers and half sisters.

Thomas another son of testator died on 28th October, 1805, of full age. He had made his last will and testament on 8th October, preceding, by which after giving an annuity of £50 chargeable on his real estate to Dr. Caldwell for life, he devised all the residue of his estate to his wife and child, and the heirs.

The child died, and the mother has married J. R. Mathews, the complainant, who with his wife claim all Thomas's share in said estate of the father, and his proportion of Archibald's share.

The question made for the consideration of the Court was, whether the testator had given a life estate, or an estate in fee simple, in the property devised to his children.

After hearing counsel in the case, Chancellor Rutledge delivered in the following decree:

There are no words in this will in any of the devises from the beginning to the end of it, indicative of an intention in the testator to give more than a life estate to his children, in the property bequeathed to them, although I think it was unquestionably his intention to give it to them absolutely; for it can scarcely be presumed that testator intended, if any of his children should die leaving issue,

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that the estate he had bequeath*ed to them should go over to his surviving children, and his grand children should be left destitute of any provision as to real estate; and such will be the case if the construction should prevail which is contended for by defendants. The word estate in a devise, connected with other words will generally carry a fee; but when merely introductory in a will, as in this case, they will not. None of the cases that I have seen however are like the present: that of a father disposing of his estate among his children, and who seems to be desirous of placing them all upon an equal footing. But as the Courts have heretofore determined that the devisees in similar cases to this, can only take an estate for life as tenants in common, I think myself bound to adhere to those decisions, and decree in like manner as to the real estate; but see no reason why a partition may not be made. I am perfectly satisfied that this decree should be appealed from, because I think from our local circumstances those rigid rules of construction respecting real estates ought now to be ameliorated, if not altogether abrogated, since the law respecting the rights of primogeniture has placed real and personal property so nearly on the same footing.

From this decree an appeal was made to the Court of Appeals, on the same grounds as were relied upon at the trial which came on to be heard before all the Chancellors, Rutledge, James, Thompson, Desaussure and Gaillard.

Mr. Drayton, counsel for the appellant, and Mr. Cheves, counsel for the respondent, were heard on the appeal.

Drayton, for appellant. Words standing alone, 4 Mod. 19, Carter v. Horner; 6 ibid, 106; 6, Bridgewater v. Bolton; Holt 281; 2 P. Wms. 522; 1 term rep. 411; 1 Ves. 10, 228. The general rule is that the word estate includes not only the lands, but also the estate or interest therein; 3 Atk. 486; H.

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Black. *22; 2 Ves. 48. The word estate carries a fee, unless controled by other words; 8 Vin. 205; 27 Vin. 257, 208, 256. Words assisted by preamble, 27, Vin. 257, 261; all my worldly estate, carries the fee; 3 Wil. 333. Testator had a fee, therefore decreed to devise a fee; having used the above words.

Cheves, for respondent. It is the unanimous wish of all parties, and their interest, that decree should be reversed, if it can be done consistent with rules of law. 1. Cases where words of inheritance are used. 2. Cases where particular circumstances shew what estate was intended. 3. Where an estate is intended, but intechnical words used. Introductory words, Cowp. 279; authority from 27th Vin. 256, doubted and commented on; contra 27 Vin. 260; 7 term rep. 635,

Goodtitle v. Edmonds; Cowp. 657, as to all my worldly estate, not deemed sufficient.

Drayton, in repiy. The series of decisions relied upon relate to laws different from ours. Our acts of Assembly virtually place real and personal estates upon the same footing. Fraser and others, v. Executors of Livingston, decided in this Court. If the words convey personal they ought under our act to convey real. Where a person makes a will, the presumption is, that he does not mean to die intestate, or make the act he is doing inoperative. 7 term rep. does not relate to children. Cowp. 279, commented on; Cowp. 657, do. Testator uniformly uses the same words, intending to give to all the same kind of estate. Had he varied it so as to give a fee simple in any one instance, the construction might have been different.

Chancellors JAMES, THOMPSON, and DESAUSSURE were of opinion, that the strong presumption was, the testator meant to give a fee simple in the property devised. That though there were no words of inheritance, nor any words used which had heretofore been construed to carry a fee simple; yet that in devises the intent ought to prevail if possible; and unlearned testators, Inops

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*consilii, did not know that words of inheritance or perpetuity were necessary in devises of real estate, more than in bequests of personal estate. That the act abolishing the rights of primogeniture, and placing real property on the same footing with personal, ought to change the rigor of the rules which required words of inheritance or perpetuity to carry real estate; and that the intent when clearly discerned, should take effect, however worded, equally, in the construction of wills, as to real, as in testaments as to personal estate, and that in the present case, the devisees took a fee. The Court therefore reversed the decree of the Circuit Judge.

Chancellors RUTLEDGE and GAILLARD were of opinion that there were no words in the will which carried a fee, and that they were bound by the old rules on the subject, and were for affirming the decree.

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3 Desaus. 84

Case XVI.

Executors of DESELL *v.* CASEY and Wife, and Others.

[Tried before and decree pronounced by His Honor Hugh Rutledge, April 6, 1810.]

[*Reformation of Instruments* ⟸28.]

The Court corrects errors in the execution of deeds, to give effect to the intent of parties.

[Ed. Note.—Cited in Hutchison v. Fuller, 67 S. C. 284, 45 S. E. 164.

For other cases, see Reformation of Instruments, Cent. Dig. § 114; Dec. Dig. ⟸28.]

This suit was brought for the purpose of foreclosing the equity of redemption in a lot of land which was conveyed by defendant, B. Casey, to trustees for the benefit of his wife, whose estate was intended to be secured to her by marriage settlement, independent of her husband. The lot was purchased by him and partly paid for with money belonging to her, and some buildings were erected thereon, but not finished. He applied to complainant's testator for a loan of $2000, to complete them, and after various negotiations it was at length agreed that the lot should be mortgaged for securing the repayment of the money. The mortgage was accordingly executed; his wife joined in it, and released all her interest and estate therein, and all her right and claim of dower be-

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fore a Justice of the Quorum. *This is a singular case: the whole transaction has been a series of blunders from first to last. The titles of the lot were improperly made in the first instance to defendant, B. Casey, instead of the trustees. His assignment to them a few days afterwards was defective, he having conveyed to them only an estate for life, instead of the fee simple; and lastly the wife who joined in the mortgage, released her right and estate perhaps rather informally before a Justice of the Quorum, instead of one of the Judges of the Common Pleas. The facts being as above stated, the question now is, whether the Court can or will under all the circumstances of the case, remedy the defects in these conveyances, and place the parties in the situation they would have been if the titles had been properly drawn at first. It is the peculiar province of this Court to correct and remedy all defects in conveyances which are occasioned either by mistake or ignorance, thereby to do complete justice to the parties interested, where the case is not affected with fraud. If the titles to the lot had been (as they ought to have been) made originally to the trustees, the defendant, Mrs. Casey, would have been entitled to possession of the premises under the statute; and in virtue of the power reserved to her by the settlement, she might have disposed of the property as she thought fit; it not being subject to her husband's control. And if she had mortgaged it to complainant's testator, for a valuable consideration of money actually paid, and that too avowedly for the purpose of ameliorating the trust property, as it testified by Miss Muckenfuss, the Court would undoubtedly decree the repayment of the money, or foreclose the mortgage on failure thereof, as was done in the case of the assignees of Kiernan v. Spierin and wife, [2 Desaus. 460.] a few terms past. Should then the mere informality of Mrs. Casey's having released her estate or interest, before a Justice of the Quorum, induce a different determination? Certainly not. The justice and equity of

complainant's claim is the same, in which way soever the renunciation is taken; and

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as this Court *which regards the substance, and not the form, looks on that as done which ought to have been done, it would compel defendants to performance of their contract, by first directing the titles to be perfected, and then decreeing repayment of the money borrowed, or on failure thereof a foreclosure of the mortgage, and a sale of the property for that purpose; but as this case is circumstanced, the defendant, Mrs. Casey, having under the assignment to the trustees but a life estate, and that too only in the event of her surviving her husband, her renunciation, it would seem, was of little consequence. Upon an attentive review of this case, it does not appear to be contaminated either with fraud on the part of the defendant; or usury, as was alleged, on part of complainant's testator: but that the whole business was conducted altogether in mistake and ignorance. In order therefore that substantial and equal justice may be done, and the rights of the respective parties be preserved, consistent with the principles of equity, it is ordered and decreed, that the lot in bill mentioned be sold by the master on a credit of one, two and three years; that the purchaser give bond and personal security, with a mortgage of the premises for the purchase money, payable with interest; that after all the incumbrances on the lot are fully satisfied and paid, together with the costs of suit, the balance of the purchase money be paid over to the trustees, to be applied agreeable to the uses contained in the marriage settlement; that it be referred to the master to ascertain and report the sums respectively due, and for the payment of which the property is liable and chargeable.

There was no appeal from this decree.

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3 Desaus. *87

*Case XVII.

PETER TREZEVANT, Escheator, v. ROBERT HOWARD, Administrator of Henry Osborne.

[Tried before Chancellor Desaussure, Circuit Court of Equity, Charleston, Nov. 1810.]

[*Aliens* ⇐14.]

The Court will not permit real estate subject to escheat to be sold to pay debts, in order to let the personal estate go over to aliens.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 59; Dec. Dig. ⇐14.]

It appeared from the report of the master that the assets in the hands of the administrator of the estate of Henry Osborne, deceased, are inadequate to the payment of the debts of the estate, and that there is a balance of cash in the hands of the said administrator not yet applied. The Court decreed that the said balance be immediately paid over by the said administrator to the judgment creditors of the estate; and that the real estate of the said Henry Osborne, be sold in February next, by the master, on the terms of as much cash as will pay what may be due by the said estate, after the appropriation of the balance of cash in the administrator's hands as directed above, and the costs of this suit, and the remainder of the purchase money payable in twelve months from the sale, and secured by a bond and mortgage of the property. The Court further decreed that the said administrator deliver up the title deeds of the said real property, and proceed to collect the debts due to the said estate, and pay them over to the master; which money together with the bonds and securities given for the purchase of the real estate, the said master shall deliver to the escheator, should the Constitutional Court determine that the said real estate is an escheat; or to the relatives of the said Henry Osborne, who claim as his heirs, should the determination of that Court be otherwise. The Court further decreed that the judgment creditors of the said estate be stayed from proceeding at law against the said lands.†

† I have no note of the argument in this case, but I have understood that the real point made was, that Henry Osborne being supposed to be an alien, and the escheator having commenced process, and Osborne having relatives abroad, but incapable of inheriting, it was insisted that

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*the real estate liable to escheat, should be sold to pay debts of the estate of H. Osborne; so that the personal estate which is not liable to escheat might go to his relations. But the Court refused to make such order, and decreed as appears above. Measures had also been taken in concert with some of the creditors to enforce the judgments by selling the land under them, and thus paying the debts, which would leave the personal property in the hands of the administrator to be paid over to the alien relations. But the Court on motion of the escheator's counsel granted the injunction above stated, prohibiting the judgment creditors from proceeding against the land, till the personal estate was exhausted.

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3 Desaus. *88

*Case XVIII.

THOMAS BOONE v. GEORGE FRASER, MARIA, His Wife, and SUSAN BOONE.

[Tried before Chancellor Gaillard, Circuit Court of Equity, Charleston, and decree pronounced November, 1810.]

[*Wills* ⇐525.]

Testator devised his lands to be appraised and divided among his children. His eldest son to have choice—the eldest son if he chooses the lot of highest value must make good the difference of value to his sisters.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1138; Dec. Dig. ⇐525.]

John Boone, the father of the complainant, by his last will and testament duly executed in 1792, having disposed of his personal estate between his wife and children share and share alike, devised his real estate in the following words: "On my son arriving at the age of twenty one years, I do hereby direct and empower my executrix and executor, hereinafter named, to have the value of my real estate fixed and ascertained in the best manner they can, and the same to be equally divided between all my children, share and share alike; so that my plantation in Christ Church Parish be in one division or lot, and my other lands be equally divided in as many parts or lots as there be children, with the tract in Christ Church where I now live; that he shall have his choice of any one tract or lot so divided. Item.—I give and bequeath the same tract or lot he makes choice of to my said son, unto him and his heirs and assigns forever." The testator's son has arrived at the age of twenty one years, and has made choice of the plantation in Christ Church, which is of considerably greater value than either of the other lots of land. The question made for the consideration of the Court is, whether the son ought to make good the difference in value

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between the planta*tion in Christ Church, and the other lots assigned to his two sisters? The Court is of opinion that the testator intended his estate to be equally divided between his children, having reference to the value of it. Why else did he direct the value of it to be fixed and ascertained? The words to be equally divided between my children, share and share alike, are strong and unequivocal. Then follow the words, so that my plantation in Christ Church Parish be in one dividend or lot, and my other lands be equally divided in as many parts or lots as there be children, with the tract in Christ Church where I now live; that he shall have the choice of any one tract or lot so divided. To construe the words so as to let the son have the plantation in Christ Church without making good the difference in value between it and the other lots of land, would be to control the obvious meaning and operation of the preceding part of the clause of the will. Such a construction ought to be put on them as will make the whole clause stand. Besides the testator would hardly have left to his son the choice of his lots of land, knowing his plantation in Christ Church to be worth a great deal more than either of his other lots of land, if he had not intended him to make good the difference in value between it and them. It is therefore ordered and decreed that the complainant do make good the difference in value between the plantation of Christ Church, of which he has made choice, and the other lots of land assigned to his sisters.

3 Desaus. 89

Case XIX.

HIGGINSON and Wife v. the Executors and Executrix of FABRE.

[Tried before and decree pronounced by Chancellor Gaillard, November, 1810.]

[*Principal and Agent* ⇐76.]

An agent selling a house for less than the limited price and crediting the full price is bound by it, though the price obtained was the full value.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 158; Dec. Dig. ⇐76.]

[*Principal and Agent* ⇐81.]

Commissions, not originally intended to be charged, and disclaimed, shall not afterwards be set up—especially as the agent got a legacy for his services.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 196; Dec. Dig. ⇐81.]

[*Account Stated* ⇐11.]

Complainant opening a stated account, and falsifying certain charges in it, the other party allowed to open it, to set right a mischarge of interest.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. § 71; Dec. Dig. ⇐11.]

[*Executors and Administrators* ⇐288.]

Executors & trustees residing abroad, not bound to give security to pay a legacy which is contingent—where there is no charge of misconduct.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1147; Dec. Dig. ⇐288.]

This case was argued on exceptions to the master's report. Those exceptions will be

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considered under the *following heads: Mr. Pringle's bond; the house; the charge of commissions; the sale of stock; interest.

1. As to the bond. (Not material to be reported.)

2. As to the house. Mr. Poyas owned a house in this city which Mr. Fabre had sold at auction for cash on the 1st September, 1791. It brought between £900. and £1000. Mr. Fabre gave credit to Mr. Poyas in his books for £1800. on account of his house and informed him of it; £1200. is stated to have been the worth of it when it was sold, and the difference between that sum and £1800. is claimed. On the 26th of January, 1799, Mr. Fabre credited Mr. Poyas in his books with the £1800. The counsel for the defendant insisted that as £1200. was the real value of the house, the complainants ought not to be allowed £1800. They considered the credit given by Mr. Fabre of £600. more than the value of the house, as an executory contract, not founded on any consideration as nudum pactum, and therefore void. To the legal validity of a contract consideration of some sort or other, is essential; but he who deliberately makes a promise to another, raising in him an expectation of benefit, is morally bound to perform it; and a slight consideration will be sufficient to render it a legal obligation. The contract in this case can-

not be considered as executory, for there does not remain any thing to be done. Considered as a contract it was executed by Mr. Fabre. He informed Mr. Poyas that he had sold the house for £1800. credited him for £1800. and expressed his willingness to make good, and to indemnify him for the difference between that sum and £2000. Ought this contract be set aside? It is unnecessary to discuss this point. However it may be as well to observe here, that if free agents will with open eyes ratify even invalid agreements, a Court of Equity will not relieve them: see Pow. on con. 2d. part, p. 163.

Mr. Poyas died in June, 1799, and never knew of this charge against him of £600. If Mr. Fabre intended to make it, he ought to have made it sooner than he did and informed Mr. Poyas of it. Fides servanda.

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*But my decision respecting this £600. is founded on another ground: Mr. Fabre's departure from his instructions. It is said he did not depart from them; and to prove this a letter from Mr. Poyas to Mr. Fabre, dated February 25, 1797, is relied on. This letter says "I think the late fire at Savannah may help the sale of it (alluding to his house) if any burnt out there should remove to Charleston; but let this be as it may, you have my carte blanche, to do the best you can, and I will be satisfied." This expression certainly imparts extensive discretionary power, and considered by itself would be conclusive; but it was accompanied by another letter dated 1 January, 1797, the contents of which it confirmed. This other says "As to the house if you find it unsold at your arrival, I confirm my desire that it may be advertised for sale, among the first things you do, and to sell, payable at the instalments mentioned, if you can obtain £2400. (or £800. per instalment) or even £2000. nett on London. If neither of these can be obtained then you will let it in the best manner you can." It appears from these letters that Mr. Poyas considered his house as worth £2000. He had received a letter dated 28th June, 1796, from Mr. Price, saying that he expected to obtain that sum for it. It is evident that Mr. Fabre thought he had violated his instructions in the sale of this house: for in his letter dated 1st February, 1798, in which he informs Mr. Poyas of his having sold it for £1800. he offers indemnity for £200. the difference between £1800. and £2000. at which he says, it had been limited. Mr. Poyas on the 8th of June, 1798, writes in reply that he was convinced, that what he had done was for the best, and considers the suggestion of indemnity as unkind. The doubt which the expression carte blanche is calculated to raise, is completely done away by the construction put on his instructions by Mr. Fabre himself. The £600. must be accounted for.

3. As to the charge of commissions. Mr. Fabre in his letter of the 6th of February,

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1792, says to his un*cle, Mr. Poyas, after speaking of winding up his concerns here, "I will help towards it by charging no commissions;" and in another letter dated on the 4th of March, 1793, he says, "You will observe as in the last year's account, no commissions are charged, which will help on your side considerably. I pushed on as much as possible to close your concerns, in order to avoid such charges which here are extravagant, being," &c. &c. The following memorandum for Mr. Fabre was made by Mr. Poyas on the 20th of November, 1793, "You will in course endeavor to settle finally with Mr. D. and also to bring the affairs of G. & Co. to a final issue, as well as any other old balance that may be outstanding. This money or any further sums you may receive for rent, dividends of stock, &c. after deducting the commissions to your house, to be vested:" and by letters which were produced it is clear that by your house, was meant the house of Fabre and Price, although that copartnership was dissolved in 1792. It was contended that this memorandum revived the right of charging commissions, which had been previously relinquished by Mr. Fabre; however this may be, it is certain that commissions were not intended to be charged by Mr. Fabre, and that they were not charged by him until the 1st February, 1799; for Mr. Price writing to Mr. Poyas on the 5th of February, 1795, observes, "I only remind you of the different conduct pursued towards you, and more particularly on your old concerns for the settlement of the whole were you charged with any commission? No." And in folio 114 and 115 of Fabre and Price's book, Mr. Poyas's account is brought down to the 4th of March, 1793, and a balance struck in his favor, and no commissions are charged. The memorandum at the foot of the account, furnishes additional proof that when the services were rendered for which commissions are charged there was no intention of charging them. Mr. Poyas never knew of this charge of commissions; he died as has been mentioned in June, 1799, and he left a

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legacy of £500. to Mr. Fa*bre, which has been paid. The inducement to this legacy is stated to be services rendered. Besides this legacy of £500. he left Mr. Fabre a contingent legacy of one fourth of the residue of his personal estate, which is considerable. The contingency is the death of his daughter without issue; she was well advanced in years before she married, has never had and probably never will have issue. If Mr. Fabre did his uncle's business without charging commissions in prospect of a legacy from him, he was not disappointed. No commissions can be allowed for services rendered previous to Mr. Poyas's death: but they must be allowed for services performed since that period. And as these services were perform-

ed here the allowance must be the usual mercantile commissions in this place.

4. As to the stock. (Not material to be reported.)

5. As to interest. Mr. Fabre wrote to Mr. Higginson on the 9th of October, 1799, and enclosed in his letter a stated account, in which interest is calculated at 7 per cent. This interest is required by complainant; but as this account has been opened and the complainants have been permitted to falsify charges contained in it, it would be unreasonable to hold the defendants strictly to it. The copartnership of Poyas and Fabre, commenced in 1793, and continued until Mr. Poyas's death, in 1799. Five per cent. must be allowed on the balances on accounts, between Mr. Fabre and Mr. Poyas, until the dissolution of the copartnership.

The defendants pray to be protected in their ulterior rights; that is, that the money which may be decreed against Fabre's estate may not be paid over without security for the contingent legacy. That the legacy is contingent is a reason for not ordering this security. Mrs. Higginson, the only daughter of Mr. Poyas, was the principal object of his bounty. Should she have issue the legacy given to Mr. Fabre will go to that issue, and should she not have issue, it may be a long time before the contingent legacy will become a vested one and payable. The testa-

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tor has thought proper to repose *trust in Dr. Hamilton and Mr. Higginson, and it is not lightly to be presumed that they will abuse it. This Court will not compel even an insolvent executor to give security, unless it should appear that he is wasting the assets of his testator, or acting improperly. There is no imputation of improper conduct against Dr. Hamilton, the trustee of Mrs. Higginson; nor against Mr. Higginson, the surviving executor of Mr. Poyas. They are therefore left to the uncontrolled exercise of the rights that belong to them, in their respective characters.

Let the accounts be referred back to the master.

Mr. Cheves, for complainant.

Mr. Ford, for defendant.

There was no appeal from this decree.

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3 Desaus. 94

Case XX.

WILLIAM THOMPSON and Others v. ANN WAGNER, Executrix of George Wagner, who was Executor of John Wagner, Who was Executor of Benjamin Baker, Deceased, and WILLIAM HASELL GIBBES, Esquire, Master in Equity.

[Tried before Chancellor Rutledge, on the 1st of February, 1810, and he pronounced his decree 1st November, 1810.]

[*Executors and Administrators* ⟸391.]

[Cited in Pope v. Mathews, 18 S. C. 448, to the point that where a master in chancery was ordered to sell land and pay over the proceeds to an executor, to be applied according to the will, it was *held* that the executor was not responsible for a loss by the insolvency of the purchaser and the neglect of the master in seeking payment, especially as the executor had repeatedly urged the master to proceed.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1589; Dec. Dig. ⟸391.]

[*Judicial Sales* ⟸16.]

[Cited in Wightman v. Gray, 10 Rich. Eq. 530, to the point that a master in chancery is not bound to take security upon a sale of land, unless security is required by the decree of sale, and his advertising that security will be required does not preclude him from dispensing with it.]

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 39; Dec. Dig. ⟸16.]

[*Limitation of Actions* ⟸102.]

[A master in chancery, selling land under a decree of court, is not a trustee of the proceeds so as to prevent him from taking advantage of the statute of limitations.]

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 495; Dec. Dig. ⟸102.]

The scope of complainant's bill is to compel a settlement of the accounts of John Wagner, deceased, as executor of Baker, and that his estate in the hands of his executor, George Wagner, may be made liable for the debts of Alexander Moultrie and Benjamin Waller, who purchased some of Baker's land, and afterwards became insolvent, whereby those debts were lost, through John Wagner's neglect: Or that the defendant, William Hasell Gibbes, master in equity, may be made responsible for them, he having sold under the decree of this Court, and neglected to take security from said Moultrie and Waller. Bill further prays that the defendant, Wagner, may be decreed to deliver up to com-

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*plainants the plate mentioned in Baker's will. The defendants, Wagner and Gibbes, by their respective answers, are each desirous of throwing the responsibility for neglect of duty in not securing the debts on the other. Defendant Gibbes also denies his responsibility as master, and pleads the limitation act in bar of complainant's demand. This case was some terms since partially argued upon the defendant Gibbes's plea of the limitation act. As the case then appeared to the Court, the plea was sustained; liable however to be set aside, if not proved or supported by his answer, which though it was then read, was not taken into view in that determination.† The whole merits of the

† The Court are of opinion that in no point of view can the defendant Gibbes be considered as a trustee for complainants. He was nothing more than the officer of this Court ordered to sell the property on a credit of twelve months, and pay over the proceeds to the executors of Wagner. It was the duty of the executor to collect the money when it became due, or to have put the bonds in suit. The master was no otherwise culpable than in not delivering to the executor the bonds he had taken for the property sold: but the executor was more culpable in not obtaining them from him and su-

case have now been discussed upon bill and
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answers; and each of the de*fendants have endeavored to throw the responsibility on the other. Defendant Gibbes's counsel contending that he is not answerable for what he did as master, acting merely as the officer, and under the order of the Court; nor even as attorney at law, having done his duty as such; and that the loss was occasioned by the distressed situation of the country, and the existing laws. Also, that he was not directed by the decretal order to take security, and as master he was not obliged to do it. That in September term. 1785, he reported to the Court that he had sold the property agreeable to order, and had taken bonds and assigned them over to the executor of John Wagner, which report was accepted and confirmed by the Court, with defendant's consent. In his answer he says he believes the bonds were not then taken out of his hands, but were ready to be delivered when called for: They ought therefore to be considered as left in his hands, for the purpose of collecting the money as it became due, and as attorney at law to be sued if necessary. Defendant Wagner's counsel on the other hand insists that he ought not to be liable for any loss, but it must be borne by Gibbes, who was the special agent appointed by the Court to sell the property and pay over the monies to the executor. That he had no control over the transactions of the master, the business being taken out of his hands by the Court and transferred to the master. That defendant Gibbes is further liable because he did not take security either real or personal from the purchasers of the property, agreeable to the conditions of sale which he himself prescribed; in consequence of which the debts of Moultrie and Waller have been lost. That on Moultrie's bond defendant Gibbes made a memorandum, that personal security was to be given or a mortgage of the lot; neither of which was done. The decretal order of June, 1785, directs the master to sell the property on a credit of twelve months, and that the monies arising from sale be paid to the executor for the purposes directed by the will. And the master advertised
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the pro*perty to be sold on twelve months credit, on bond bearing interest, and such security as may be approved of by the master. By the testator's will dated in 1780, he directs his estate to be sold in better times. No power is given therein to executors to sell. The law was not then in existence authorising executors to sell where testator had not expressly given it. The Court therefore ordered the property to be sold by the master. From the view I have taken of this case, I think the questions are, 1. Whether the master, as master, neglected his duty? 2. Whether after making his report he is still to be considered as master, and if guilty of neglect in that character? 3. Whether he is responsible? and being responsible, 4. Whether his plea will protect him? I do not think it is absolutely the master's duty to take security on sales of property, unless directed by the decree so to do; because acting in such cases in some respects in a judicial character, he must exercise his own judgment. If however he thinks fit to prescribe the conditions of sale, and sells upon those terms, he makes it part of his duty to have them complied with, and he cannot afterwards dispense with them. Indeed it is plain that he did not think himself at liberty to do it, because he took security from Waller, and made a memorandum on Moultrie's bond of the date of sale, that it was to be signed by the security therein named, or the lot was to be mortgaged by Moultrie; neither of which was done. It will not therefore avail him now to say that defendant Wagner did not urge it: His assent was not necessary. Defendant Gibbes was therefore guilty of neglect in not taking security agreeable to his advertisement; and having made it his duty, & omitting to perform it, though the report of the sales afterwards was confirmed without opposition, it does not vary the case or lessen his responsibility. If, as he alleges, he acts as attorney, he ought to have shewn (as he did in Fenwick's Case [1 Desaus. 126]) a special authority from Wagner for that purpose, which has not been attempted. The Court must therefore con-
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sider him as *acting as master, or its agent especially appointed, in either of which characters he is responsible for negligence or misconduct. The arguments used by defendant

ing if necessary. If defendant Gibbes was responsible to any one, it was the executor. There was no privity, no confidence between him and complainants; nor was there any trust between him and the executor, who was here on the spot, his next door neighbor, who received some money on account of the sale of some of the property, and gave his own receipt for it, and never in the course of twelve years after the property was sold, thought fit to call on the master to make good any loss sustained by the insolvency of the debtors. If he had received any money under the decree of this Court, the case would have been materially different, and his plea of the limitation act would not have availed him at the distance of any period of time; but as he cannot be considered as a trustee in this case, seeing he had only to deliver over the bonds, for he was not authorised to receive the money, he stands upon the same footing, and is entitled to the same benefit and privilege of pleading the act of limitation with any other individual. Viewing him then merely in the light of an attorney at law, with whom the bonds were left by the executor, and who directed one of them to be sued, which was done, but nothing received, he is no more responsible than any other attorney; indeed it would be a harsh doctrine and not well relished by the bar, if at the end of 20 or 25 years, after a debt had been sued for, the attorney should be made responsible for it to clients, although it had never been recovered. The plea of the limitation act must therefore be sustained.

Gibbes's counsel respecting the situation of the country, and the various instalment acts that were passed at that period in my opinion do not apply in this case, for although the legislature prohibited the recovery of debts generally, it allowed creditors to demand security, and to sue if it was refused to be given. But in this case if defendant Gibbes had done his duty in the first instance, the injury now complained of could not have occurred; for his sale was in August, 1785, his report in September, and the first instalment act, or pine barren law, as it is called, was not passed until October, previous to which all his sales were closed, and his neglect of duty had occurred; nor does he attempt to exculpate himself for it: indeed he cannot. The case of Fenwick against the defendant Gibbes as master, was relied on by his counsel, but that was totally different from this. To be sure the order of the Court was only to sell, and no terms prescribed. He however sold, took a mortgage of the property, and an assignment of a bond that he thought good, but which afterwards proved a bad one. The injury complained of there, was, that he had not taken sufficient security; but the bond proving to be a bad one at a subsequent period, being a circumstance not within the reach of human foresight, and an error in judgment, the Court would not make him liable for the debt. In the present case Gibbes did not take any security at all. He was therefore guilty of great neglect; being the proper officer of the Court, ordered to sell, receive the money and pay it over when it became due. When the plea was argued it is plain the Court was misled respecting the terms of the first decree; for in the last decree it is declared, "That the master was no otherwise culpable than in not delivering over to the executor the bonds he had taken. Also if defendant had received any monies under the decree, the case would have been materially differ-

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ent, and the *plea would not have availed him; and that he could not be considered as trustee, seeing that he was only to deliver over the bonds and was not authorised to receive the money. Whereas the contrary is the fact; for he was not authorised to deliver over the bonds; but was ordered to sell the property, receive the money and pay it over to the executor for the purposes mentioned in the will. Also, that he did receive all the monies under the authority of the Court (except a small sum which was discounted by Wagner with Moultrie,) and paid them over as directed. He can be viewed then in no other light than as master, acting under the authority of the Court; and as such having been guilty of great neglect, and misconduct, the Court ought not to permit him to avail himself of the benefit of his plea to shield himself from responsibility. As to Waller's debt the defendant Gibbes took such security as in his judgment appeared to be good. I do not think therefore he or defendant Wagner ought to be charged with that. Now although I am of opinion that defendant Gibbes was guilty of great neglect in the first instance in not taking security, and is therefore responsible, I at the same time am of opinion that he ought not to be wholly so; for the defendant John Wagner was also extremely culpable in not compelling him to do his duty, and ought to be equally chargeable with the loss of Moultrie's debt; for although the Court directed the property to be sold by the master, and the money to be paid over by him to the executor, it was nevertheless incumbent on Wagner to take care that the decree was complied with, and if the master was guilty of neglect, to apply to the Court, whose officer he was, and who had a control over him, to exercise their power by compelling him to do his duty, which the Court no doubt would readily have done. Instead however of making such application, he (Wagner) remained inactive from the time of the sale to the day of his death, nearly twelve years, without once calling on the Court to aid him in bringing defendant Gibbes to any account what-

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ever, although he himself *was constantly and repeatedly urged to a settlement of the affairs of the estate by the legatees and devisees of Baker. And further, notwithstanding Annely has sworn that in 1790, he repeatedly went with Wagner to defendant Gibbes to press him to get payment from Moultrie; yet it nevertheless appears from Gibbes's account furnished by himself, that at that very time he had received on account of sales, and was in possession of upwards 600l. that remained in his hands until John Wagner's death, which happened in 1797, which would not have been the case if he had used any thing like common diligence in calling Gibbes to account. Upon the whole of this case, considering all the circumstances attending it, and for reasons above mentioned, I am of opinion that both Wagner and Gibbes were guilty of such great negligence and misconduct in the whole of this transaction, as ought to make them responsible for the loss of Moultrie's debt. It is therefore ordered and decreed that it be referred to the register to state what is due for principal and interest thereon, and that the amount thereof be paid in equal proportions by the defendant, William Hasell Gibbes, and the executor of John Wagner, deceased. The testator, Benjamin Baker, having in his will given to Mrs. H—— and Miss C——, the articles they were in possession of belonging to him with certain exceptions, without mentioning of what they consisted; it is further ordered that it be referred to the master to ascertain in the first instance what those articles were, and to report thereon.

Cheves, complainant's solicitor.

Parker, solicitor for defendant Gibbes.

Ford, Drayton and Pringle for Mrs. Wagner.

From this decree there was an appeal by Mrs. Wagner, executrix of Wagner.

The defendant, Ann Wagner, widow and relict of Geo. Wagner, who was executor of John Wagner, who was executor of Benja-

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min Baker, will appeal from the sen*tence and decree delivered in this case, on the following grounds:

1. That there was no obligation imposed by the decree of the Court in the suit heretofore brought by two of the complainants against the deceased John Wagner, as executor of Baker, to take security from Alexander Moultrie and Benjamin Waller, two of the purchasers at the master's sales under the said decree; and the Court not having dictated such duty, there could be no culpability inferred from the omission to take such security by the master.

2. That the circumstance of the master's advertising the property for sale on a twelve months credit, for bonds on interest with such security as might be approved by the master, being an act of his own, ought to be regarded only as intended to reserve to himself the power of exercising his discretion when the purchasers should be known, and not as imposing such an indispensible obligation, as would have been imported in a decree of the Court prescribing such terms of sale.

3. That in August, 1785, when the sale was made by the master, the two purchasers, Alexander Moultrie and Benjamin Waller, were both in very high credit, possessed of very extensive property, worthy then of being trusted to a far greater extent than the amount of their purchases, and were actually so trusted. Col. Moultrie in particular, being attorney-general of the state, being in the habit of receiving public monies to a great amount annually, and the state requiring no security; of all which there was sufficient testimony before the Court; from all which it is contended that it was not culpable in the master to take their bonds for the purchase money.

4. But nevertheless, should it even be determined that the not taking of security from Alexander Moultrie and Benjamin Waller, was a culpable negligence, there was nothing in the case before the Court either of law or fact whereby any part thereof could be imputed to John Wagner, for as much as that

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he was only a de*fendant in the original suit, was vested with no power to dictate to, or control or influence the master, as his proceedings under the decree, and there was no legal proof that he either could or did absolve the master from any of his lawful duties, or assume on himself any share of the responsibility for duties omitted by the master. That the judgment or assent of Wagner on the point of taking or not taking security, was neither authorised or contemplated by the decree, which divested him of all agency in the sale, nor were they referred to in the advertisement by the master, which reserved the right of judging wholly to himself. Nor does it appear that Wagner actually knew that no security of any kind had been taken by the master.

5. If there was any culpable neglect in not earlier proceeding against Alexander Moultrie by suit or for security, no share of the blame and far less any of the penalty belong to John Wagner, who had no power under the will to sell, and no authority under the decree to sue or to dispense with suing; the bonds having been taken by the master, payable to himself and kept in his custody. It is submitted that the negligence occasioning the losses complained of, was justly imputed to the master exclusively; because it was his duty under the decretal order of the Court to recover the money, and it was more especially his duty to do so in this case, because by omitting to take the security specified in his own advertisement, he rendered the payment of the debt more hazardous, thereby making it peculiarly necessary to exercise extraordinary diligence against the debtors. The executor, John Wagner, was not required to execute his trust until the money was paid to him, and it appears by the evidence of Mr. Annely, that he took the steps which are not customary to urge the master by frequently pressing him to do his duty.

6. For that the said decree is erroneous in making the said John Wagner answerable for the official neglects or defaults of the master, on the ground that he, John Wagner, did not coerce the master to his duty, by

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*complaining of him to the Court. It is submitted that on this ground the consequences are most of all imputable to the complainants themselves, who neglected to complain to the Court that the benefit of the decree in their favor was so long withheld from them. That as complainants on record, at whose instance that very decree was made, it rested with them to pursue their remedy to its consummation, and not at all with the defendant, who was passive in the suit, and who was no trustee for them by the terms of the decree, until the money should be paid to him by the master. The Court being equally open to them for a remedy against the master, as it originally was for the purposes sought in their bill. It is submitted that they ought in this respect to stand in no other or better light than is usual with plaintiffs at law, or complainants in equity, who having obtained judgments omit to call on the Court, when occasion requires, to en-

force obedience to its judgments or decrees, or compel execution thereof by its officers.

Ford, solicitor for defendant Wagner.

There was also an appeal from the decree by W. H. Gibbes, the master in Chancery.

The cause was fully argued, but so imperfect a sketch has been preserved, that it would be an injustice to the bar to give the argument.

The Court of Appeals after hearing and considering the arguments of counsel, delivered its decree as follows:

The bill seeks to make the estate of Wagner, the executor of Baker, and William Hasell Gibbes, master in equity, liable for Moultrie's debt, which has been lost by his insolvency. In the suit of Bayley and wife against the executors of Baker, the Court ordered certain lands belonging to Baker's estate to be sold, and the monies arising from the sale to be paid to the executor for the purposes directed by the testator's will. This order is dated on the 13th of June, 1785, and

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in obedience to it a *sale was made, and a report of the sale confirmed in September following, Moultrie's bond remained in the hands of Gibbes, and was sued in May, 1790, and judgment obtained on it in November after. It is said that Wagner's estate ought to be charged with this debt, on the ground of gross negligence. From the evidence adduced it appears that in 1786, '7 and '8, Wagner frequently applied to the master to get payment from Moultrie, and that in 1792, he engaged a gentleman of the law, as Annely, a witness says, to compel Gibbes to do his duty. Considering these circumstances and the situation of the country from 1786 to 1790, the period between the time when the bond was payable and when it was sued it would be harsh and unreasonable to make the estate of Wagner liable for the loss of this debt. It might have been secured if Moultrie had been sued as soon as it became due; but an executor is not bound to act so rigorously; he is left very much to the exercise of his own discretion, and if his conduct be fair and honest, the law though it will not excuse him for gross negligence, will not make him liable for every omission of duty. This results from the very nature of discretionary powers. In 1786, and some years after, Moultrie was in good credit, and few persons acting for themselves, would at this time, have deemed it a necessary caution to require security from him. The forbearance of Wagner from 1786 to 1790, under the circumstances which have been stated, is not sufficient to constitute such a laches, as ought to render him responsible. The decree as to Wagner is reversed. The complaint against the other defendant, Gibbes, is that he did not take security from Moultrie, and that he ought to have obtained from him payment of his bond. The decretal order left Gibbes at liberty to take security or not, as he might think proper. Much importance has been attached to Gibbes's advertising that security would be required; but the order having left him on the subject of security free to act according to his own judgment, he continued so until the completion of the

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contract. *His advertising that security would be required, did not deprive him of the right of dispensing with it. If Gibbes erred in not taking security from Moultrie, it was an error of judgment. The next part of the complaint is that he ought as master to have procured payment of Moultrie's bond. The defendant has pleaded the statute of limitations, and this plea is sufficient to protect him. There are many cases in which the Court would consider the master as not entitled to the benefit of this statute: but this case is not of that class. The complainants themselves, are subject to the imputation of laches, for the transactions of which they complain, took place, some of them, as far back as in 1785, and their bill was not filed until 1806. The Court cannot relieve them. The decree is reversed as to Gibbes also. The complainants must pay the costs.

(Signed) W. THOMPSON,
THEODORE GAILLARD,
THOS. WATIES.

March 19, 1812.

Judge THOMPSON informed the bar that Judge JAMES concurred in this decree.

Judge DESAUSSURE gave no opinion in this case, having been concerned in it as counsel when at the bar.

Northrop, for complainant.

Ford, Ward, W. L. Smith, for defendant Wagner.

K. L. Simons, for defendant Gibbes.

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3 Desaus. 105

Case XXI.

WILLIAM HALYBURTON v. KERSHAW and Others, Administrators of W. WHITE.

[Tried before Chancellor Desaussure, Circuit Court of Equity, Charleston, Nov., 1810.]

[*Aliens* ⇐9; *Escheat* ⇐3; *Executors and Administrators* ⇐92.]

A person dies intestate: his nearest relatives are aliens: a more distant relation who is a citizen is entitled to the land: and he is entitled to have the benefit of a contract made by the testator for building a house on the land: the administrators had rescinded and cancelled it.

[Ed. Note.—Cited in Hull v. Hull, 3 Rich. Eq. 92.

For other cases, see Aliens, Cent. Dig. § 21; Dec. Dig. ⇐9; Escheat, Cent. Dig. § 3; Dec. Dig. ⇐3; Executors and Administrators, Cent. Dig. § 403; Dec. Dig. ⇐92.]

[*Evidence* ⇐78.]

[In an action by an heir against an administrator of his intestate to secure the benefits of

the contract alleged to have been entered into by the intestate for the construction of a dwelling house upon the lands descended to the heir, it appeared that, before the contract was carried into execution, the intestate died, and the administrators canceled and destroyed the contract. *Held* that, under the rule that everything will be presumed against the party to the instrument by whom it had been destroyed, it will be presumed that the contract was supported by a sufficient consideration.]

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 98; Dec. Dig. ⟸78.]

[*Evidence* ⟸251.]

[An admission by an administrator in a suit against him in relation to the estate of the intestate binds the parties entitled to the estate.]

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 986; Dec. Dig. ⟸251.]

This cause came to a hearing under the following circumstances: William White died intestate, leaving a considerable real

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and personal estate. He left neither *wife nor child. His nearest relatives were aliens and could not inherit his land, but they were entitled to the personal estate. The complainant, William Haleyburton, was a more distant relation, but having become a citizen, he was entitled to the real estate, as if no persons existed more nearly related to the deceased White.

The intestate had a short time before his death, made a contract with Mr. Hobbs, a carpenter, to build him a house on a lot of land which belonged to him in fee simple. The contract was in writing, and described the sort of house and out buildings to be erected; and White agreed to pay the builder 800*l.* of which he advanced a considerable part to Hobbs. Mr. White died soon after, and before the contract could be carried into execution. The administrators of W. White unaware of the effect of such an act, afterwards agreed with the carpenter to rescind the contract, and the same was cancelled, and the money refunded.

The complainant who inherits the real estate of W. White, as the nearest relative capable of taking and holding it, filed his bill to have the benefit of this contract made by the intestate for the improvement of the real estate.

The defendants admitted all the facts, and stated, that being unaware of their conduct being prejudicial to any person concerned in the estate, they had rescinded the contract and cancelled the agreement, and submitted to the direction of the Court for their government.

There were no proofs in the case. The point was argued on the bill and answer.

Cheves, for complainant. It is a general rule, that any contract relating to land, goes with the land, for the benefit of the heir or devisee.

The reason of covenants relating to lands, descending and passing to the heir at law or devisee, is because it is a covenant that runs with the land and goes with it.

Suppose the administrator and the workman had gone on with the contract and com-

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pleted the work, to whose *benefit would it have enured? To the heir or devisee of the land. And he has a right to insist on its being carried into effect, and to have the buildings paid for out of the personal estate.

W. L. Smith, for defendants. 1. Is this case sufficiently proved? Complainant produces no evidence but the answer of the administrators admitting the agreement. The party interested to oppose complainant is Thomas Haleyburton, who claims the personal estate, and who has been decreed to be one of the nearest relations and entitled to half the personal estate. He is the real defendant. Thomas Haleyburton is a foreigner. He would have been entitled to the real estate if he had been a citizen.

The contract is uncertain: not known whether it be a real or personal contract. Whether it bound the land or the heir or the personal representatives. The bill does not state the particulars of the contract, but briefly that it was to erect a house on a lot of Mr. White. No certainty either of the nature of the contract, whom it bound, or whether it could be carried into execution.

The administrators had a right to rescind the contract or not. If not, what they did was a nullity; and a suit may be brought for the completion of the contract; perhaps Hobbs could not have completed it; he might not have been able.

Suppose administrators had a right to cancel the contract? Then there is an end of the matter, and complainant cannot set it up.

As to the law on the case, see 2 Fonblanque, 196, text and note. Reasons why heirs are favored, because they are usually children or near relations, and executors are strangers or distant relations. 1 Fonbl. 420: It does not appear but that the building intended by the contract might be a wooden building, not fixed to the soil. The contract being with a carpenter shews it was to be of wood. Cases to shew that the Court latterly departs as much as it can, from the old rule of preferring heirs to executors and personal rep-

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resentatives; 3 Atk. 255, *Curling and May; 2 Ves. Jun'r 170, Walker and Dun. see abr. 222. To give money the character of land, it must be imperatively fixed as land. No evidence here to shew the nature of this contract, and to prove that the money was imperatively fixed as land. 3 Atk. 212, Harper v. Miller: Where power to lay out monies in land, and the original intention to consider it as money, if not laid out in land. White did not consider it as land unless the house was built in his life time. 3 P. Wms. 22,

Creuse v. Barley. 4 Ves. 60, Croft and Lee, abr. p. 223, where object fails (of a trust) the Court will not vary the nature of the property so as to interfere between representatives. 2 Ves. Jun. 336, Briston and Ward, abr. 222, 3; Ib. 447, Sheldon and Barnes, abr. 223; 3 Ves. Jun. 450, Mabberly and Strode, abr. 223; 5 Ves. Jun. 303, att. gen. v. Bowyer, abr. 224; Ib. 388, Whelpdale v. Partridge, abr. 224; 1 Brown, Poultney and Darlington, abr. 222; 4 Ves. Jun. 411, Kendall and Abbott, abr. 224; 10 Ves. Jun. 607, Brown and Marke. It must appear clearly to the Court that both parties were completely bound by the contract. If the ancestor could not have been compelled to carry into effect the agreement, the Court will not vary the situation of the funds. Perhaps specific performance could not have been enforced. Court will not presume that White could or would have enforced the contract. 13 Ves. 456, Buckmaster v. Harrow. To entitle the heir to performance of an agreement out of the personal estate, agreement must have been binding, and the property converted before testator's death. The question is, whether at the death a contract existed, by which parties were legally bound, and could have been specifically enforced. No sort of evidence that White's contract bound the heirs or only personal representatives. The bill charges only generally that a contract was made, but does not say of what nature it is; and defendant admits the bill. 1 Foubl. 422: If the purpose of the intended investment in land fails, the

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heir not *entitled to the land. 2d point. Different policy of this country in its laws relative to real estate: see Judge Grimke's remarks on the primogeniture act. Suppose a case: White had contracted to build a palace, which would have taken almost all his fortune, and died. His son was a foreigner. His relation who was a citizen was a distant one. Then could the Court rob the son already robbed of the real estate, by enforcing the contract and paying for it out of the personal estate?—Case of Pringle and executors of M'Pherson; where machines contracted for were directed to be built by the Court, out of the general funds of the estate, was not decided on argument.

Cheves, in reply. In Viner (collection of cases,) Lord Kenyon says that all covenants do not go with the land, unless the party contracting had an interest in the land. None of the cases quoted are to this point. The principle does not turn on the ground of favor of the heir. Case of the devisee getting the benefit of the covenant relative to land, against the heir, are common.

Remarks on the cases quoted: some of them are cases of an option. Some cases of trust where the object failed. The claim upon the Court is not to the favor of the Court, but to substantiate a right, of which he was deprived by the innocent but erroneous act of defendants. The affair is to be considered as it stood at the death of the party. How did that stand? This was a contract which could have been compelled to have been enforced by either party, and the house would have been built, and the heir would have had the benefit of it. The case of Pringle and M'Pherson, was on full consideration, though not on great argument; but the point was distinctly submitted to the Court, with an argument; and that case decided in our own Court a few years ago comes fully up to this.

Remarks on the contract. The admission of it by the defendant is the best evidence, and surely binds the personal estate, which the administrators represent. The contract was for a good dwelling house, out build-

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*ings, &c. and the price fixed. Mr. White contracted to pay; his personal estate is liable to pay. The only question left is, will the Court turn round the party to a suit at law? Surely not. For complainant was bound to come here. The deed or contract had been destroyed, and he came here to set it up, and have the effect of it. Discovery draws relief. The bill is framed so as to have the money or have the contract carried into effect. It was competent to complainant to adopt the act of the administrators, and to receive the money, instead of carrying the agreement into effect, and he by this bill has adopted it.

THE COURT thereupon delivered the following decree:

The complainant files this bill, as entitled to the real estate of the late William White, against the administrators of the said White, to have the benefit of a contract made in writing by Mr. White, in his lifetime, with Mr. Hobbs, a carpenter, by which Mr. Hobbs engaged to build a house and out buildings, for the said Mr. White, on a lot of land belonging to him, for which he engaged to pay Mr. Hobbs the sum of 800*l.* of which sum he advanced 500*l.* to the said Hobbs.

The bill sets forth the existence of the contract above-mentioned, and then charges that the administrators soon after the death of Mr. White, (which took place soon after he had entered into the contract,) not adverting to the distinct interests of the persons who might be entitled to the real estate, and of those who might be entitled to the personal estate, had cancelled the contract with Mr. Hobbs, paying him a small sum for labor and expense incurred by him in commencing the work; and the bill prays for payment of the sum of money which would have been expended in the erection of said buildings according to the contract, with interest thereon, or such other relief as may be proper.

The answer admits that Mr. White did enter into such contract as is stated in the bill,

and that it was cancelled in the manner re-

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lated; and submits to the Court *whether the complainant is entitled to have a compensation out of the personal estate.

No testimony was produced on the trial. The complainant relied on the admission of the defendants, as to the formation and terms of the agreement; and as to the existence of it in full force at the death of Mr. White, and of its being cancelled by the administrators after his death.

The counsel for the defendants (supporting the interests of the persons entitled to the personal estate,) insisted that this admission by the administrators was not a sufficient foundation to establish the agreement, for that the admission of the administrators could not bind the persons entitled to the personal estate.

I cannot however discern in what respect this question differs from others that occur daily in the transactions of administrators. There is scarcely a cause depending in this Court against administrators, in which they do not in their answers admit some of the facts charged; and these admissions in those cases as well as in this, operate as far as they go to charge the personal estate to the prejudice of those entitled ultimately to it. They are the legal representatives authorised to settle the affairs of the personal estate legally, and the persons entitled to it, are entitled to no more than the clear residue after payment of debts. If indeed they make false admissions to the prejudice of the estate, they do it at their peril, and could be made answerable therefor. And it would be the hardest case imaginable, if the complainant could not have the benefit of this admission. For the administrators having under a mistaken idea cancelled and destroyed the evidence of the contract of which the complainant claims the benefit, and to the use of which he would have been entitled, in order to support his claim, had it not been destroyed, would be stript by this objection of the only means of establishing the facts, upon which his claim rests; without any default on his part, and by the act of the defend-

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ants. This *would be too mischievous in its effects to be allowed to prevail.

It is further insisted by the defendant's counsel that even grant the admission to be valid, it does not state with sufficient precision the nature and terms of the agreement, to enable the Court to form a correct opinion of it, and to ground a decree for relief: and that the Court will not presume any thing in favor of the complainant who comes in by fortuitous events, to the enjoyment of the real estate, to which he was not otherwise entitled.

With respect to the mode in which the complainant becomes entitled to the real estate the Court has nothing to do with that. The law of the land gives it to him, and he is entitled to all the advantages of it.

It does not appear that there is occasion for much, or indeed any presumptions in the case. The agreement for building a house of a particular description, with the ordinary out buildings at a stipulated price is distinctly charged to have been made in writing, and this is as distinctly admitted. No presumption seems wanting. If it had, the Court would have been inclined to have made them in favor of a complainant, who has been deprived of the benefit of the written contract, by the act of the defendants. The Court will go very far in presuming against those who destroy papers and instruments necessary to the security or elucidation of the rights of others, in odium spoliatoris, as it is expressed. I do not apply that phrase to these defendants: they are good men, who acted unadvisedly, and not wilfully wrong; but the effects of that error are the same to the complainant. And he would be entitled to the benefit of all the presumptions which could reasonably be raised out of the circumstances for his benefit.

It is further contended that the contract might not have been of a nature capable of being carried into specific execution; or that the parties might not have been willing or able to comply with it, and that in any of these cases the complainant is not entitled

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to the relief he *claims. It appears to me that the contract as charged and admitted, was sufficiently precise and exact to have enabled either party to have enforced a specific execution; and the Court cannot speculate upon what the parties, Mr. White and Mr. Hobbs, might afterwards have been able or willing to do. The natural and the legal presumption is that men are able and willing to do what they have contracted to do, and he who alleges the contrary, must prove his allegation.

It is insisted further that the administrators either had a right to cancel the agreement, or they had not. If they had, that there would be an end of the complainant's claim. If they had not, in that case, what they did was a nullity; and a suit may yet be brought for the completion of the contract. In my opinion they had no right to rescind this contract, and so to vary the rights of the different claimants of Mr. White's estate. If they had no right then of what use would it be to any party to bring a suit for the completion of it at this time. Suppose it done, the administrators would be bound to pay for the house out of the personal estate. I cannot turn the parties round in that manner.

Having cleared the case of all the difficulties raised by the ingenuity of counsel, we come now to the question of law. Is this a covenant running with the land, which ought to go to the benefit of the person who be-

comes entitled to the land by the operation of law?

In considering this question it was properly asked by the counsel for the complainant, suppose the administrators and the carpenter had gone on with the contract, and completed the work, and paid for it, to whose use would the improvements on the lot have enured? Surely to the person who was entitled to the land.

In arguing the question of law the counsel for the defendants likened this case to those in England where the heir is favored; but insisted that the later cases do not favor the heir even in England, as much as formerly; and that the reason and policy for favoring the heir at law do not exist in this country

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as in England. That *in fact as our laws now stand, there is no such person known as an heir at law who can be favored.

It is unnecessary to examine particularly in this case, the general effect of the alteration made by the present laws upon the rights of those formerly denominated heirs at law. But surely those to whom the act for the division of real estates, allots the real estate, call them by what name you will, must have many, if not all, the rights atached to or connected with the land, to which they become entitled; and the precise question here is, whether the party to whom the law has given the land, is entitled to the benefit of a contract made by the former owner of the land, which would have improved it, and encreased its value, and which he left in full force at his death.

I have considered this question with attention, and I have examined the cases cited with care.

It appears to me that the counsel for the defendant has misapprehended the question made, in most of the cases he has cited, or has misapplied the cases. Upon a review of most of them it will be found that they are cases of devisees of money to be laid out in land, and the land given to a particular person. But the person for whom the land is so directed to be purchased, dies before the purchase is made. The question made in those cases is, whether the heir of the person so dying, or his executor is entitled to the money, or the benefit intended by the purchase. And this question has been decided differently according to the infinitely various circumstances of these cases. But that is not the question in the case under consideration. I have stated above what I conceive to be the true question, and do not think there is room for doubt, either on principle, or on the authority of decided cases.

On principle the question stands thus: Mr. White made a contract with Mr. Hobbs, to build a house for him on one of his lots, and he agrees to pay 800*l.* for the buildings, of which sum he advances a part. He dies immediately after, leaving the contract in

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full *force. It was a contract of which either party could have compelled the other to the specific execution.

There is no evidence that either party had intended to cancel the contract, and the Court cannot presume it. If it had been carried into execution, it would have improved and enhanced the value of the real estate; and the person to whom the law has given the land would have had the benefit of it. The administrators had no right to vary the position or the interests of the parties. Mr. Hobbs on building the house would have been entitled to payment according to the contract. From whom? Of course from the administrators, who had in their hands the personal estate, which still remains at least the primary fund for the payment of debts, notwithstanding all the alterations made by our laws. Shall the unauthorized and unadvised act of the administrators deprive the owner of the land of the benefit of the contract? Surely not. I think therefore on principle he is entitled to it, and it is immaterial to the defendants whether the house was built and the money paid to Hobbs, or the money be paid directly to the owner of the land, who would have had the house with it, if built. And there are cases directly in point to this question. I shall cite but one. It is the case of Whitaker and Whitaker, in 4 Brown's Chan. cas. p. 31. In that case a testator contracted for a particular estate, but dies before the purchase was completed; afterwards from the state of his affairs the contract is dissolved. Yet the purchase money shall not sink into his personal estate, but be laid out in other lands, to the same uses as he had devised the land contracted for. So here the dissolution of the contract, after the death of the contractor, cannot alter the right of the party to whom the land goes; and it appears to me immaterial whether the land contracted to be purchased or improved is devised or descends according to law. In either case the devisee or person entitled by law to the land must have the benefit of the contract; and the sum agreed to be laid out in land, or in building on land, shall not sink

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into *the personal estate, but he expended as contracted to be done, or go to the person who would have been entitled to the improvement on the land.

This certainly is not a new principle, though few cases have been decided in this country. We are not however without some lights upon the question, even here. In the case of J. R. Pringle and wife v. the executors of Gen. M'Pherson, [2 Desaus. 524.] this very point was before the Court, and though there was not an elaborate argument, the question was distinctly submitted to the Court, and decided as I now decide in this case.

It is therefore ordered and decreed that

the administrators of Mr. White do pay to the complainant the sum of 800*l.* which was contracted to be paid by him to Mr. Hobbs for putting up a dwelling house and out buildings. As to the interest, I think that follows clearly the fate of the principal. Let interest be paid at the end of two years from the death of Mr. White. Costs to be paid out of the estate of Mr. White generally.

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3 Desaus. 116

Case XXII.

The Executors of KINDER MASON v. the Executors of SPENCER MAN and the Administrator of J. J. FOLTZ.

[Tried before Chancellor Desaussure, Circuit Court of Equity, Charleston, Nov., 1810.]

[*Executors and Administrators* ⟸263; *Principal and Agent* ⟸64.]

An agent receiving money from his principal, on a bond and judgment, it is simple contract debt; and it cannot be ranked among his judgment or specialty debts on death of the agent.

[Ed. Note.—Cited in Rolain v. Darby, 1 McCord, Eq. 476; Stock v. Parker, 2 McCord, Eq. 384.

For other cases, see Executors and Administrators, Cent. Dig. § 975; Dec. Dig. ⟸263; Principal and Agent, Cent. Dig. § 119; Dec. Dig. ⟸64.]

The bill charges that the late Kinder Mason appointed the late Spencer Man his attorney in fact to recover and remit considerable sums of money, due to him by R. & P. Smith on bonds, on which judgments were obtained. That Spencer Man received considerable sums of money, which he remitted, but there remained in his hands a large balance unaccounted for. That this balance the said Man employed to his own use, or carried the same into the copartnership funds

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of Man & *Foltz, who traded thereon; and the copartnership funds are liable therefor.

The complainants pray that they may be paid the balance due, either out of the copartnership funds or the private estate of Mr. Man; and that the debt may be considered a specialty debt, as the money was received on specialties, due to complainants' testator, on which judgment was obtained.

The answers admitted the facts generally, but denied that there was any ground on which this simple agency could be converted into a trust, subject to the peculiar rules of this Court: and the executors of Mr. Man and the administrators of Mr. Foltz submitted to be guided in their conduct by the decree of the Court.

An order of reference was made to the master, to enquire into and report the balance due to the complainants' testator; and the master reported the precise sum due for monies received by Mr. Man as attorney of Mr. Mason. The money received was all subsequent to the judgment against R. & P. Smith. The sums received were entered in the books of Man & Foltz, sometimes by Man and at others by Foltz.

Mr. Man was anxious for the payment of this debt, and in a memorandum which he made respecting it he called it a sacred debt.

There were judgment creditors of Mr. Man's estate who claimed a priority and resisted the payment of this claim till they were paid, and insisted that this was no more than a simple contract debt.

Mr. Pringle, for complainant, contended that this demand against Mr. Man's estate should be put on the footing of a judgment, or at least a specialty, because the money was received by the attorney on a bond, on which judgment had been obtained. He cited the case of the heirs and legatees of Gadsden v. the executors of Lord, decided in this Court, in August, 1791, by which it was decreed that the husband of an executrix, receiving money on bonds due to the testator, should be accountable as for a specialty

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debt: and a similar deci*sion in the case of Buist & others, administrators of Sommers, v. executors of Perry, made in May, 1803. These decisions apply to the case before the Court, and they are founded on the highest equity. Mr. Man considered the money received for Mr. Mason a sacred debt, and in fact a trust. No particular words are necessary to raise a trust. It arises, by implication, from acts done, as well as from written deeds. Prothonotaries receiving money (fees of office) for a judge, were decreed to be trustees, as having received the money in trust, see 4 Bacon, 473, new edition; 2 Lord Raym. 1204. So when money is left in a person's hands for a particular purpose, 2 Cha. cas. 26.

The money in Mr. Man's hands was a trust, and his estate must be liable as for a judgment debt, because received by him on a judgment. Stare decisis is an important maxim, without which the law of the country could not have any stability or uniformity.

Mr. Ward for defendants, and Mr. W. L. Smith for the judgment creditors of Mr. Man.

They insisted that where money is received by one person for another, it forms a simple contract debt. The cases cited do not form a rule, but an exception, under peculiar circumstances. In Lord's case particularly, the husband of an executrix called in money due to an estate, on bond and judgment, which estate owed no money. He did not put out the money so received to interest, but kept it in his own hands. This was considered a breach of trust, and his estate, the solvency of which was doubtful, was decreed to be liable as for bond and judgment

debts. In Buist and Perry there were similar circumstances.

The case under consideration is very different. Mason appointed Man his attorney expressly to collect the money due; and if he had not done so it would have been a neglect of his duty as agent. Having received the money, it is in his hands as money had and received for his principal, and this is a simple contract debt. Many of the merchants are mere agents. If, when they

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re*ceive and neglect to remit money, the debt should be set up as a judgment or bond debt, (according to the nature of it when received from the debtor) it would be very dangerous. Such latent liens would spring up suddenly and defeat all the prudential arrangements of cautious men, who perhaps examined the offices for judgments and mortgages, before they gave credit to these very agents. In this case it would destroy or diminish the fund to pay judgment creditors.

The executor's law fixes the right of creditors in relation to judgments, bonds, and other claims on the estates of deceased persons; and that act recognizes no such latent liens as this. It would be mischievous to break in upon the rules and regulations of the act. The law relative to agents and executors besides is very different. Executors are easily converted into trustees; they are peculiarly under the control of the Court. Agents and attornies are liable to suits at law for money had and received.

In Lord's and Perry's cases the executors called in money at interest and well secured, improperly, and never vested it, but employed it to their own use; and one of these, Lord, employed it to purchase property which the Court could follow and lay its hands on. But Mr. Man put the money he received, as agent, into the funds of Man & Foltz, as appears by his declarations to Mr. Ogilvie at his death. This cannot be followed specifically as property could.

If a factor becomes bankrupt, and a merchant's goods trusted to him, are not mixed, he shall have them; not so if mixed, see 2 Atk. 623. Principal has a lien on his goods, if unchanged. If sold, he is only a general creditor. If notes are taken, which can be pointed out and followed, the Court will lay hold of them for the principal. But it must be something which can be distinctly traced and laid hold of, see 2 Vern. 585.

In the case of M'Farlane and Player, decided in this Court, 2d. vol. of decrees, (manuscript) the Court refused to follow money received and carried into a copart-

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*nership fund, in a very hard case, and left the creditor to pursue his remedy as a simple contract creditor. See also Ambl. 297. Bond creditors considered here as having priority, because they have it at law. This Court follows the rule of the forum having jurisdiction. The counsel quoted 3 Atk. 333; 2 Ves. 269; 5 Ves. 169; 10 Ves. 511.

This is not a trust more than any other agency. Trust is a creature of equity, where the party has no remedy, or an imperfect one, at law. The declaration of Mr. Man, that this was a sacred debt, cannot change its nature and convert that into a trust which was a mere agency. The statute of limitations would apply to such a demand as this, after the proper lapse of time. This shews it cannot be a trust. If you take Man's declarations you must take them altogether; and they shew you that he has placed the money received into the funds of Man & Foltz, a commercial house. This was neither a trust, nor a breach of trust. He did as he was required. He collected the money and remitted the greater part. A balance remained in his hands, which he did not lay out in property, but transferred to his commercial house, which is liable. There may be a lien on property purchased with the money of another, but not on receipt and expenditure of another's money. But if this had been a trust, and a breach of it, it would only raise a simple contract debt: and even particular circumstances will not vary the law, 2 Atk. 119, Vernon v. Bawdry. Cestui que trust is only a simple contract creditor of his trustee, unless trustee has acknowledged the debt under his hand and seal, see 2 Fonbl. 173, ch. 7, sec. 1, note. A debt due by an attorney for money collected on a judgment is only a simple contract debt, see 1 Hening & Mumford, 427, Cartwright v. Marshall. None of the English decisions come up to this; none of them set up such a claim as this and put it on the footing of a bond or judgment debt.

Mr. Pringle, in reply, contended that there was no more reason for the Court declaring

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executors trustees, *on a misapplication of funds, than mere agents. Insists there were no peculiar circumstances in Perry's or Lord's cases, to declare them trustees, more than exist in Man's; the receipt of money and application of it to their own use. The Court must have decreed in those cases on a general principle. The case of factors is different. They are general agents for every body. They are not special agents selected and confided in as trustees; and cases respecting them, and their receipt of money for their principals, turn upon this reason, that money has no earmark and cannot be followed. Baillies and receivers are as liable to the control of this Court as executors: they are liable to account here.

THE COURT delivered its decree on the 17th November, 1810, as follows:

The substance of this case is comprised in a few words. Kinder Mason having a demand on bond against R. & P. Smith, sent a power

of attorney to the late Mr. Spencer Man, to recover, receive and remit the same. A judgment was obtained thereon, and various payments were made to Mr. Man, part of which were carried into the funds of Man & Foltz, and some remittances were made to Mr. Kinder Mason.

On his death-bed, Mr. Man, feeling distressed that he had not remitted all the money which he had received for his principal, Mr. Mason, expressed a strong desire that it should be paid; considering it, as he very feelingly called it, a sacred debt.

Mr. Bulkley holds a judgment against Mr. Man; and Mr. Man's estate, it is said, will be sufficient to pay this debt, if the debt to Mr. K. Mason be not construed to be a judgment debt—but not otherwise.

Several questions were made at the opening of this cause, but it was agreed by the counsel that the consideration and decision of them could not properly take place in the present situation of the case. The argument, therefore, was confined strictly to the question, whether the money received by Mr.

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Man, on the judg*ment debt of R. & P. Smith to Mr. K. Mason, should be considered a judgment or a simple contract debt?

There cannot be any doubt that the general rule is, that agents receiving money and not paying it over to their principals, on judgments or bonds, are liable merely as simple contract debtors, and not as judgment or specialty debtors. And indeed the decided cases, as well as the elementary writers, say that trustees receiving money, and committing a breach of trust, are liable only as simple contract debtors.

But it has been contended that two decisions in this country have settled this point, and that stare decisis is a maxim of judicial wisdom, of great importance to the security of property and the sound administration of justice; and that this maxim should have peculiar obligation on a judge sitting singly.

I am very sensible of the value of that maxim, and I hope it will ever so influence my conduct as to prevent my rashly disturbing settled doctrines. I shall therefore be unwilling, sitting alone, to shake the authority of those cases, where they have a direct and clear application. But I confess that I do not feel inclined to extend the principle, contained in the cases referred to, which, if pressed to an extreme, would be introductory of very great mischiefs.

On examining those cases, the devisees and legatees of Tho. Gadsden v. the executors of Andrew Lord, [1 Desaus. 208,] and of Dr. Buist, administrator of Somers v. the executors of Perry, the executor of Somers, it does not appear to me that the Court intended to lay it down as a principle that in all cases where executors have received and misapplied money of their testator, due on judgment or bond, that they should be liable as judgment and bond debtors. The question does not appear to have arisen solely between conflicting creditors; and if it had, it seems to me that the Court acted on the peculiar circumstances of those cases.

In another case, that of M'Cauly, executor of Wells, v. the assignees of M'Farlane and

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Player, [2 Desaus. 239,] the Court *refused to apply the principle contended for, though there were some peculiar and urgent circumstances to have induced the application of it, if it had been intended by the Court to have adopted the principle as a general one.

The case of the commissioners of public accounts v. Rose, Tunno and Alexander Moultrie, [1 Desaus. 461,] turned upon other principles entirely. It was very properly remarked by the counsel for the defendants, that in the cases of Gadsden, and the executors of Lord, and the executor of Perry, the executors had not received the money pursuant to the powers vested in them and for the benefit of the estates under their charge, but had called in good securities, unnecessarily, and misapplied the money; whereas, in the case under consideration, the sole object of the power given to Mr. Man was to recover and receive the money, and afterwards to remit it. He did receive the money but did not remit it, and I think that his estate is liable only as in ordinary cases of agencies, for I really cannot discern any peculiar circumstances in this case to take it out of the course of common agencies.

Much stress was laid upon the solemn declaration of Man, in his last illness, that he considered this to be a sacred debt; but I do not think that declaration can alter the nature of the transaction, or give a higher character to the demand on his estate. The law interposed at his death, and fixed the rights and priorities of the parties.

If the Court should be inclined to extend the principle contended for, to all cases of executors and administrators, (which I do not think it would be,) still there is a distinction between the case of executors and of mere agents. Executors are certainly more immediately and exclusively under the control of this Court. They act generally on estates where widows and children are interested, who are seldom able to watch over their conduct and to call them to account for many years, and who are more peculiarly the objects of the care of this Court. Whereas agents are appointed by, and act for,

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*principals, who are generally able and willing to act vigilantly for themselves, to watch over the conduct of their agents, and to change them when dissatisfied with their conduct.

The counsel have not been able to produce a single case, where agents, receiving money for their principals, on judgments or special-

ties, have been decreed to be debtors on judgment or specialty.

The current of authorities is the other way, and this policy has been pursued in the other states; for, in the case of Garthright v. Marshall, executor of Rind, decided in the High Court of Appeals, in Virginia, (see 1 Henning & Munford's Reports, p. 427) the Court decided, on appeal, that a debt due from an attorney to his client, collected on a judgment, is only a debt by simple contract.

Upon the whole I do not feel myself warranted, either on principle or on the authority of decided cases, to say that in a case of mere agency, where the agent receives money under his power of attorney, even on a judgment or specialty, and does not pay over the same, and then dies in bad circumstances, that the principal can come in upon his estate as a judgment or specialty creditor.

It is ordered and decreed, that it be referred to the master to examine and report what is due by the estate of Spencer Man, deceased, to the executors of Kinder Mason; and that the same, when ascertained, be deemed and taken to be a simple contract debt, due by the estate of S. Man to the executors of K. Mason.

There was no appeal from this decree.

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3 Desaus. 124

Case XXIII.

ANDERSONS and TILLEY v. MONCRIEFF, Administrator of W. M'Leod.

[Tried before Chancellor Desaussure, Charleston, Nov., 1810.]

[*Contracts* ⟸138; *Principal and Agent* ⟸76.]

An agent employed to sell property, receive and remit the money, shall not refuse to account on the plea that the act which brought the money into his hands was in violation of a law of the land. And the Court will go far to give such construction to the acts of a principal, as to prevent them being held to be illegal in such a case.

[Ed. Note.—Cited in Tate, Muller & Wittichen v. Pegues, 28 S. C. 465, 6 S. E. 298; Gist v. Telegraph Co., 45 S. C. 372, 23 S. E. 143, 55 Am. St. Rep. 763; Saunders v. Phelps Co., 53 S. C. 179, 31 S. E. 54; Rountree v. Ingle, 94 S. C. 236, 77 S. E. 931, 45 L. R. A. (N. S.) 776.

For other cases, see Contracts, Cent. Dig. § 689½; Dec. Dig. ⟸138; Principal and Agent, Cent. Dig. § 160; Dec. Dig. ⟸76.]

The complainants, who are London Merchants, charge that on the 6th of October,

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1799, they consign*ed by the schooner Phœbe, captain Walsh, forty-five Negroes from the Island of Bance, on the coast of Africa, to William M'Leod, to sell the said negroes at the Havanna to the best advantage, and remit the nett proceeds to the said Andersons, at that time in London. That the said negroes were received and sold by the said William M'Leod, but when or for what price they are ignorant, never having received any accounts thereof from the said William M'Leod, in his life time, nor any part of the proceeds of the sales, excepting $2571.43, remitted on account by M'Leod by a bill of exchange; and the further sum of $4154.10, paid by M'Leod to William Miller, of Charleston, a creditor of John Tilly, who had attached the monies of the said Tilley in the hands of William M'Leod, which two sums amounted to $6715.43, so that the said M'Leod is a debtor for the difference between $6715.63, and the amount of sales of the forty-five negroes. That the complainants could never obtain from M'Leod any account of the nett sales of the negroes. That he died on the A. D. 18 , intestate, and letters of administration were granted to the defendant, John Moncrieff, who has been applied to for an account of the said sales, and to pay over unto the complainants, which he has refused, alleging that he has no books or papers that discover what they sold for. Whereas the complainants apprehended that if the prices cannot be fixed by any proof in the possession of the defendant, they are entitled to the highest average prices which similar negroes produced about the time when these were sold, which may be easily ascertained. Complainants pray that defendant may be made to answer and to discover all the property of his intestate, and the appropriation thereof, unless he admits the sufficiency of assets to satisfy their demands, and praying subpœna, the bill concludes as usual. Drayton, solicitor.

To this bill the defendant put in the following plea in bar:

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*This defendant says that he is ignorant of every thing relative to the said consignment of negroes by the complainants to William M'Leod as alleged, excepting that he has found among the said M'Leod's papers a letter from T. and F. Anderson to M'Leod, dated 30th of August, 1800, a copy of which is as follows:

"Mr. Wm. M'Leod, Sir—Annexed is a duplicate of our letter of the 18th of June, advising the receipt of remittance of £600 by direction of our friend, Mr. John Tilley, of Bance Island, who gives us to understand in his letter of the 5th of October, 1799, that you are to remit us the proceeds of 45 negroes, consigned you in the Phœbe. We have been expecting a further remittance on the same account, and we are rather surprised that you did not mention how much more we had to expect on the same account. We have used the freedom to inclose this letter to our brother, Mr. James Anderson and Mr. William Milligan requesting that they may wait upon you and desire the necessary remittances as they come into your hands may be

transmitted to us along with the accounts relating thereunto.

We are sir, your most obedient servants,
John & Alexander Anderson."

And he hath also found a receipt of William Milligan, which this defendant supposed to be the receipt alluded to in complainant's bill, a copy of which is as follows:

William Milligan v. Augustin Beaudequin, survivor of Balthasar Beaudequin.—Judgment against William M'Leod, as garnishee in attachment.

"Received from William M'Leod, Esq. his note at sixty days dated 25th inst. for one thousand one hundred and forty-four dollars, ten cents, which when paid will be in full of the judgment obtained by me against him as garnishee for Augustin Beaudequin, survivor of Balthasar Beaudequin.

"Charleston, Aug. 2, 1802.
"William Milligan,
"By his attorney Donald Sanderson."

Also one or two receipts of the said Milligan prior to the above, which the defendant

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believes may relate to *the same transaction. The defendant further says that he cannot find any entry in the books of William M'Leod, or among his papers, or any other documents than above mentioned, in any wise appertaining to the above business. This defendant admits it to be true, that the said William M'Leod did depart this life about the time mentioned, and that the defendant did obtain letters of administration, and that application hath been made to him for an account of the sales of the negroes, and to pay over the same to the complainants and that he declined complying, because he could not furnish an account, and because he thought he would not be justifiable without a decree of this Court to pay them any part of the said claims; and how far the estate is competent to pay demands of the same order and degree with those of the said complainants if they should be judicially established will appear from the defendant's general account of his administration therewith filed. And as to the complainants praying that this defendant might be compelled out of the assets to pay, if they are sufficient, this defendant not confessing or acknowledging the things complained of by the bill to be true, pleads thereto that it appears by the complainant's bill that the slaves were consigned by the complainants from Africa to the said William M'Leod in Charleston, to be there disposed of to the best advantage on their account. That by an act of the legislature prohibiting the importation of negroes until the 1st January, 1799, it was enacted "That the importation of negroes from Africa and other places beyond the seas, be and is hereby prohibited until the 1st of January, 1799;" and it further declared that every slave so imported should be forfeited; and in and by a certain other act of the legislature, passed 27th of December, 1798, the act of 1799 was extended to the 1st of January, 1801; and that the complainant's said claims being on account of negro slaves imported in contravention and violation of the said acts of the legislature, they are not entitled to the aid of the Court of Equity to sub-

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stantiate or recover the same, *and the defendant therefore pleads the said acts in bar thereto, and he prays to be dismissed as usual. Pringle, defendant's solicitor.

To this answer and plea the complainants have filed a general replication.

The cause came to a hearing on the plea in bar. It was argued by Mr. Drayton for the complainants, and by Mr. Parker and Mr. Pringle for defendants.

Mr. Parker, for defendant. The contract was on 5th October, 1799, for consignment of the negroes to Mr. M'Leod. This was contrary to law. Courts are established to administer justice according to the laws of the country: they cannot act against the laws. The law of this state, and that of Congress, prevented the importation of negro slaves. The party intending to ship had proceeded to act, and to obtain a consignee, (M'Leod.) This was an efficient act.

Contracts on policies of insurance on a trade prohibited are void, and the money cannot be recovered on them. So of any other prohibited trade.

The letter enclosing the bill of lading was during the existence of the prohibition act of 19th Dec. 1796: The state law prohibited importation of negroes till 1st Jan'ry, 1799: The act of 27th Dec. 1798, continued the above act to the 1st January, 1801. The contract was made with a direct view to a breach of the law of the land: not a long, antecedent contract, but recently, and with a view to the breach of the act.

Mr. Drayton, for complainant. The question made by the pleadings, is, whether the defendant having received a sum of money for complainant, the latter can recover from him as the shipment and importation was contrary to law?

Tilley was not properly acquainted, in October, 1799, with the act of December, 1798, continuing the prohibition to January, 1801. But his letter of October, 1799, directed M'Leod, "that if it was necessary for Mr.

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*M'Leod to send his negroes to the Havana, then to send his also." This gave him a discretion. It may be said, M'Leod being his agent, and actually receiving them here, it is his act. But this is not so, if the act was unlawful. It is alleged that the act of Congress (1794) prohibits any citizen, or resident of the United States, from carrying slaves even to foreign countries. But this only applies to the cases of Americans or residents in the United States. Tilley is a

British subject, and not liable to the law. Mass. Term Reports, 436. See this case fully.

But even admit that the contract was in violation of the law of the country, has the agent any right to detain the money? Surely not. Suppose the insurers on an illegal voyage had paid the money to an agent: the agent never could set up a defence that the transaction was an illegal one. 1 Bos. & Puller, p. 4, Tennent & Elliott.

The agent receiving the money for his principal, on an illegal contract, cannot keep it and defend himself on the ground of the illegality of the contract, 3 Bos. & Puller, p. 298, Farmer v. Russel. Same principle established. The distinction is, between a suit brought to enforce an illegal contract, and for the recovery of the money from the agent who has received the money, for his principal, on an illegal contract. 'Tis a most ungracious defence. Cases under stat. of Ann: though contracts are void suits may be sustained at law for recovery of the money.

Mr. Pringle, for def't. It is not ungracious on the part of the administrators, to set up this defence. They might feel it a duty to the creditors of M'Leod, who might have complained of his not setting up a legal defence, which would have defeated the claim and enlarged their funds; and he might have been liable to them for not setting it up. Some of the creditors did require the defence to be set up.

This is clearly an illegal contract. The direct destination of the port was to Charleston. The clause in the letter, speaking of the necessity of sending the negroes to the Havana, does not protect the party from the

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il*legality of the voyage, and the importation of slaves. It could not be supposed to relate to the illegality of the voyage as the necessity, obliging them to be sent to the Havana.

Dilemma. Either Tilley knew of the law prohibiting, or not. If he did, the original destination was illegal: if he did not, it cannot be supposed that his letter had reference to the illegality, and intended to give directions to avoid it by sending them to the Havana. The expression is too equivocal and uncertain to justify the inference the counsel draws. He might mean only the necessity arising from the low state of the markets.

Here was a plain contract, by consignment, in direct violation of law: and the negroes were shipped and disposed of in the state, contrary to law; and the recovery from M'Leod would be in violation of the law. Suppose Tilley ignorant, yet ignorantia legis neminem excusat. There is strong presumption of knowledge. Tilley was in the trade, and if ignorant, he should shew it, by proving no intercourse.

Negroes were actually imported against law: the consequences must follow. Some instances occurred, of importations, by persons really ignorant; yet their property was confiscated. 1 Espin. Ni. Pri. 88, assumpsit. 5 Term Rep. 242. 2 Henry Bla. 6 Term Rep. 405, 51. Powell on Contracts, 186, 201.

The cases quoted by Mr. Drayton do not apply; for the party is obliged to come here for the assistance of the Court. Admit that complainants could have recovered at law; this Court is not obliged to aid them in recovering the money under such circumstances. It does not appear to the Court but that the negroes might be forfeited, or that the purchasers of the negroes might refuse to pay, and be protected by the law from doing so; and so the consignee, M'Leod, might have nothing in his hands.

A party coming into Court, to ask equity, must come in with clean hands. He cannot ask the Court to set up an illegal contract.

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This is not a contract clearly exe*cuted; it was executory, and the Court will not be assistant.

Date of the act of Congress, 1794, which prohibited the citizens and residents in America fitting out vessels, for the African trade, to supply foreign ports or places, which would affect the shipment for the Havana.

THE COURT delivered the following decree:

The case made by the pleadings, in this cause, is an important one, and I have given it the best consideration in my power.

There can be no doubt where the justice of the case lies, whilst the distinctions of property, and of right and wrong in relation to it, subsist among men. The funds in the hands of the deceased Mr. M'Leod, were unquestionably the property of the complainant, and came there by a high act of confidence. In justice he and his representatives were bound to pay it.

But it is alleged, by the defendant, that whatever may have been the moral obligation, the complainants were not entitled to recover from the defendant; because the money in question arose from a shipment of negroes made in October, 1799, from the coast of Africa, to Mr. M'Leod, in Charleston, at a time when the importation of negroes, into this state, was made illegal by the acts of Assembly then in force, prohibiting such importation, and confiscating the negroes; and that courts of justice wil not enforce illegal contracts, nor aid parties in recovering under them.

The position laid down by the defendant's counsel is certainly true in general, that courts of justice will not enforce illegal contracts, nor assist parties in recovering under them. The cases of insurance on illegal voyages, and other examples, have been cited and relied upon in support of this doctrine. But all the cases cited are where attempts are made to recover under the illegal

contract itself, as in the instance of insurances, where the suit is brought to recover against the insurer on the illegal policy.

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*The counsel endeavored to give application to this set of cases, by insisting that this was a contract, whereby Mr. M'Leod undertook, by receiving the negroes, to sell them and be accountable for the proceeds; and that this contract being contrary to law, was void and could not be enforced in our courts.

I cannot, however, think that these decisions have any application to this case. This is a mere agency. It was so understood by the parties in the course of the trade whilst it was legal. But suppose it to be a contract, what is it? That defendant would receive a cargo of negroes, and sell them, and receive the money for the complainant. All this he has done: it is completed. But the defendant says, I will not pay you the money which I have received on your account, because the whole transaction is illegal, as the law prohibited the importation of negroes. The complainant files this bill to compel the payment. The suit is not bro't to recover a cent, out of the defendant's pocket, of his own money; it is to make him pay money which he has received as the agent, and for the use, of the complainant. It would be monstrous that the defendant should be permitted to keep the money; and the decided cases, following the principles of abstract justice, shew that where an illegal transaction has taken place, the agent, who has received the money on the part of the principal, shall not shelter himself from the payment of it to his principal under the pretence of the illegality of the original transaction. I will not say that there may not be cases, where the transaction may involve so much moral guilt, that courts of justice would not suffer themselves to be polluted with them directly or indirectly. But I do not think that this is one of those cases; or that it differs from the decided cases on this point. The principal one is that of Tennent and Elliott, in 1 Bos. & Puller, p. 3. There it was solemnly decided, that Elliott, a broker, who had received money to the use of Tennent, his employer, on an illegal policy of insurance, which the underwriters paid, on the loss occurring, shall not be al-

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lowed to set up the *illegality of the contract as a defence in an action bro't by Tennent, for money had and received. This was also decided in the case of Farmer v. Russel and another, 1 Bos. & Puller, p. 298.

I think these cases were rightly decided, and are applicable to the case now under consideration, thinking, as I do, that the defendant was a mere agent, and that this is not an attempt to enforce an illegal contract under the sanction of the Court; but a suit brought for the recovery of money received by defendant, for the complainant, though founded on a transaction originally illegal.

If, however, the counsel for the defendant should be doubtful on this point, they would do well to carry it up to a higher tribunal, for it is a very important point, and one of some difficulty. It may not be considered as so distinct a case of mere and exclusive agency as the cases referred to.

There is, however, another ground in this cause which I think is very conclusive for the complainant. In Tilley's letter of the 5th October, 1799, to Mr. M'Leod, he expressly states, "Should it be necessary for your slaves to proceed to the Havana, you will please act with mine as your own."

Without speculating or conjecturing whether Tilley knew of the prohibition of the importation of negroes into this state, or was ignorant of it, these words are susceptible of a plain and reasonable interpretation, which will protect the complainant from the effects of the illegality attributed to the act of importation. The words are "should it be necessary for your slaves to proceed to the Havana, you will please act with mine as your own." What necessity could exist, so strong, for the negroes sent by the Phœbe not being brought into Charleston, and for their proceeding to the Havana, as the prohibition of the importation by the law of Carolina? It was conclusive; and upon the existence of any necessity, the negroes were to be sent to the Havana. Surely it is not straining

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the words to say, that the wri*ter meant to leave it to the knowledge and judgment of Mr. M'Leod, residing on the spot and better informed, to decide whether it was proper to introduce those negroes into Carolina, or not. Mr. M'Leod did decide to introduce them, though contrary to law. And shall he be permitted to say my decision was contrary to the law of the land, and being so contrary, you shall not recover the money, though I have sold the negroes and received the money? It is impossible! Justice forbids it; and as her humble minister I cannot sanction it.

But it is argued, that if this letter exempts the complainant from a participation of the guilt of violating the law of the state, that still the act of Congress, which was passed in 1794, prohibited citizens of the United States, or persons resident therein, from fitting out vessels for the African trade, to supply foreign countries; and that the shipment of those negroes on board an American vessel, fitted out at Charleston, with a view to the transportation of slaves to the Havana, would bring the case within that law.

It does not appear to me that foreigners, residing out of the United States, acting as this complainant has done, could come within the provisions and scope of that act. But if they did, still the original question recurs, can the defendant protect himself, under

such a plea, from paying money he has received as an agent to the complainant? and I adhere to the opinion already given on that point.

It was also contended by the defendant's counsel, that even if the complainant could have recovered at law in an action for money had and received, yet wanting the assistance of this Court for a discovery, this Court would not assist him in such a case.

I confess I cannot see the ground of this doctrine. It is but of late years that the action for money had and received has had the extent and operation given to it which it now has; and it is likened to a bill in equity, from the introduction of equitable doctrines through that channel into the courts of law.

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If therefore the *objection to the relief in such cases could be valid in this court it must have operated at law. We have seen that it does not; and I should be inclined to say, a fortiori not in this Court.

It has been objected that it does not appear to the Court that the negroes were not seized and forfeited, or that the purchasers did not refuse to pay. In other words, that it does not appear that the defendant has received the money.

I consider this argument as not belonging to this part of the case. When the plea is overruled and the defendant ordered to account, then these topics will be open to defendant and he may avail himself of them as far as they may be founded on fact.

The complainant's counsel dwelt with much severity on the ungracious nature of this defence; and if Mr. M'Leod had lived and had set up the defence, I should have certainly agreed with complainant's counsel, that it was a very ungracious, not to say an atrocious one. But I agree with the counsel for the administrator that he is far less censurable for resorting to it. Creditors and heirs might have blamed him, and might even have attempted to make him liable for not using what they might deem a legal defence.

It is ordered and decreed that the plea be overruled, and that the defendant do account for the nett amount sales of the negroes, taking credit for the sums already paid on account of complainant.

There was no appeal from this decree.

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3 Desaus. 135

Case XXIX.

Administrators of MARY BYRNE, v. Administrators of THOMAS STEWART.

[Tried before Chancellor Desaussure, Charleston, November, 1810.]

[*Husband and Wife* ⇐11.]

The husband is not entitled after his wife's death to the property which could not be reduced to possession. But he comes in for a proportion under the statute of 1791.

[Ed. Note.—Cited in Davis v. Rhame, 1 McCord, Eq. 194; Marsh v. Nail, Rich. Eq. Cas. 119; Durant v. Salley, 3 Strob. Eq. 160.

For other cases, see Husband and Wife, Cent. Dig. § 51; Dec. Dig. ⇐11.]

[*Conversion* ⇐15.]

[A testator devised certain land to his wife and children, to be hired out for their support during the minority of the children, and directed that, when his youngest child should become of age, the land should be sold, and the money divided among the wife and children. *Held*, that the property was to be treated as personal property.]

[Ed. Note.—For other cases, see Conversion, Cent. Dig. § 32; Dec. Dig. ⇐15.]

[*Statutes* ⇐159.]

[A later statute repeals an earlier one, if inconsistent therewith.]

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 229; Dec. Dig. ⇐159.]

This case arises out of the following facts: Thomas Stewart made and duly executed his

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last will and *testament on the 14th June, 1788, and died on the 16th September, 1788, leaving the same in full force and virtue. The testator bequeathed to his wife and his children jointly, a lot of land in Hasell street, to be hired out for the support of his wife and children, during the minority of all his said children; and that no part thereof should be sold, until his youngest son came of age; and that the said lot should then be sold by his executor and executrix, and the money arising from the sale should be divided equally between his wife and children. His widow being named executrix, qualified on the will and possessed herself of the negroes and lot of land, and received the rents and profits. The widow afterwards, on the 8th March, 1792, married Patrick Byrne, the present complainant, and she died on the 8th March, 1803, without issue by her 2d marriage. On her death, C. Fitzsimons, who had been named ex'or of her husband, renounced, and administration with the will annexed was granted to Ann Stewart, one of the daughters of the testator, who intermarried with Wm. Porter, and they possessed themselves in November, 1803, of the said lot, and received the rents and profits thereof till the sale. John, the youngest son of the testator, died some time after his mother, on the 14th July, 1805, having then attained nineteen years of age. The other three children having attained the age of twenty-one years, the lot of land was sold on the day of October, 1805, and it brought 1055*l.* sterling, one fourth in cash, and the remaining three fourths payable in one, two and three years. Patrick Byrne administered on his wife's estate and effects. He claims and files this bill to recover her proportion of the rents and profits of the said lot, and of the amount of sales thereof. The only

question, however, now submitted to the Court for its decision is, what proportion of the money arising from the sale of the lot Patrick Byrne is entitled to, in right of his late wife. He contends that from the death of John, the youngest son of testator, his wife was entitled to a fourth part of the

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amount sales. *His counsel insisted that the devise of the land, directing the same to be sold, converted it to personal property; and also, that this was a vested interest, and that by virtue of his marital rights and of his administration, he is entitled to the whole of her share. For defendant it was contended that this was real estate, and continued to be so at the wife's death, upon which the act of 1791 would operate, and give the husband only a third part. And the defendant's counsel contended further that even if it should be conceded that the devise converted the real into personal estate, and that it was a vested legacy, still Patrick Byrne was not entitled to the whole share that his wife had a right to, for that the same not having been reduced to possession during the coverture the marital rights could not attach, and that as they did not attach, the regulations of the primogeniture act interposed, and directed that the property of the wife, dying intestate, should be divided, one third to the husband, and the remaining two thirds to the children of the said Mrs. Mary Byrne, by her first husband Thomas Stewart.

Mr. Smith, for complainant, contends that the primogeniture act did not intrench on the rights of the husband. It prescribes the division of the real and personal estates of the intestate whether male or female, but there is no repeal of the old law as to the marital rights. See Judge Grimke's law of ex'rs, 274. Concerning the distribution of intestate's estates, the same question arose under the stat. of distributions, 22d Charles 2d, originally; but the declaratory act of 29th Charles 2d, intervened and declared the act of 22d Car. 2d, had not taken away the husband's rights. The court will not admit of a constructive repeal. Judge G. says, that our act of Assembly, of 1791, not mentioning this subject, leaves the statute in full operation: that the act of 1791 gives new rights to the husband, but took none from him. The explan. act of 29 Car. 2d, saved the husband's rights. 1 P. Wm. 381. The constitution di-

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rected that the pri*mogeniture act should be passed, but meant not to affect personal property, at least not as to the husband's rights. The act of 1791 could only mean to operate as to estates that were distributable by law, and the effects of the wife were not distributable by law. The short clause, in the act abolishing primogeniture, putting real and personal estate on the same footing, does not reach or alter the husband's rights in his wife's property unless by implication. Constructive repeals are not favored. Bay's rep. 244, Townsend & Rippon. As to putting notes on the same footing with bonds, the Court would not do it by implication, though the provision in the executor's act would have borne that construction. Examines the case of Speight v. Halloway, administrator of Meggs. Thinks it not applicable fully to the main point of the case; for it does not appear that the husband was actually administrator: he might not have administered.†

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This makes no difference: for if the hus*band did not administer, the husband's right to administer is so exclusive that his representatives would be entitled at all events. Cites the case of Peyre and Jervey, (decided in

† J. SPEIGHTS v. J. HALLOWAY, Administrator of J. Meggs.

Motion to set aside order confirming return of commissioners upon a writ of partition, and to quash the verdict. Before Judge Waties, then a Judge in the Court of Common Pleas.

J. Meggs died in 1792, seized and possessed of real and personal estate, leaving Catharine, his widow, and three minor children. Catharine married in 1794 the plaintiff, and died in 1802, without any partition of Megg's estate having been made. In 1804 a writ of partition was issued in behalf of plaintiff to effect a partition of Megg's estate. By such writ commissioners were commanded to divide the real and personal estate into 9 equal parts, and to assign and deliver one-ninth to plaintiff. Return made as directed, and confirmed. Plaintiff insists it was illegal, on the following grounds, viz: because, upon the death of Meggs, a right to an undivided third part of his personal estate immediately vested in his widow, and by her intermarriage with plaintiff became vested absolutely and immediately in him, without any partition having been made in her life time: because, if plaintiff, by his intermarriage with the widow of Meggs, had not an absolute and unconditional vested interest in an undivided third part of Megg's personal estate, without having had partition made and the same reduced into his possession during the life of his wife, yet he is still entitled to administer to his wife, and, as her administrator, is entitled to recover a third part of Megg's personal estate and to enjoy the same to his own use and benefit, without being compellable to make distribution thereof.

Witherspoon, for plaintiff. 1 Com. Dig. 349, Carthew 52. Was this a vested or contingent interest? A married woman cannot be said to

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be *such a one as can die intestate. 1 Com. Dig. 350; 1 P. Wm. 382. The husband is entitled to the wife's choses in action as administrator.

Blanding, e contra. It must vest in interest as well as possession. 1 Bac. Ab. 479. All personal estate that was the property and in possession of the wife at the time of the marriage becomes the husband's. The act of A. authorises persons claiming part of an estate to apply to the court to make partitions. She did not. The administrator never consented to give up the wife's share to her. Choses in action, demandable by action, do not survive to the husband at the death of the wife. This was a vested interest, but it was a chose in action and demandable by action. Legacy to wife and received by husband's agent, it is the husband's property; if not received, it is a chose in action. Possession is necessary to vest an interest in the husband. Motion refused same day.

this Court) 2d vol. of Decrees, 239, Oct. 1803. The Court supported the marital rights under the old law, notwithstanding the regulations of the primogeniture law.

Mr. Ford,†† for complainant. It is not the necessary effect of the construction of the act of 1791, to entrench on the marital rights. Husband takes the wife with all her debts, and he is bound to pay the debts, even if he gets no property: but he is not bound to pay unless judgment is obtained against him during the coverture. The marital rights did not depend on statute, but on the common law. The stat. of 29th Car. 2d, is a declaratory act, and introduced no new law. The 5th clause of stat. of distributions is positive as to distributing the whole personal estate of the intestate; yet a wife dying intestate, the property was not distributed, for the marital rights intervened. The right of the husband to the choses in action of the wife, is transmissible. 1 P. Wm. 382–3, Squib v. Williams. Even if an intruder should administer on the wife's estate, he would be a trustee for the husband and his representatives.

The act of 1791 must be construed to give married women a right to make wills, before

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it can be made to *apply to husband's rights, in the personal property of the wife. An affirmative statute will not repeal the common law. 6 Bac. Abr. 376, 383. When the provision of a statute is general, it is subject to the control and construction of the common law.

The marital rights should not be totally altered and subverted by three lines of an affirmative statute, fixing a new rule. The legislature should have expressed an intention to reach and alter those rights. If you do not extend the words, "in all cases of intestacy," to married women, you leave the marital rights where you find them; and you do not make such a great alteration in the law by mere implication, or by an affirmative statute. For what purpose is the wife's property given to the husband? Because the husband is bound to take the wife with all her circumstances, debts, &c.

Mr. Drayton, for defendants. The recommendation of the constitution is to abolish the rights of primogeniture, and to make more equitable distribution of intestates' estates: and that married women were in contemplation of the legislature, is clear, for married women are spoken of expressly in the act.

The 12th clause puts personal estate on the same footing as real. There is no room for inference, construction or argument. 1 Comyn's Digest, 349, says, it was doubted whether, under the 22d Car. 2d, (and before the 29th Car. 2d) the husband was entitled to all the personal estate of his wife, 2 Modern. p. 20; case in 26th and 27th Car. 2d, Wilson v. ——.

Toller's law of executors, 83–4. The husband's exclusive right to the administration of his wife's estate, and to hold her property, was doubted till the 29th Car. 2d. That statute expressly reserved the rights of husbands. Mr. Grinke's compilation, 279, says, the bar at Westminster thought the husband was compellable to make distribution of his wife's personal estate, till stat. 29, Car. 2d. The act of 29, Car. 2d, recites, that the husband had the exclusive right prior to the statute. 4 Mod. 208; 1 Lord Ray. 96. An af-

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firmative statute ex*cludes all matter not necessarily included within the statute. The act of 1791 gives the husband one third of the real and personal estate of his wife. Can this rule stand with the claim of the husband to the whole? Examine 1 P. Wms. 381, which was quoted by the other party: it was subsequent to the stat. 29, Car. 2d. (Stat. of frauds.)

Not one of the clauses of the statute of 22d or 29th, Car. 2d, speaks of a married woman: a man, dying without a wife, or leaving one, is spoken of, provided for, &c, &c.— yet the law has been extended to married women.

The act of 1791 speaks of married women; gives the husband a right in fee simple to a third part of the wife's real estate, as an equivalent for the diminution of the husband's rights in the personal estate, not actually reduced to possession. The act of 1791 meant to give something; but the 12th clause would be stripped of all meaning, and give nothing to the husband of the personal estate, and would be made a nullity, unless the construction is given he contends for. The responsibility of the husband, for the wife's debts, does not remain after her death except he receives other property of her's after her death. As to Townsend v. Rippon, it does not apply; there is no analogy. Speight's case, decided by the law judges, at Columbia, is precisely the question here, and decided against the husband's claim to the whole of his wife's estate. Geiger's case, which is said to be opposed to Speight's does not seem to be in opposition. As to Peyre and Jervey, Decrees, 239, it is exactly in point, and against this claim. It is now proper to settle the doctrine, for the two courts clash. The right to administer and to the property it is said, go together; but it does not follow as a corollary. In England they go together, because the husband taking all, administration follows. Here the question is, Does he take all? Another law has been introduced, forming a new rule.

Mr. Pringle, for complainant. 1 Black. 433–4. As to the rights of the husband. He

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may assign the wife's *choses in action. 10

†† Mr. Ford and Mr. Pringle being concerned in another case, depending on the same point, argued this cause.

Mod. p. 163. He may release debts due to his wife. Can, then, property in this situation be called the wife's? No. It is a mere contingency, dependant on her surviving the husband. The property in Elm's case were negroes though not divided. It was therefore a chattel interest and not a chose in action. 11th Viner, 87–8. To shew that the right of the husband was vested and transmissible. The right of administration of the husband was founded on the right of property. Hargrave's law tracts, 475. Right of administration did not go to the husband as the next of kin, but from his right to his wife's property, and administration was necessary to the perfect enjoyment of the property. This cannot be reckoned the property of the wife. It was in abeyance during the coverture; it might have survived to her if she had survived her husband. She did not survive; therefore became again his property. Toller's law of executors, 83–4. Act of 29, Car. 2d, is declaratory of the act of 22d Car merely because there were doubts, which the legislature deemed to be unfounded. Husband's rights to wife's personal estate not dependent on the statutes of 22d Car. 2d, or 29th Car. 2d; but on his marital rights at common law, independent of any statutes. 3 Vesey, Jr. 247, Watt v. Wyatt. Wife had merely a revestible right, and if she did not survive it never revested: consequently there was nothing in her, for distribution, on her dying before her husband. The jus disponendi not being in her, what interest had she? None. The obligation to administer does not shew that the property was his wife's, but results from the necessity of acting as administrator, as a means of recovering debts due formerly to the wife. A married woman may have a sole and separate estate, disposable by her, by will, (under a settlement) and if she does not dispose, then the act of 1791 would attach to it, and the property would be distributable according to the act; so that the act has something to operate upon. It is a conclusion, that the rights of husbands should not be taken away by implication. For if you

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collate *the other parts of the act with the particular clauses, it will appear to have been merely in relation to the real estate that the statute was expressly enacted. The act professes to be made to abolish the rights of primogeniture; this can only relate to land. Then comes a little clause putting personal on the same footing with real.

The act of 1791 does not divide personal estates more than the statute of distributions. (22d and 23d Car.) The policy of the division of real estate is not applicable to personal estate. The 16th clause of the act of 1791 shews that real estate alone was contemplated. It gives her what she takes (at her option) under the act, in bar of dower. Case of Elms was of negroes undivided: the possession of one is possession of the other.

THE COURT then delivered the following decree:

The first question then for consideration is, whether this property is to be considered as real or personal estate, at the death of the wife? This is the case of a will, and the intent of the testator must guide us if it applies to the question.

It appears to me that the testator did plainly intend to change this land into personal property. He directs it to be sold, on his youngest son's coming of age, and the money to be divided between his wife and children. The sale is suspended, but the ultimate destination is to make the bequest pecuniary. The right of the wife was not to any part of the land, but to part of the proceeds of its sale; and being a vested legacy, which is not denied, her proportion will go to whoever is entitled to it by law. The main question then is, who is entitled to the share which devolved on Mrs. Byrne? Mr. Byrne claims the whole, either under his marital rights, or under his administration, without liability to account. His marital rights cannot give him this property because it was not reduced to possession; nor could it be, for the sale did not take place till after her death; and the question before the Court relates to her share of the amount of sales. Is he entitled

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to it under his adminis*tration of his wife's estate and effects, without any liability to account? It is said that this would have been the clear state of his rights, under the law, if the act of 1791, for the abolition of the rights of primogeniture, had not intervened; and that this act does not take away or alter the rights of the husband: that the act contemplates a division of real estate, and the clause respecting personal estate appears, it is said, to have slipped in by mistake or inadvertence. I admit that in all doubtful cases it is proper to look, as has been urged, at the preamble, and to seek light from whatever quarter it may be got. But what is the object of the search? It is to discover what the law makers intended. The moment that discovery is made, all further enquiry is at an end, for that intention must govern, unless it be in hostility to some constitutional regulation. Now the clauses on this subject, in the act of 1791, are as clear and as explicit as possible. They are as follows: "On the death of any married woman the husband shall be entitled to the same share of her real estate as is herein given to the widow out of the estate of the husband, and the remainder of her real estate shall be distributed among her descendants and relations in the same manner as is heretofore directed in case of the intestacy of a married man." "In all cases of intestacy the personal estate of the intestate shall be distributed in the same manner as real estates are disposed of by this act."

It is manifest, from these clauses, 1st, that the husband's rights in the real estate of

the wife are put on the same footing as those of the wife in the husband's real estate. 2d. That personal estate is put on the same footing as real estate, in the division of intestates' estates. As there could be no doubt with respect to the real, there can be none as to the personal. It is, however, contended that there is no direct repeal of the law in favor of the husband's rights to the property of his wife, not reduced to possession at the time of her death; a right founded on the common law and fortified by the statute, which however was unnecessary.

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*There are two modes of repealing laws; one by direct and distinct repeal, sometimes substituting another provision in the room of that which is abrogated, and sometimes simply by repeal: the other, by introducing a new rule inconsistent with and contradictory to the former rule. This, by implication, repeals the former. Both cannot subsist together, and the maxim of law and of reason is, leges posteriores priores abrogant. In the case before us a new rule is introduced, different from the old rule and abrogates it. The court of common pleas appears, in the case of Speight v. Halloway, administrator of Meggs, to have taken this view of the subject. I think it is the right view. But as no solemn decision of this point has been made in this Court, I should be glad to have it settled by the judgment of the whole Court. It is ordered and decreed, that the defendants do account with and pay over to complainant one third part of that proportion of the nett amount of sales of the lot in question, to which his late wife, Mrs. Byrne, was entitled, under the will of her first husband, Thomas Stewart.

From this decree there was an appeal, on the ground, "That the husband, either by virtue of his marital rights, or as administrator of his late wife, is entitled to her whole interest and estate, whatever it may be, in the lot of land and premises aforesaid."

21st Nov. 1810.

Winstanley, sol. for comp't.

The appeal came to a hearing in March, and was argued by Mr. W. L. Smith for appellant, and Mr. Cheves for respondent.

Mr. Smith contended that, this property should be considered to be personal estate. The testator manifestly meant to convert the lot of land into personalty. He connects it with personalty in the direction for a division. The land is directed to be sold at all events, and the money is to be divided.

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The postponement of the sale till *the youngest son attains twenty-one years does not alter the case. See 2 P. Wms. 322, Doughty and Bull; 3 P. Wms. 211; 3 Atk. 448. In this Court the same point was decided in Drayton and Drayton.

2 Atk. 562, 8. If the testator orders his executor to sell real estate, this converts it to money, and it will go as personal estate. The act of 1791, abolishing the rights of primogeniture, has no application. The statutes of 22d and 29th, Car. 2d, were not repealed by the act of 1791, and must have operation. It was decided by Lord Ch. Macclesfield, that the husband should be within the statute (of distributions) as to his interest, but not to his prejudice. So Lord Cowper. The point has been decided by this Court; Peyre v. Jervey, 2d vol. of Decrees, 239. Claims for the surviving husband the whole that the wife was entitled to, by virtue of the marital rights; and repeated the arguments used before the Circuit Court.

Mr. Cheves, for respondent, stated that the decision in Doughty and Bull only settled a doubt, by deciding that a power given to sell, and a power to sell at discretion, means the same thing. The general principle is, that real estate, so disposed of, is considered as personal from the death of the testator. But this does not apply to a case where the testator directs the estate to continue as real estate till the death of the youngest son, a period of nearly twenty-one years; then any of the children dying, during the continuance of the real estate, their share to be considered as real estate, and to be divided accordingly. So the wife's share. There was no power to sell till the youngest child should attain the age of 21 years, if it had lived.

But if the property should be considered as personal estate, the husband, surviving his wife, must come in under the primogeniture law for a proportion only. It is true that this Court and the Court of Law have decided this point differently. This Court (in the case of Peyre) was in favor of the marital rights to the old extent: the Court of

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Law has restricted them (in the case *of Speights and Halloway, in 1805, at Columbia) to the precise limits marked by the act of 1791, abolishing the rights of primogeniture, and for the division of real and personal estates; and it is proper there should be an uniformity of decision. The English statute of distributions did provide for the wife's right to a third part of the intestate husband's personal property, but made no provision on the subject of the wife's dying intestate, (as she must unless specially permitted to make a will.) The common law rule, therefore, must then prevail, in the case of the wife dying intestate, and the husband would take all: so that there really was no reason for the statute of frauds declaring that the statute of distributions did not extend to the case of the wife's estate. 2d Blackst. 514. But our act of 1791 provides expressly how the real estate of the wife shall be divided, on her decease, among her husband and other relations; and then

declares that the personal estate shall, in cases of intestacy, be divided in the same manner as the real estate. Admitted that if the right had vested in the wife during her life, and had been reduced to possession, the marital rights would have attached, and the property become absolutely the husband's. But the property in question had not so vested, and therefore was subject to the operation of the act of 1791. But if a vested legacy, still not to take effect till events, which never took place in her life, and and therefore not reduced to possession for the marital rights to attach upon. The act of 1791, for abolishing the rights of primogeniture and the more equal division of intestates' estates, does lay down a new rule of property, different from the old; et leges posteriores priores abrogant.

After the argument, the Court, composed of Chancellors James, Thompson, Desaussure and Gaillard, (Chancellor Rutledge being recently dead) were unanimously of opinion that the decree of the Circuit Court ought to be affirmed.

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*The entry in the decree book of the Court of Appeals is as follows:

"The administrators of Mary Byrne v. Porter and wife, administratrix of Stewart. Miss Elms v. Arthur Hughes. Court of Appeals, March 15, 1811.

"Both these causes, turning on the same question, were argued together. From the 10th clause of the first section of the act abolishing the rights of primogeniture, which says that "on the death of any married woman the husband shall be entitled to the same share of her real estate as is herein given to the widow out of the estate of the husband," it is clear that a married woman may die intestate as to real estate, and it is equally clear from the 2d section of that act, that she may die intestate as to personal estate. This section enacts, in general terms, "that in all cases of intestacy, the personal estate of the intestate shall be distributed in the same manner as real estates are disposed of by this act." The only point to be determined is, Whether the husband jure mariti became entitled, on the death of his wife, to her personal estate not reduced by him into possession during the coverture? or whether such estate must be considered as belonging to the wife, and be distributed in the manner directed by the above act. The Court are unanimously of opinion, that the personal estate of the wife, not reduced into possession by the husband during the coverture, must be considered as her estate, and consequently, that it must be distributed according to the act of 1791, abolishing the rights of primogeniture, and for other purposes.

"March 15, 1811. Decree affirmed."

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*Case XXX.

M. E. HOLMES v. MARY SIMONS, Guardian of the Children of Robert Simons, Deceased.

[Tried before Chancellor Desaussure, Charleston, November, 1810.]

[*Evidence* ⇨444.]

The Court refused to permit parol evidence to prove that the grantor intended to have made limitations different from those on the face of the deed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1929; Dec. Dig. ⇨444.]

The bill in this case is filed to have an account of certain estates, real and personal, and the delivery thereof, to the complainant, on the ground that the deed under which the defendant holds was erroneously drawn, and ought, according to the intentions of the donor, to have contained a clause which would (upon certain events that have occurred) have carried the estates in question to the complainant. The deed spoken of was a deed of gift, very inartificially drawn, but very clear, by which Mr. Benjamin Simons, now deceased, gave £1000. sterling to trustees, to be invested in property, for the use and benefit of his brother "Robert Simons's lawfully begotten children." The annual interest, or income, to be applied to the use and benefit of the said children until the son or sons arrive at the age or ages of 21 years, and the daughter or daughters arrive at the age of 18 years; then to be equally divided between them, share and share alike. And in case the said Robert Simons should have no children arrive to the above years, he to have the annual interest, or income, during his natural life; and after his death to go to his sister, Mary E. Simons, (the present complainant) and her heirs.

The trustees invested the £1000 in property, partly real and partly personal, which is the object of the present suit.

At the time this deed was executed, (to wit, on the 18th November, 1789,) Robert Simons was married, and had several children. Upon the death of his wife he intermarried with Mary, the defendant, by whom he had several children who are living. All the children, by the first marriage, are dead, without having attained the age of 18 years, and Robert Simons himself is dead.

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*On the part of the complainant it was insisted that there was a mistake made in drawing the deed of gift; that her brother Benjamin intended to have restricted his bounty to the children of his brother Robert Simons by his first wife, (then living;) and that upon failure of those children, and the death of Robert, he intended the property should go immediately to his sister, the complainant, without any regard to the children

whom he left by his second marriage: and the complainant offered to go into parol proof that such were the intentions of her brother, and that he had given instructions to Mr. John Bryan to draw the deed accordingly; and other testimony corroborating the above.

The production of such testimony was objected to, by the defendant's counsel, on the ground that it would be in the highest degree dangerous to permit such parol testimony to be given, which would totally defeat the effect of a deed which, though not technically drawn, was very clear and precise in its provisions.

Mr. Grimke, for complainant. The first question for consideration is, Can parol evidence be admitted to prove that an omission took place in the wording of the deed in question? [Reads the deed of gift.] The rules of evidence as to deeds at common law for val. cons. are not applicable to vol. deeds. Neither of these parties claim as purchasers; both are volunteers, under the bounty of the donor. The wording of the deed shews it to be drawn by some person unskilled in the law.

What may begin by parol may be continued by parol: Peake. This deed, not relating to lands, but to money, may originate by parol.

Ambiguitas latens (as this is) may be explained by parol evidence: Peake. As to latent or patent ambiguity: latent, is where the omission does not appear on the face of the instrument.

The Court of Equity is to correct errors or frauds. A mistake has been made: parol

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evidence may shew *this error, to do justice, by giving effect to the intent of the testator. 1 Fonbl. 122, note. Parol evidence may be admitted to shew the deed differed from the real intent of the parties. Ib. 200. 1 vol. of Day's rep. in Connecticut. Parol evidence admissible to shew that a deed which was absolute was intended to be a mortgage. 2 Fonbl. 262. See Roberts on frauds, p. 30; 2 Dallas, 171. Parol evidence admitted to explain a deed from which a clause is omitted. 2 Dallas, 70. Parol evidence admitted to shew error, in the name of a devisee.

From the circumstances of the case the presumption is, that the donor had an eye to the children of Mr. Simons then in existence, and no other: like the cases of legacies to A. and his children; in some of which the children, in existence at the time, are alone considered to be entitled. See the deed itself. The limitation to particular ages shews that the donor did not mean to comprehend all the children, but either all who were in existence at the time of the deed, and no others, or those in existence when the eldest should attain 21 years.

Mr. Markley, for defendant, insisted on the danger of parol testimony, which might defeat the real intention of the testator. Look at the situation of the parties: B. Simons was desirous to provide for his brother Robert's family. Why confine it to those in being? Why distinguish one set of his brother's children from another? It was not the brother of the first wife providing for her children: it was one brother providing for another brother's children: and it was immaterial to him by what wife he should have them.

As to the argument, that the deed being voluntary, might be by parol, it is not so. It must have been done by deed. Since the statute of frauds it could not be by parol.

As to the latent and patent ambiguity. Latent is exterior; patent, is what appears on the face of the deed. There are no ambigui-

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ties on the face of the deed; it is *plain and clear. 2 Vesey, 216, Hampshire v. Pierce; see this case.

This is a very different case from those in which the Court has let in parol proof. All of them are cases of real ambiguity. The general principle against parol evidence was long adhered to. At length exceptions were made either to explain or confirm, but not to destroy what appears on the face of the deed. 1 Harr. chanc. 373, 518; 2 Vesey, 655, Harris v. Bishop of Lincoln. Cases of explanation, as to who was meant, in the devise. 1 Harr. 376, 379. Where the extent of the meaning is doubtful, parol evidence is received; but there is no doubt here. 1 Brown ch. rep. 341, countess of Shelburne v. earl of Inchiquin; 2 Atk. 240, Baillis and Church v. attorney general; 1 Harr. 380; 1 Brown 92, Earlen v. Child; 2 Brown, 219, lord Portmore v. Norris; Eq. Cas. abr. 416; Peake's Evid. 115. No parol evidence to enlarge or limit a deed.

The date is of no importance: the delivery is that time from which it is to take effect. Ambiguitas patens is that which appears from the face of the deed; latens, where it is extraneous. Parol evidence is admitted to explain the latter, not the former. Brown v. Selwin, case in equity in the time of Talbot, 241.

THE COURT then delivered the following decree:

This is too plain a case to admit of any doubt. It would, indeed, be highly mischievous, and tend to the endangering all property, however disposed of by deed or will, if such parol testimony should be admitted. I will not lay any stress upon the length of time which has elapsed, and the death of all the original and principal actors in this business, before any attempt was made to shake this deed; although I think those circum-

stances should have weight, even in a case of stronger claim than the present for the admission of parol testimony. But I will take the question in its simplest form. Can parol evidence be admitted, to introduce a new clause or additional words into this deed, so

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as to vary it materi*ally, and carry the property to another person, different from those entitled to it as the deed now stands?

The general rule certainly is not to let in parol evidence to explain either deeds or wills: and this rule is founded in great wisdom and caution. It would tend greatly to introduce perjuries, and to unsettle what men had deliberately settled in writing, relative to their estates, to the great hazard of the titles of all property. Still the judges have been induced to admit parol evidence, in a few cases, and under very peculiar circumstances, to supply some manifest defect, or to explain what was extremely doubtful. This has been done more freely in the cases of wills than of deeds, because they are more frequently executed in haste and without counsel. In deeds, where men act more advisedly, there is more reluctance to admit parol evidence, and the examples of it are very rare, except to prevent a fraud. There has indeed been a good deal of diversity of opinion among successive judges, in what cases parol evidence is admissible. Their sound judgment has approved the rule; but they have been tempted by particular circumstances, and by a strong desire to get at the whole truth, to make exceptions to the rule. The later cases, founded upon more experience, have gone to establish the rule more firmly, and to narrow the range of the exceptions. Lord Hardwicke, in the case of Ulrich and Litchfield, 2 Atk. 373, lays it down, that courts of law and equity admit parol evidence in two cases only: first, to ascertain the person where there are two of the same name, or where there has been a mistake in a christian or surname; secondly, in resulting trusts relating to personal estate. Other cases shew, that to avoid frauds parol evidence is admissible. None of the cases, however, have ever gone to receive parol evidence, to add distinct and independent clauses or new words to a will, or a deed, which would essentially alter the deed or will, and make a different disposition of the property from that apparent on its face, clearly and unambiguously expressed.

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It would be dangerous in the *highest degree, and contrary not only to the statute of frauds, but to the common law before the statute, as relates to land. In the case under the consideration of the Court, there is a clear, unambiguous provision, by which the 1000*l.* is to be invested by trustees for the use and benefit of Mr. Robert Simons's children; and if he should leave no children who should attain a certain age, the property is limited over to his sister Mrs. Holmes, the complainant. It is insisted that a mistake was made in drawing the deed, for, that it was the intention of the donor to restrict the provision to the children of Mr. Robert Simons by his first marriage, and that parol evidence should be admitted to prove declarations by the donor, and by a Mr. Bryan, who drew the deed, to that effect, they being both dead.

I am decidedly of opinion, that such evidence is inadmissible; and it would be inadmissible if Mr. Bryan were living and ready to attest to this fact. It would go to add to and alter the deed, and give a different destination to the property, contrary to the clear and explicit provisions on its face. It was attempted, in Hampshire and Pierce, 2 Vesey, 216, to limit, by parol evidence, a legacy to the children of one wife, contrary to the words of the will, which spoke generally of the children of the party, without distinguishing the particular brood, by the two wives. But the Court refused to admit the parol evidence even in the case of a will.

I will not travel over all the cases which establish the doctrine, but refer generally to the following cases: Brown and Selwin, Cases, time of Talbot, p. 240; Whitton v. Russel, 2 Atk. 448; Ulrich v. Litchfield, 2 Atk. 373; Parterich v. Poulett, 2 Atk. 283; Tyrrel v. Hope, 2 Atk. 558; Rych v. Jackson, 4 Bro. c. c. 514; Pym v. Blackburn, 3 Vesey, jr. 34; Conolly v. Lord Howe, 5 Vesey, jr. 700; Shales v. Barrington, 1 P. Wms. 481.†

The bill was dismissed.

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† See also 1 Bro. c. c. 92. 3 do. 168. 4 do. 514, and 1 Bro. c. c. 338. 2 do. 326. 6 Vesey, 328.

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*Case XXXI.

Ex parte MARGARET WELLS, by Her Guardian, E. Lynah.

Writ of partition for two thirds of the personal estate of her deceased father, Matthew Wells, including four negroes, with the issue of the females, said to have been conveyed by the said Matthew Wells to his wife, by a deed of gift, which is contested.

Ex parte E. M. B. ELMS, by her Guardian, E. Lynah.

Writ of partition of a tract of land of 490 acres, and two thirds of four negroes and their issue, included in a deed of gift from Matthew Wells to his wife Hannah, who aft-

erwards intermarried with William Elms, and had issue the said E. M. B. Elms.

[Tried before Chancellor Desaussure, Charleston, November, 1810.]

[*Husband and Wife* ⟸11.]

The act of 1791 does affect the marital rights, and the wife's property not reduced to possession by the husband is distributable.

[Ed. Note.—Cited in Davis v. Rhame, 1 McCord, Eq. 194; Phaelon v. Perman, 2 McCord, Eq. 433; Marsh v. Nail, Rich. Eq. Cas. 119; Durant v. Salley, 3 Strob. Eq. 160.

For other cases, see Husband and Wife, Cent. Dig. § 53; Dec. Dig. ⟸11.]

To the summons issued in this case, to shew cause why a writ of partition should not issue in the last mentioned case, Mr. Pringle and Mr. Ford appeared for Arthur Hughes, and shewed cause, viz: That the said William Elms died in January, 1794, intestate, leaving the said Hannah, his widow, and two infant daughters, the said Elizabeth Mary Elms, and Sarah, who died in the month of July following. The said Hannah Wells afterwards intermarried with the said Arthur Hughes, who has survived her. The said Arthur Hughes appeared to the summons issued in this case; and it was contended, on his part, by Messrs. Ford and Pringle, that surviving his said wife, he was, in her right, entitled to two third parts of William Elms's said estate, that is to say, one third part on the death of William Elms, and another third part on the death of the infant daughter, who died in July, 1794, previous to the alteration of the primogeniture act in 1797. The said widow of William Elms, afterwards Mrs. Hughes, adminis-

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ter*ed with Cornelius Dupre on the said estate of William Elms.

The defendant contends, that the deed of gift made by Matthew Wells, of four negroes, passed those negroes to his wife, and that they are to be divided as part of the estate of William Elms. But he contends that the share of his wife, who was the widow of Matthew Wells, was not reduced into possession by William Elms, nor became part of his estate, but survived to the widow on the death of Elms, and so vested in her subsequent husband, Arthur Hughes, as to have become his absolute property in the event, that has happened, of his surviving her.

On the other hand, Miss Wells contends, that the deed of gift did not pass the four negroes; and Miss Elms contends that the act of administration and consequent possession of the whole property, by her father, was such a reduction of his (then) wife's share of the estate into possession as to have made her share of the said estate absolute in the said William Elms, and therefore that it is to be divided as part of his personal estate.

These causes came on to be heard on the ——— November, 1810, and were argued by Mr. Northrop, Mr. Pringle, and Mr. Ford.

Mr. Northrop, for Miss Elms, stated the facts, and submitted the case in the first instance to the Court.

Mr. Ford, for A. Hughes. The deed from Matthew Wells to his wife is for love and affection, of four negroes; no trustee. 'Tis a direct gift to the wife.

Formerly it was decided that direct gifts from husband to wife were void. But not so in later cases. The civil law doctrines consider them distinct persons; differing from the common law. Where a wife has separate property, she is considered as a feme sole. Fonbl. 94. Lucas v. Lucas, 1 Atk. 270–8. In equity, gifts from husband to wife, without trustee, are good. The adverse cases are where such deeds would prejudice creditors.

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*Supposing this deed established, the next point relates to Matthew Wells's estate: Whether Mr. W. Elms had so reduced into possession the share of his wife, in the estate of Matthew Wells, as made him absolute owner? Elms administered, 'tis true, with his wife, and took possession of the estate of Wells; but as administrator, not as husband—as administrator, the mere agent of the ordinary; or, as an officer of the law accountable—not as husband. His possession, therefore, is that of a public officer. He should have proceeded to a partition of the property, and to separate his wife's third from the mass of the estate of Wells, to entitle him to the absolute estate in his wife's right. No writ of partition could issue till the debts were paid; and the debts were not paid during Elms's life. 1 Fonbl. 304. As to the husband's rights in the wife's estate—chattels. Things in action, not reduced to possession, do not go to the husband. 3 Atk. 20, 726.

Mr. Pringle. Hannah Wells and William Elms administered on Mr. Wells's estate the 28th July, 1789. There is no doubt as to the validity of the deed. It is not bad for want of the interposition of trustees. 1 Fonbl. 106. Bennett v. ———. 2 P. Wms. 316. From the nature of the gift the Court of Equity will infer that it is for the wife's separate use. Dr. O'Driscoll and Culliatt, a case at law; no interposition of trustees and the deed supported.

As to the 2d question. Elms held the estate as administrator of Wells. To obtain a division of Well's estate, so as to obtain his wife's share, a partition was absolutely necessary. Elms died in the minority of the child of Wells; so that no division could be effected, but by application to the Court. He could not reduce to possession what his wife herself had not in possession; for she had only a right to an undivided third part, to

get which a writ of partition was requisite. 1 Fonbl. 313. No act of the husband can be ascribed to his transactions. He did not take possession as husband, but merely as administrator. Till the debts were paid it

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could not be *ascertained how many negroes would be left for division, for it might be necessary to sell some to pay the debts. Though a vested right, it was a right in action: suit must be brought for possession; and Elms died before her.

Mr. Northrop, for Miss Wells. There is a distinction as to property in which a wife becomes entitled to a separate estate, aliunde. There, without the interposition of trustees, the deed is good. Not so where there is a direct gift by the husband to the wife. No provision in this deed for children. The wife has no will to assent to direct gifts. She has no want of these articles. She enjoys the whole in common with her husband.

The negroes are not a chose in action; an undivided portion of the negroes cannot be called a chose in action. If the negroes were not in possession of the husband, but were in dispute and in possession of others, then it would be a chose in action. Partition is merely to divide a property in possession. The cases, then, as to choses in action, are totally different from this.

THE COURT, after taking time to consider, delivered the following decree:

Several questions were made for the determination of the Court, upon which instructions might be given to the commissioners for the execution of the writs of partition.

It was contended for the representatives of Mrs. Wells, (afterwards Mrs. Elms, and then Mrs. Hughes,) that the deed of gift was a voluntary gift from a husband to a wife, which, without the intervention of a trustee, is a mere nullity and void, or enures immediately to the husband. This was denied, and it was contended that by the more recent decisions such gifts are supported in equity.

On examining the decided cases on this point, it appears that in equity such gifts between husband and wife have been often supported, provided the same be not made to the prejudice of creditors, or subsequent bona

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*fide purchasers without notice. See 1 Fonbl. 108; 1 Atk. 270, Lucas v. Lucas, &c. &c.

This deed being thus established, for there are no creditors to be injured in this case, (Mr. Wells having abundance of other property to pay his debts) the negroes included in it, became the absolute property of the wife. It was the very object of the deed that they should be a separate property to the wife. On her marriage with Mr. Elms, he took possession of these negroes, and they became by virtue of the marital rights his property. On his death, intestate, this property became divisible between his widow and his daughters, one third to each. One of the daughters dying in January, 1794, intestate and unmarried, her third devolved upon her mother under the law as it then stood. On the marriage of the mother with Mr. Hughes, she carried her rights to two thirds of the said negroes in marriage to him; and he might have obtained a writ of partition and had her two third parts allotted, and then, having reduced the same to possession, they would have become his absolute property. This, however, he did not complete. These two thirds still remain undivided from the third part which belongs to Miss Elms. Mr Hughes claims, however, these two third parts as survivor of his wife. The opinion of the Court will be given upon this point, at a subsequent stage of the decree, in connection with another part of the property which falls under the same question.

On the death of Mr. Wells his widow was entitled to one third of his personal estate, exclusive of the four negroes included in the deed of gift. During the marriage of Mr. Elms with her, no partition was made, but her third part remained blended with the rest of the estate, to which the daughter, Miss Wells, was entitled. At that time, too, the debts of the estate of Mr. Wells were not all paid. It was contended, that as Mr. Elms had not obtained a partition, so as to ascertain what part of the personal estate was his wife's, he could not be said to have reduced

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this property into possession: that *the possession which he had was as administrator of Mr. Wells, and he held all the personal estate merely as the representative of Wells, and not in his wife's right or his own; and that his rights lay in action, for it was absolutely necessary to have a writ of partition to divide the estate, in order to ascertain what should be his wife's; and he dying in his wife's lifetime, her rights in the property survived to her, and she carried those rights in marriage to Mr. Hughes, who surviving her, they became vested in him.

On the other hand, it was insisted that the right of the wife, to a third part of Mr. Wells's personal estate, was not a chose in action. It was a right to an undivided portion of negroes, actually in possession. That the writ of partition which was necessary, was merely to divide property in possession; and this was totally different from a chose in action.

On considering this question, I am inclined to think, that as Mr. Elms's possession was merely as administrator; and as a writ of partition was necessary to divide the personal estate, to enable Mr. Elms to hold his wife's share as husband; and as, wherever a suit is necessary to establish or to give effect to a right, this is a right in action; and as Mr. Elms died before his wife; the right and the possession was not so vested in Mr.

Elms, as husband, as to establish his property in the personal estate, but the same survived to his widow.

This brings us to the third question. Mr. Hughes, not having obtained, or taken any steps to obtain, a partition of the four negroes and their issue, comprised in the deed of gift, so as to separate his wife's two third parts therein from the third part to which Miss Elms is entitled; nor of the personal estate of Matthew Wells, so as to separate his wife's third part thereof from the two thirds which Miss Wells is entitled to—What interest survives to him on her death?

As the law stood prior to the act of 1791, for abolishing the rights of primogeniture, there could not have been any doubt but that

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Mr. Hughes would have taken *the property in question. Since the passage of that act different opinions have prevailed. In the case of Peyre and Jervey, it was decided in this Court, that the act of 1791 did not intrench on the marital rights, and that the husband surviving his wife took her property though not reduced to possession, either as survivor or under his exclusive right to administer without account. In another case, that of Speight and others, decided at law, a contrary opinion prevailed, and the act of 1791 was considered as interposing and giving the wife's property not reduced to possession among her husband and her children. This question came before me, in the case of administrator of Byrne v. administratrix of Stewart, and upon considering the act of 1791 it did appear to me to apply to and govern this question, and I decided accordingly. As I gave my reasons for that opinion in the decree which I then gave, and that case was carried up to the Court of Appeals at my request, and is now pending there, I will now only say that I adhere to that opinion; consequently, that the property in question is divisible into three parts: one of which must go to Mr. Hughes, one to Miss Wells, and one to Miss Elms, the two daughters of Mrs. Hughes. But I recommend that this case may also be carried up to the Court of Appeals that this contested question may receive a solemn adjudication.

From this decree an appeal was made, on the following grounds:

1. That before the passing of the primogeniture act, a husband was jure mariti entitled to the whole personal estate of his wife; that it was a vested interest, subject to be defeated, in the event of the wife's surviving the husband, and by his not having reduced the personal estate into actual possession, and being absolute and transmissible in the event of his being the survivor.

2. That it was not the true intent and meaning of the provisions made in the primogeniture act, in this respect, to alter or impair the marital rights.

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*3. That the primogeniture act ought not to be extended by construction so as to impair the marital rights, forasmuch as it doth not alter or diminish the correspondent reasons or obligations on which those rights are professedly founded by the law.

Ford, for the appellant.

On this appeal the counsel argued the case as follows:

Mr. Ford. The statute 29th Chas. 2d, was not introductory of a new law, but relates to an old one: it is declaratory. See 3 Atk. 526, as to the complete right of the husband. 1 P. Wms. 378. The statute of Chas. was one of those which, at the time of forming the constitution, was adopted as the law of the land. The legislature, in passing a law relative to intestate estates, could not have in contemplation a feme covert, who is incapable of making a will: but infants are in the same situation.

The act of primogeniture is affirmative; not to be construed to do away with the common law. 6 Bac. 376, on construction. Ibid. 383. The law gives the chattels real, of the wife, to the husband, upon marriage: if the act of primogeniture should be extended, as contended, these would be included and distributed.

Drayton, for respondent. The object of the legislature was general; to carry into effect the clause of the constitution. It is not confined to the eldest son alone, but also to every equitable distribution. It evidently extends to women, and places real and personal estate on the same footing. The question is not how or why the clause was introduced: it has in fact been introduced, and that is sufficient. A subsequent statute shall prevail over the common law. Comyn, vol. 1, 323. Toller, 83–4. These authorities go to shew that the jus mariti was doubtful at common law. Doubts solved by Toller by referring to statute 29, Car. 2d.

An affirmative statute excludes all matters not incident to or included in it. If there are statutes, pari materia, they may

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be taken together; but where a single *statute, it must be considered singly. In not one of the clauses of the act of distributions is the husband named; and no case mentioned of a feme covert dying intestate. In the act of 1791 it is the reverse; both are named. By the act of 1791 he receives one third of the real estate in fee, to which he was not entitled at common law. The marital rights are taken away and an equivalent granted. By the act of distribution the rights are taken away and no equivalent granted. Instead of transferring the whole property of the wife to the husband, it transfers one third. The act must operate upon something. All the property in possession vests in the husband. This something must

be the property of the wife distributed by the act.

The husband is liable to the wife's debts only during coverture; while all the property in possession is in him. After her death, for only what he receives. This is in answer to the objection, "that there was responsibility without the means," which is a non sequitur. In the case of Speight & Holloway, at the com. law, the Court has decided that property goes under the act of 1791; and in the case of Peyre v. Jervey, in equity, the contrary. This is conceded. The question here, now is, has he a right to take? not whether he has a right to administer.

Pringle, for Hughes, the appellant, on the same point. 1 Black. 433–4. Baron may assign choses in action, and feme will be bound by it. Har. L. T. 475. That the property, jure mariti, vested in him by common law, and the right of administration followed. By statute, administration would have gone to the next of kin. But the common law having given him the right of property, also gave him the means of reducing it into possession. Vin. p. 88. By common law, and not by statute, the interest vested in him, and became transmissible to his representatives upon his surviving her. The construction ought to be confined by the object expressed in the preamble. Upon the death of the first husband, would not the share of

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the wife vest in her, in *possession, and the rights of her children vest in them in interest? If so, the right to choses in action, in the husband, at common law, will by the act also vest in her children, in interest, and the husband will have no right to dispose of them more than any other personal property without being accountable.

Smith, for appellant, contends that the act abolishing the rights of primogeniture has no application. Grimke's L. of Executors, 274, 273. Acts of 22d and 23d, Chas. 2d, are not repealed by the act of 1791. "Decided by Lord Macclesfield that the husband should be within the statute as to his interest, but not to his prejudice." Lord Cowper also decided so. By the act of primogeniture the legislature never intended to interfere with the rights of the husband. Bay's reports, 244, Townsend and Rippon. Speights and Halloway in Con. Court. Peyre v. Thos. H. Jervey, 2d vol. 239.

After hearing the arguments, the Court, composed of the judges James, Thompson, Desaussure and Gaillard, (Chancellor Rutledge being recently dead) were unanimously of opinion, that the decree of the Circuit Court should be affirmed.

[Mr. Ford, some time after the termination of the case, furnished me with the following note:—The decree of the Court is in exact conformity with the case of Baker v. Hall, 12 Vesey, 497; that possession by the husband, as executor and trustee, is not a reduction into possession of his wife's share of the residue, entitling him, against her right of survivorship. See also the case of Cape and wife v. Adams and others, 2d volume of Decrees, p. 101, and Harleston v. Hamilton.]

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3 Desaus. *165

***Case XXXII.**

WILLIAM JONES and Wife v. THOMAS W. PRICE and CHARLOTTE, His Wife.

[Tried before Chancellor Desaussure, Circuit Court of Equity, Charleston, March, 1811.]

[*Perpetuities* ⊂⊃4.]

Where the intention of the testator appears to be plain, that the devise over should take effect after a dying without issue of the first devisee, the Court will give effect to such intention, and not readily construe the limitation too remote.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. § 30; Dec. Dig. ⊂⊃4.]

[This case is also cited in Price v. White, Bailey Eq. 247, as to facts.]

A summons was issued in this case, calling on the defendant to shew cause why a writ of partition should not issue, to divide certain negroes, mentioned in the will of the late Philip Smith, deceased, between the complainant and Thomas W. Price and his wife.

The clause of the will, in question, is in the following words:

"Also, I give and bequeath unto Gen. Pinckney, N. Russel and John Lloyd, and to the survivors, &c. and the heirs and assigns of such survivors, the following negroes, called, viz: (Here follow the names of the negroes) to have and to hold, to them the said trustees and the survivors, &c. upon the special trust and confidence, and for the several uses, intents and purposes, herein mentioned of and concerning the same negro slaves with their issue and increase last above mentioned; and to and for no other use, intent or purpose, whatsoever, that is to say, that they, the said trustees, and the survivors, &c. shall permit and suffer my son, Philip Skirving Smith, upon his arrival at the age of 21 years, and his lawful heir, to have, use and occupy, possess and enjoy, all and singular, the last abovementioned negro slaves, with their issue and increase, and of the free use, benefit and profits, arising from the labor and work of the said negro slaves, for and during the term of his natural life: and after his death, I give and bequeath all the use whereof I have hereby bequeathed for any time to my son, P. S. Smith, to the children of the said Philip S. Smith, lawfully to be begotten, or to such one or more of them,

and in such parts and proportions, manner and form, as the said P. S. Smith shall, at

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any *time or times, after his arrival at the age of 21 years by any writing or writings under his hand and seal, duly attested by two or more credible witnesses, direct, limit and appoint; and for want of such direction, limitation and appointment, then to the use of all and every the child and children of the said Philip S. Smith, lawfully to be begotten, forever, to be equally divided between them, if more than one, share and share alike; and for default of such issue, I give and bequeath all the said last mentioned slaves, with their issue and increase, to my daughters Mary and Charlotte, equally to be divided; or in case they, my said daughters, shall be then dead, to and among their children, or such child or children, or either of them, as shall then be living. But in case one only of them, my said daughters, shall upon the contingency aforesaid, be dead, leaving issue, it is my will that all the said slaves, with their issue and increase, shall be, by my executors and the survivor, &c. equally divided, one half to my surviving daughter, and the other to the child or children of my deceased daughter; and in case one of my daughters shall be then dead, without issue, then that all and the whole of the said slaves, herein last abovementioned, with their issue and increase, shall go to my surviving daughter, to whom, upon the contingency, uses and trusts, intents and purposes, herein beforementioned, limited, expressed and declared of, for, and concerning this my last will and testament."

The testator died, leaving his last will and testament in full force; and leaving alive his son and daughters mentioned in his will. The son is since dead, after having attained 21 years of age, but without leaving wife or child.

It is contended, that the limitation over to the two daughters is too remote and void; that the whole estate vested absolutely in the son, P. S. Smith; and that upon his death, without issue and intestate, his sister Charlotte being of the whole blood, is entitled to all the said negroes, with their in-

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crease; and that his sister *Mary, being of the half blood, is not entitled to any of the said negroes, and therefore is not entitled to a writ of partition.

I have looked into the doctrine applicable to this question, and into the reported cases illustrative of this doctrine. The rule is, that a devise over, of real or personal estate, on the first devisee's dying, without heirs, generally, is void; yet there are many exceptions to the rule. The multitude of decided cases explain those exceptions. Thus a devise to one and his heirs, with an executory devise over, limited to take place on an event, which must happen within the compass of a life in being; as where a testator devised to A. and his heirs, and if he should die before 21, then to B. and his heirs. This was a good executory devise to B. Fearn on executory devises, 181. Upon the same principle, though an executory devise to vest on a dying without issue generally, is not good, because too remote, yet where the dying without issue is restrained to the period of a life in being, an executory devise thereon limited will be good. Ib. 182, Duke of Norfolk's case. Same doctrine in Sheffield v. Londondery, 2 Atk. 282. But the Court of Chancery has very much inclined to lay hold of any words in the will, relating to terms or other personal estates, to tie up the generality of expression, of dying without issue, to living at the time of the person's decease. Ib. 186. Thus, where a testator devised to his son A. for life, and no longer, and after his decease to such of A.'s issue as A. should by will appoint; and in case A. should die without issue then he devised the lands over. These words upon the whole of the will were construed to mean issue living at his death; because it was to be intended such issue as A. should or might appoint the term to, viz. issue then living. Fearn, 188. Target v. Gaunt. 1 P. Wms. 432, and Hockly v. Manly, 3 Bro. Rep. 82.

Both these last cases have a direct application to the case under consideration. Indeed this is a stronger case than those. So too, 1 P. Wms. 534, Hughes v. Layer. In the case

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of Atkinson v. Hutchinson, 3. P. Wms. *258, Lord Hardwicke explains the doctrine very clearly and fully. He there states that the rule which had been insisted upon, that whatever words of a will in the case of a freehold will create an estate tail, the same, when made use of with respect to a term, will pass an absolute interest in such term, seems to be laid down too broadly. In that case the Lord Chancellor decided that the intention of the testator being plain, that if A. died and left no issue, the devise over should take effect, he would give effect to such intention, and permit the devise over to operate.

In the case under consideration, I am of opinion, that the intention of the testator is plain, that if his son should die without leaving issue the devise over should take effect. The power of appointment given to the son, as it is expressed, and the subsequent limitations to the daughters and the survivor of them, if one of them should die without issue at the happening of the contingency, which must be taken to mean at the time of the death of the brother, shews clearly that the testator did not mean an indefinite failure of issue. It was to take effect within a life, or lives, in being, and therefore is not too remote. I consider the devise over good

and effectual; therefore the applicant for the writ of partition is entitled to it.

H. A. Desaussure, for complainants.
Drayton, for defendants.

There was no appeal.

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Case XXXIII.

JAMES CLARK, His Wife, and Others, v. JOHN MIKELL.

[Tried before Chancellor Desaussure, Charleston, November, 1810.]

[*Wills* ⇨598.]

[Cited in Jenkins v. Clement, Harp. Eq. 83, 14 Am. Dec. 698, to the point that, where a testator commenced his will in these words, "As to such worldly goods as it has pleased God to bless me with, I give, devise," etc., and then gave to his son a lot of land, without words of inheritance, and gave another lot to be sold, and directed a division of the proceeds between his two daughters, the son took an estate in fee.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1328; Dec. Dig. ⇨598.]

[*Wills* ⇨597.]

[Cited in Robert v. Ellis, 59 S. C. 156, 37 S. E. 250, to the point that a devise without words of inheritance will not carry a fee unless such intent appears.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1319-1326; Dec. Dig. ⇨597.]

The only question made in this case for the consideration of the Court, is, whether, under the will of the late Mr. William Joseph Mik-

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ell, of Edisto Island, his *son, John Mikell, is entitled to a fee simple in a tract of land devised to him, or whether he takes a mere life estate, and that the fee descends among all the heirs of the testator, under the act of the legislature of February, 1791, abolishing the rights of primogeniture.

The testator evidently did not mean to die intestate as to any part of his estate, for he says, "as to such worldly goods and estate as it pleased Almighty God to bless me with in this world, I leave, give, devise and bequeath in manner following"—He then proceeds to make a full and minute disposition of his real and personal estate; and he says, among other things, "In case my wife Mary should marry, or at the day of her death, I give and bequeath to my son John the choice of one of my two tracts of land, and the other tract of land I direct to be sold by my executors, hereinafter to be named and appointed; and one third of the amount of the land sold I give and bequeath to my daughter Sarah Mikell, one third to my daughter Abigail Mikell, and the remaining third to my grand children, W. Clark, Ann M. Clark, Elizabeth G. Clark and Lydia E. Clark, to be equally divided among them.

The testator's family consisted of his widow, his son John, his daughters Sarah and Abigail, and his grand children, the Clarks, children of a deceased daughter. He had no other lands than the two tracts spoken of.

There are certainly no words of inheritance in the devise to the son. But the intent to give him an absolute estate in one of the tracts, of which he gives him the choice, seems manifest; for he professes, in a preliminary clause, to intend to dispose of his whole estate. Now if the devise to the son be not construed an absolute estate, it will be a mere life estate, and the testator will have died intestate as to the fee simple of that tract. I am aware that this alone is not sufficient to warrant a construction that the devise to the son is a fee; but coupled with other circumstances, it may shew the intent; and the intent, when ascertained, must prevail.

The other circumstance on which I rely is

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this: the *testator manifestly did not mean to place his son on a worse footing than his daughters, but rather on a better; yet if the devise to him of one of the tracts, which he should choose, be not deemed a fee simple, the son will be on a worse footing than the daughters; for he directs his other tract of land to be sold and the proceeds of the sale to be equally divided among his daughters, to the exclusion of his son; and if he should have only a life estate in the tract, the choice of which is given to him, at his death the land will revert to the testator's heirs, and the daughters and their heirs will come in equally with the heirs of the son for that land.

The decided cases in this Court favor this liberality of construction, in order to give effect to the testator's manifest intent. The case of Mary Fraser and others v. the executors of J. C. Livingston, and the minor devisees, decided in May, 1808, goes a great way to establish this doctrine.

The case under consideration was submitted without argument. I regret that I was deprived of the benefit of the lights which learned counsel could have thrown on the question. But I must decide on the lights which I possess.

Upon the best consideration which I have been able to give, I am of opinion that the devise in this will must, in order to give effect to the intent of the testator, be deemed and taken to be a devise of an absolute estate in that tract of land, which the son may choose, according to the will.

From the above decree the complainants aforesaid appeal, and as grounds of such, their appeal, state:

1st. Because there are no words of inheritance attached to the devise to John Mikell.

2d. Because there are no other words amounting thereto contained in the said will.

3d. Because the conclusion of the Circuit Court, that unless John Mikell took a fee he

would be on a worse footing than the tes-
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tator's daughters, was incorrect in *point of fact, the Circuit Court not having that light before it which the case afforded; but which from its nature, being viva voce evidence, could not have been then introduced, as the same would have amounted to a trial and thereby given to appellants' cause a priority contrary to the rules of the said Court as aforesaid.

4th. Because the late decisions in the Circuit Court and Court of Appeals in Equity, on which the Circuit Court relied in its decree, in the appellants' case, do not apply to the nature of that case.

Th. Parker, sol. for appellants.

The case came to a hearing in March, 1811.

Mr. Parker, for appellants. It is an agreed fact between the parties, that the tract of land chosen by the son is nearly double the value of the other tract, which is to be sold and the money divided among the daughters.

2 Bos. and Pul. 249, Moore v. Denn, revises all the cases on the subject, and establishes, that if the intent of the testator appears on the face of the will, to give a fee, it shall be a fee; without any regard to technical words. But the intent must be plain, not dubious. If it is dubious the Court will not construe it a fee, and in this case it is at least dubious. Cowper, 306, Hagan v. Jackson. The requiring some words to convey a fee is not on the ground of favoring the heir; but because of wills being a species of conveyance.

2 P. Wms. 522–4, Barry and Edgeworth; 5 Term Rep. 561; 8 Term Rep. 67–8, Doe v. Wright, 8 Term Rep. 502–4, Doe v. Allen; Bos. and Puller, 335, Doe v. Child; 2 Bos. and Puller, 249, Moore v. Denn. These cases go to shew that some words of inheritance or perpetuity are necessary to carry a fee; or a plain intent appears. It is highly dangerous to meddle with the doctrine which has been settled. It would unsettle the property, and the rules of property.

Admits that the British cases go to the length of saying that wherever the intent appears, the fee will pass; though no words of inheritance or other technical words;
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*but there must be some words expressive of the intent to give a fee.

There are no words of inheritance, nor no other words in the will carrying a fee. The introductory clause is not so full as usual, and no evidence of the intent to devise all, and not to die intestate of any. 1 Wilson's Rep. 333, Grayson v. Atkinson; Cowper, 660; 2 Vernon, 690, Beachcroft v. Sam; 3 P. Wms. 297, Tanner v. Wise; 8 Term Rep. 501, Doe v. —. The introductory clause in the will has no effect, unless there be some clause of connection. The word choice, given to the son, must relate to the thing, and not to the quantum of interest.

As to the intent evidenced by the son's being upon a worse footing, unless the fee is given to him, it is not founded in fact, for the son has chosen a tract (as the will allowed him) which is worth double the amount of the other. Whatever construction of a will which goes to defeat the equality prescribed by the act of 1791, will not be favored.

As to circumstances indicative of intent to give a fee, or not, insists that there are stronger to lead the mind to suppose there was no intent to give a fee. Equality runs through it.

As to the cases decided in this Court, they do not apply. Case of Fraser and Livingston, turned on the word "property."

The case of Whaley turned on other reasons—on a survivorship. The Circuit Court decided against the enlargement of the estate into a fee simple; the Court of Appeals reversed it.

No argument can be drawn from the statute of 1791; for though that statute did level the distinction between real and personal estate, as to most purposes, such as division, payment of debts, &c. it does not go the whole length of abolishing all distinctions; so as to justify the idea, that the same words in a will which would carry the absolute property in personal estate will
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carry the *fee in real estate. There is no charge on the son's land, so as to raise an implication of a fee in the son.

To go further than has been done would open the door to great litigation; it will open the door to the discussion of every will. To alter the rule of property, already settled, would be legislating even against the statute of 1712, which made the common law of force. Judge Waties's opinion upon this very case is favorable to his side of the question: the Courts will differ.

Mr. Drayton, for respondent. The British cases all agree that the intention shall govern; yet they trammel it with a restriction, that if the devise relates to real estate there must be words of perpetuity, or words tantamount, to give a fee; thus destroying the intention, though they acknowledge that in almost all the cases which arise, the donor giving a house or land generally, it is his intention to give the absolute estate.

This English mode of construction, by defeating the intention, is to protect their favorite, the eldest son and heir at law. Our act of 1791 has destroyed the distinction between real and personal estate. This necessarily breaks down the rule which requires the use of words of perpetuity: cessante ratione cessat et ipsa lex.

It is by no means certain that even by the English cases this will would not give the fee. 2 Term Rep. The word "estate" carries a fee. Cowper, 352. Preamble, declaratory of the intent to bequeath all his prop-

erty, is coupled with the direct devise, and will give a fee though there are no words of inheritance.

This testator gives to his son and two daughters his two tracts of land. Giving the son his choice implies an equality; and he gives to his daughters a fee, in their tract, for he orders a sale of it, and the money to be divided. A fee is implied, both to the daughters and the son. Implication of a fee is as strong in this case as in that of Waring v. Middleton and others, recently decided by this Court.

The English law, founded on decided cases, have been altered by their judges on

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obtaining more lights. We *may take the same liberty with their cases as they did themselves. 2 Binny's Rep. 13, 21, French v. M'Ilhenney, decided in Pennsylvania, is directly to the case before the Court. 2 Massachusetts Reports: devisee took a fee according to the intent of testator, without words of perpetuity.

But it is said that there are circumstances in this will to shew an intent not to give a fee to the son. No such circumstances appear. He does not appear to have known that words of perpetuity or inheritance were necessary to carry a fee. In the devise to the daughters there are no such words. It is only from his ordering a sale that his intention, to give them the absolute interest in the land and its amount of sale, is discovered. The decision in Whaley's case, directly applicable to this, and being by the Court of Appeals, forms the law; and that case decides that the intention shall prevail, untrammelled by the exception which requires the use of words of perpetuity.

Mr. Parker, in reply. Binny's case is different: the word "same" connecting the devising clause with the introductory clause, where estate is spoken of. "As for such worldly estate as I am blessed with, I give, dispose and bequeath the same, in the following manner." It rests upon the act of 1712, as establishing British adjudications, as the law of the land; and no modern cases (since the revolution) could have any authority to alter the effect of the former decided cases.

The British rule is a clear rule. A sound lawyer can always decide on a will if a fee be given. The Massachusetts case has a clause of survivorship, and there is no such survivorship in this case of Mikell.

Makes a calculation, to shew the inequality against the daughters. If the son takes a fee he gets eight times as much as a daughter. In cases of doubt we should follow the rule of equality; the great principle introduced by the act of 1791.

The Court of Appeals delivered its judgment in the above case.

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*Chancellors JAMES, THOMPSON, and DESAUSSURE, affirmed the decree of the Circuit Court: it appearing to the Court that the intention of the devisor was apparent, on the face of the will, to give a fee simple estate in the land to the son.

Chancellor GAILLARD was of opinion that the decree ought to be reversed.

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Case XXXIV.

JONATHAN COIT, Administrator of THOMAS CRAVEN, v. JOHN OWEN, Executor of PHILIP HAWKINS.

[Tried before Chancellor Gaillard, Charleston, November, 1810.]

[*Witnesses* ⟸98.]

The Court will not admit incompetent testimony, because of the difficulty of otherwise proving the claim: and after a lapse of many years will not give further time to obtain proof.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 332; Dec. Dig. ⟸98.]

[This case is also cited in Woddrop v. Ward, 3 Desaus. 207, on the respective liability of partnership and private property.]

The assignees of John Hawkins, of London, a bankrupt, had a demand on account against the estate of Philip Hawkins, which Mr. Owen the executor, believed to be just. The estate of Philip Hawkins being composed chiefly of property purchased with the funds of Hawkins, Petrie & Co. the Court of Chancery had by a decretal order, made in December, 1787, in a cause then depending, directed that the estate of Philip Hawkins should be sold, and that the executor should retain in his hands, for the use of the creditors of Hawkins, Petrie & Co. so much as would satisfy Philip Hawkins's proportion of the debts of that concern.

In 1807 a decree was made by the Court in a cause instituted by the present complainant, against the executor of P. Hawkins, in which decree it was, amongst other things, directed, that as the defendant, John Owen, had made it appear that the copartnership debts of Hawkins, Petrie & Co. were now settled, and there is a balance of the private estate of said Philip Hawkins unadministered, the complainant Coit should come in with the other creditors for his proportion of the estate of Philip Hawkins to be administered.

In March, 1810, the Court, at the instance of Mr. Winstanly, solicitor for complainant

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Coit, made an or*der directing a commission to be issued to examine such witnesses as might be adduced, and also to examine such books and documents as might be produced to substantiate the demand of the assignees

of John Hawkins against Philip Hawkins. And upon an apprehension that the witnesses might be dead after such a lapse of time, interrogatories were sent, under a second commission, to John Hawkins, the bankrupt, relative to the nature and amount of the demand against Philip Hawkins; in which commissions both parties joined. One of the commissions was returned executed, the other was not returned.

At the hearing of the above case, in the Circuit Court, (Nov. 1810) an objection was taken to the admissibility of the evidence of John Hawkins, who might have, and probably had, interests in the case, notwithstanding his bankruptcy and assignment, as there might be a surplus. The executor had always indeed understood and believed, and admitted, that some debt was justly due, but to what amount or whether a copartnership or private debt, he was not fully apprised.

It appeared, at the hearing, that the books of John Hawkins had been lost, and that two of the clerks who had made the entries were dead, and the residence of the third was unknown, and the examination of John Hawkins, alone, had been taken by the commissioners. Mr. Coit, the complainant, insisted that this evidence should not be read, as John Hawkins was an incompetent witness. On the other hand, it was insisted that the evidence under all these circumstances ought to be received, that the executor firmly believed a just debt was due, and that a creditor ought not to be allowed to come in and object to testimony with which the executor was satisfied, and thereby defeat a just claim, in order to enlarge his own proportion of dividend: and that if the Court thought the evidence inadmissible, further time ought to be given to get the evidence to establish the demand.

The judge, however, was of opinion that
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the evidence *was inadmissible, and that it would not be proper to allow further time. He therefore made the following order:

"The commission being opened and the interrogations read; the Court having heard counsel in support of and against the claim of John Hawkins; the Court is of opinion that the evidence of John Hawkins is not legal evidence, and even if it were, that under all the circumstances of this case it would be unreasonable to postpone longer the payment of the debt due the complainant:—it is therefore ordered and decreed, that the claim of the said John Hawkins be dismissed and that the defendant, John Owen, do pay over the sum retained as the proportion of the debt of the said John Hawkins to and amongst the other private creditors of the said Philip Hawkins, deceased, whose debts have been allowed or legally established, and that the costs be paid by defendant out of his testator's estate."

From this decree the assignees of John Hawkins appealed, and, as grounds of the appeal, state:

1st. That the evidence of the said John Hawkins, under the circumstances of the case, ought to have been admitted.

2d. That under all the circumstances, the claim of the said John Hawkins, or rather of his assignees, ought not to have been dismissed, but should either have been allowed or further time given to substantiate the same.

The appeal was argued before the Court by Mr. Parker and Mr. Drayton for appellant, and Mr. Pringle and Mr. Simons for respondent.

After hearing the counsel the Court of Appeals affirmed the decree of the Circuit Court for the reasons given therein.

Judge DESAUSSURE having been counsel in the cause, when at the bar, declined giving any opinion.

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*Case XXXV.

PIERCE BUTLER v. JAMES RYAN.

[Tried before Chancellor Desaussure, Circuit Court of Equity, Charleston, November, 1810.]

[*Clerks of Courts* ⇐37.]

Register bound to furnish his bills of costs in the manner prescribed by law, or his execution will be set aside. Bills must be taxed.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. § 65; Dec. Dig. ⇐37.]

[This case is also cited in Arthur v. Master in equity, Harp. Eq. 50, regarding remuneration of receivers.]

This case came on upon motion to set aside certain executions, which have been lodged in the sheriff's office by the Register of this Court, to enforce the collection of certain fees of office claimed by him from Pierce Butler: also, to order the money, paid into the sheriff's hands, to abide the order of the Court, on the legality of the executions, to be refunded to P. Butler; and to reduce the bill of costs on which the executions issued for illegality and excessiveness.

Mr. Fraser, in support of the motion, argued that the act of assembly establishes the fees which the register is entitled to. There is no other rule. The items objected to in the bills of costs are not warranted by the fee bill, for they are not enumerated therein. The charge of "attendance" in the office to do particular official acts, is inadmissible; for it is the general duty of the officer to attend, and no charge for attendance is allowed in the fee bill. The law to prevent abuse or oppression enumerates all the cases in which payment for services is demandable. It is true that the Court, some years ago,

did, in the case of Shubrick and Fisher, sanction certain bills of costs containing items of charge not provided for by the act of the legislature. But it is contended that must have been done under some misapprehension, for the act certainly meant to exclude all charges not enumerated therein.

With respect to the register's issuing executions for his fees, he denies his authority to do so. The law authorizing the issue of executions for fees by clerks of the courts of law and attornies, is entirely silent as to registers and commissioners in equity. Usage cannot sanction such an assumption of

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authority. Besides it was *the duty of the register to have signed the bills, to have stated the items distinctly, to have had them taxed by the master, to have furnished copies to the party interested, and to have given notice that if not paid he would issue execution to enforce payment. Nothing of all this was done. The bills did not contain the items of charge; they were not signed; they were not taxed, and no notice was given of the intention to lodge the execution.

Mr. Magwood's affidavit states that he called on the register to inform him that Major Butler would pay the bills of costs if Mr. Pringle, his solicitor, would sanction them, or if they were taxed by the master: but neither of these things was done; and that upon the whole the execution was illegally issued and ought to be set aside, and the money lodged with the sheriff ought to be refunded, and the bills of cost taxed by the proper officer of the Court.

Mr. Drayton and Mr. Cheves, for the register, argued that there are no negative words in the fee bill forbidding the receipt of fees for services other than those enumerated. The items objected to were for non-enumerated services, such as attendance on the cause, which is a fair and reasonable charge. The items now disputed were sanctioned by the decision of the Court, then composed of the chancellors Rutledge, Marshall and James, in the case of Shubrick and Fisher. To be sure if that decision was palpably wrong the Court would disregard it: but the Court will consider maturely and pause long before it would pronounce such a judgment erroneous. Stare decisis is a maxim of great wisdom and utility.

As to the objection that the register had not complied with the law, by furnishing bills to the party or his agent containing the items of charge, the necessity of doing so was waived by Mr. Magwood, the agent of Major Butler; he said he did not require them. And as to the notice, Mr. Ryan did write to Major Butler, in January, 1809, re-

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questing payment of his bills, the *amounts of which were stated. That with respect to the issuing the executions, for costs, the act of the legislature seems to sanction it; for the act authorizes the issue, to enforce the decree, and the costs are part of the decree, and it is the long settled practice of the Court.

But all these objections come too late, for the party has paid the money on the executions to the sheriff, and the execution is functus officio. If the applicant is aggrieved he has no other remedy but a suit to recover back what was illegally exacted.

THE COURT delivered the following decree:

This case comes before the Court on motion to set aside certain executions which have been lodged in the sheriff's office, by the register, to enforce the collection of certain fees of office claimed by him from Pierce Butler; and to order the money paid thereon to the sheriff to be refunded: and also to reduce the bills of costs, for excessiveness and illegality.

It was contended on the argument in support of the motion, that the items of fees, charged by the register in the bills complained of, were against law; that the act of assembly, which furnishes the only rule, enumerates the fees allowable, and forbids any other or higher charges.

To this it was answered for the register, that the words of the act do not contain any negative words applicable to the items in dispute; that the law enumerates certain services and affixes certain fees, and forbids any other or higher fees being charged for said services, but is silent as to other services; that where other services, not enumerated, are performed, the register has a just claim to a fair compensation; and that such a claim has been sanctioned by the judgment of a bench of three judges, which has established the right of the officer to such fees as he now claims.

I have examined the act of February, 1791, which regulated the fees of public officers, with attention. The clauses which apply are

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as follow: "Be it enacted, &c. *That the several and respective fees hereinafter mentioned, and no others, shall be paid and taken in the respective public offices in this state, and by those entitled to fees throughout the same for the different services in the respective suits in this act specified and contained, in lieu of all other demands whatever for said services; any law, usage, or custom, to the contrary thereof in any wise notwithstanding." Then follows an enumeration of the services usually incident to each cause, and the fees for the performance of them. "And be it further enacted, That if any public officers of this state, or other person or persons entitled to fees by this act, and in the foregoing lists particularly mentioned, shall take or receive any further, other or greater fee or reward, for any of the services in the said foregoing lists respectively men-

tioned, or shall invent or contrive any other or further fee or reward for any of the said services, then, and in every such case, the person or persons, so offending, upon due proof and conviction, shall forfeit," &c. &c. And in another clause: "And no person shall be compellable to pay any of the aforesaid fees unless at the time of the demand, or before distress of goods is made, an account thereof shall be delivered, signed by the officer to whom the same is due, specifying distinctly every article in words at length, with the particular fee charged for it, and shall give a receipt for the same if required." "And be it enacted, &c. That the several clerks and registers of the courts of justice, and sheriffs, throughout the state, shall collect in and receive their own fees from the different suitors, or persons who are liable to pay the same in the said courts of justice respectively," &c. &c. "And be it further enacted, That all former and other acts for regulating and establishing salaries and fees throughout this state, or in the districts and counties thereof, shall be, and the same are hereby repealed."

Upon a careful perusal of these clauses of the act, one cannot but be struck with the idea that the legislature intended to enu-

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merate all the services which it was *supposed could be requisite or necessary in each cause, and to allow a compensation for those and no other. This intention appears to me so strong, that if the thing was res integra, I confess I should not feel myself at liberty to allow any fees for any services alleged to be performed, not comprised in the act. But the question has been decided by a full bench of all the judges then constituting the Court of Equity. The case of Fisher and Shubrick was solemnly argued, and it was there decided that there were some services which might be performed, for which the register might demand fees, tho' not enumerated in the lists in the act. This indeed is not decided in so many words, but it is in substance; because the Court did in that case sanction many items of charge, for services alleged to be performed, which are not comprised in the act.

This undoubtedly must have been done on the ground, that however the general expressions of the act seemed to restrict the right of public officers to the fees actually enumerated, yet there are other words in the act which qualify that generality; and on inspection of the fee bill there does appear some grounds for their construction, for the restrictions usually close by saying that no other fees shall be taken than those affixed to the enumerated services; which seems to leave the question open, whether, if there were other services claimed and actually performed, beyond the enumerated lists, the officer performing them might or might not demand fees for those extra services? My respect for the decision of a full bench would lead me very far to accord with it; or, at any rate, to acquiesce in their construction of an act which is susceptible of some doubt. I am not indeed wholly satisfied with this construction, because it does appear to me that the intention of the legislature was to enumerate all possible necessary services in each cause, and to restrict the demands of public officers to the enumerated fees. With these conflicting impressions, I should be sorry to be obliged to decide this question, sitting singly. As, however, my decision on

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this motion *will turn on another point, it is not necessary for me to give a definitive opinion on the main question.

Admit, for argument sake, that there was no doubt that the act of the legislature did not positively forbid fees being claimed for services other than those enumerated, the question then arises, on what ground the register is entitled to claim a compensation for such nonenumerated, but really necessary and performed services? His claim cannot rest on the statute. It must rest then on the common and just principle, that every man, whether in public service or in private life, is entitled to reasonable compensation for services claimed from him and done by him for another person. He must claim on a quantum meruit. But how is the reasonable reward for such service to be ascertained? Certainly not on his own arbitrary charge. I cannot think of any other methods than the following:— 1st, by suit, and the verdict of a jury. 2d, by the ordinary and established method fixed by the course of the Courts, to wit, by the taxation of the master, an experienced and confidential officer of the Court and of the law.

The first method, that by suit, would be intolerably burthensome to the officer and to the suitors of the Court. The second method, by the taxation of the master, would give reasonable security to the suitors that they would not be obliged to pay for services not performed, or unreasonably, for services actually performed.

But this taxation, thus substituted for suits, for the convenience of all, would seem to be indispensable. The officer has no claim established till the taxation takes place. He has no claim under the act; and his claim on the quantum meruit must be made out, by the proof of the service performed and of the reasonableness of the fee charged, to the satisfaction of the competent authority. Unless this be done, he cannot legally enforce his claim.

Has this been done in the case under consideration? The answer is that it has not;

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nay more that the mas*ter refused to tax the bills in question. Then it follows that the officer having no claim to the non-enumerated fees under the act, and not having established his claim on the quantum meruit by

suit or by taxation by the master, had no right to enforce his demand on his own mere motion.

Independently of this defect there is another which is equally conclusive. We have seen by one of the above recited clauses of the act that no person shall be compellable to pay any of the fees claimed from him, unless at the time of the demand, or before distress of goods is made, an account thereof shall be delivered, signed by the officer to whom the same is due, specifying distinctly every article in words at length, with the particular fee charged for it, &c. Now it is not pretended that this was done; on the contrary the counsel for the register relied upon a supposed waver of the right of the party to have such account rendered to him. There can be no doubt that a man may wave or renounce the advantage of a rule or law made for his benefit. But such waver must be made out very clearly. It does not appear to me that it has been made out in this case. I should doubt indeed the agent's authority to wave the right unless specially directed, of which there is no proof; but in reality no such waver appears to have been made, either by the agent or the principal. The only ground relied upon as a waver was that the officer was informed if he would obtain Mr. Pringle's approbation of the bills or the taxation of the master, the bills should be paid. Such waver, if it amounted to one, was coupled with a condition which has never been complied with; for Mr. Pringle has not approved of the bills, nor has the master taxed them. But the very reference to the master or Mr. Pringle implies an exhibition of the account, and it was the officer's duty to obtain the approbation of the one or the taxation of the other, if he meant to rely on this offer.

It might perhaps be unnecessary to give any opinion of the right of the register to is-

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sue an execution to en*force his claim when once legally established. But I have no objection to state that in my opinion he has a right to do so. One of the clauses of the act directs that the several clerks and registers of the courts of justice, and sheriffs shall collect in and receive their own fees from the different suitors, or persons who are liable to pay the same. How could these officers collect in, what was due to them, when refused by the suitors, but by an execution. This regulation was not intended as a mockery, which it would be if there was no legal means of enforcing the demand.† And the very clause which is relied upon to shew that the register was bound to furnish an account to the party duly made out and signed, expressly states that this must be done before distress of goods is made, which can be done only by an execution. Besides, as was well observed by the counsel for the register, the decree for costs is part of the judgment of the Court and may be enforced by execution as well as any other part of the decree. If therefore the register had established his claim to the fees in question, I should not doubt his right to enforce the collection by execution.

It was insisted in the argument against the motion that the party came too late, as he had paid the money under the execution into the hands of the sheriff, that the execution was functus officio and that his money could not be recovered back but by suit at law.

It was stated to the Court by one party and not denied by the other, that the money was not paid to the sheriff under the executions, but conditionally to avoid the painful circumstance of an advertisement and sale under the levy; and that the money should remain in the hands of the sheriff till the question of right could be settled. I must therefore consider the money in the hands of the officer of the Court, and subject to the order of the Court.

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*Upon the whole I feel myself bound to grant this motion, and to order that the executions issued in this case be set aside as irregularly issued, without the officer having complied with the requisites of the act of Assembly, and prescribed by the course of the Court; and that the sheriff do refund the money to the party who has paid it under the irregular execution.

And it is further ordered that the register do furnish regular bills of the fees claimed by him to the party interested or his solicitor, and that the master do tax them according to law.

The register does not appear to have appealed from this decree. At least there is no note of any appeal in the copies furnished me from the office.

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Case XXXVI.

THOMAS COCHRAN v. Executrix COCHRAN, on Exceptions to the Master's Report.

[Tried before Chancellor Desaussure, Circuit Court of Equity, Charleston, January, 1811.]

[*Wills* ⟸524.]

Construction of will on a question of survivorship.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1116–1127; Dec. Dig. ⟸524.]

[*Wills* ⟸634.]

[A testator directed by his will that certain property devised to his wife for her life should at her death be considered a part of his estate, and be divided among his children named in the will, or the survivors of them. *Held*, that the interests of the children were contingent during the life of the wife, and that the property vested in those surviving at the wife's

† When the law gives an advantage or a right, it furnishes the means to enforce it.

death, to the exclusion of the representatives of a deceased child.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1500; Dec. Dig. ⟸634.]

The late Mr. Thomas Cochran, deceased, in and by his last will and testament devised to his wife, Susannah, the full use of a house and lot, with the furniture, chariot, horses, and sundry negroes by name, during her natural life. It further directed that at her death, or when a division of his other property should be made agreeably to the directions of his will, (which should last occur) the house and so much of the personal property as should be then remaining should be deemed a part of his estate, and should be divided amongst his three sons, Thomas Cochran, John Cochran and Samuel Cochran, or the survivors of them.

The testator in another part of his will, directs that a division of that part of his es-

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tate not already devised *to his wife should be made as soon as his youngest son, Samuel, attains the age of twenty-one years, or in case of his death under that age, then as soon as his son John should attain twenty-one years, whichever should last occur. The testator afterwards directs a settlement of accounts of the income of the estate when the first division takes place between the three brothers. He then proceeds:

"Item. On the arrival of my youngest surviving son at the age of twenty-one years, I do will, order and direct all my estate, both real and personal, (including the house and servants, the use of which in the intermediate time I have devised to my son Thomas, and in the event of my widow being then deceased, and not otherwise, including also the house and other property herein bequeathed to her use,) to be equally and equitably divided between my sons Thomas, John and Sam'l, or the survivors of them, share and share alike."

There is then a provision made for the case of his sons John and Samuel, or either of them marrying and dying before twenty-one years of age and leaving issue; But if no issue, then to the surviving brothers. There is also a clause providing for the case of his son Thomas dying before the earliest period appointed by his will for a division of that part of the estate not appropriated to the use of the widow, without leaving issue, or in case of the death of such issue under twenty-one years of age, this clause directs that in such case, the share of the estate devised to the son Thomas shall in like manner go to his brothers, and their heirs subject to his debts and his widow's dower. At the time of making the will, the son Thomas was a married man and of age. He is now living and has issue. Both the sons John and Samuel attained twenty-one years of age, and then died unmarried. Mrs. Cochran, the widow, is still living. The question is whether the house and lot and negroes bequeathed to Mrs. Cochran, the widow, for life, and at her death

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to the surviving sons, will *devolve on her death exclusively to Thomas Cochran, the only son now living, or upon him and the representatives of his two brothers, as tenants in common.

I have examined the will of Mr. Cochran as well as the cases and the arguments furnished by the counsel, with attention. The will is explicit in this case, and fixes the survivorship with respect to the house and lot devised to the wife during life, and afterwards to the three sons or the survivors, to the time of the division of the estate on the youngest son's attaining twenty-one, or the death of the mother, whichsoever should last happen.

This idea of postponing the division of that particular property till the death of the widow, is repeated in the clause of the will providing for the general division of the estate.

I am not aware that any general reasoning can elucidate this matter. A close inspection of the will, and comparison of its different clauses, can alone give a perfect impression of the question and satisfy the mind as to the intention of the testator and the provisions of his will. I have made this inspection and comparison, and I am satisfied that the testator did intend and has provided that the interest in the house and lot in question should vest in the son or sons who should be living at the general division of the estate, which was to depend on the youngest son's attaining twenty-one years, or on the death of the widow, who had the life estate, whichsoever should last occur. And believing this to be his intention which is not in opposition to any rule of law, I must decide accordingly. I cannot say with the counsel for the defendant, that the postponement of the division of the house and lot until Mrs. Cochran's death was merely for her convenience, by which he did not contemplate a contingency affecting the quantity of estate to be enjoyed by his sons or his representatives.

The testator connects the division and the gift inseparably. Indeed his words are un-

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usually decisive on *this point; for he says, upon the occurrence of the last of the two stipulated events the house and lot shall be deemed to be a part of his estate, and be divided among his three sons or the survivors of them. Now if it be deemed at the occurrence of the last of the two stipulated events a part of his estate, it could not be a property vested in another at a prior time, viz. when the youngest son attained twenty-one years.

It was rightly observed by the counsel for the complainant, that the division of the mass of the estate on the youngest son's attaining twenty-one years, does not apply to the clause relative to this particular house and lot; for the provisions and contingencies stated in the different clauses, and for the different cases are distinct and different. And

in the clauses relative to the son, Thomas Cochran, a benefit of survivorship is given to his brothers, in case of his death without issue, before a division of the estate, though he had attained twenty-one years, and was a married man at the time of the execution of the will.

The case of Weedon and Fell, cited from 2 Atk, p. 123, cannot govern this case. For the last words of the applicable clause of the will in that case do expressly state, that if any of the four children should die before attaining twenty-one years of age, or day of marriage, that the share of the one so dying should be equally divided among the survivors, which qualify and explain the preceding words, by which a division was to be made after the mother's decease, among the four children, or the survivor of them. But as Constance, (the child whose share was in question) did attain twenty-one, and was also married, the rights of survivorship could not attach in her brothers and sisters to the prejudice of her representatives, though she died in her mother's life time.

It may be sufficient to say, that in the other cases cited from Vesey, no period is fixed by the will; and the Court was left at

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liberty to fix any period which would *give most effect to the intent of the testator, and those cases have otherwise no direct bearing on the case under consideration.

Upon the whole I am of opinion the house and lot in question, is vested in Thomas Cochran, the surviving brother, to the exclusion of his brother's representatives.

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3 Desaus. 190

Case XXXVII.

ELIZABETH RIVERS v. the Executors of THOMAS RIVERS.

[Tried before Chancellor Desaussure, January, 1811.]

[*Wills* ⇐⇒60.]

A woman about to marry a man, agrees in writing to renounce all claims on his estate on his agreeing to make adequate provision for her. He makes provision for her by will, and dies. —The Court decided that it was not an adequate provision, proportioned to his estate, and enlarged it.

[Ed. Note.—Cited in McKeegan v. O'Neill, 22 S. C. 467.

For other cases, see Wills, Cent. Dig. § 167; Dec. Dig. ⇐⇒60.]

[*Wills* ⇐⇒728.]

[Where a will provided for the support of the testator's widow out of the income of the estate, the court refused to order a sale and a reinvestment of the proceeds, in order to render the property more productive.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1779; Dec. Dig. ⇐⇒728.]

The complainant, Elizabeth Rivers, widow of the late Thomas Rivers, files this bill to obtain a competent provision out of his estate, under the following circumstances. Mr. Rivers was a widower, with three children, and a good estate. Mrs. Elizabeth Cromwell was a widow, with two children, and a property of small value, consisting of a small house and lot in the city, and two negroes. Being about to form a matrimonial connexion, they entered into two agreements in writing. By the first, Mr. Rivers agreed to renounce all the rights he might acquire by the marriage to every part of his intended wife's property, and to leave the same and its profits wholly to her disposal. By the second agreement, Mrs. Cromwell agreed to renounce all her dower and thirds, which she might be entitled to in the real and personal estate of her intended husband, Mr. Rivers, in case she survived him, upon condition that the said Thomas Rivers would bequeath to her, by his will, a competent and sufficient maintenance during her life. After the execution of these agreements the marriage took effect, and the parties lived together in harmony and affection till his death. She was a kind, attentive, and dutiful wife. By his will he devised to his widow a house and lot, in town, during her life, in

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lieu of dower *and of all other claims on his estate. The widow is dissatisfied with this provision, not deeming it a "sufficient and competent maintenance," according to the agreement. By the master's report it appeared that the testator's estate consisted of

Fifty negroes, valued at	$20,300
Of land, valued at	6,928
Of houses, in town	8,700
And of sundry articles of personal estate, choses in action, money, &c. which were stated (though not by the master) to be worth about	4,000

Making an aggregate value of about 40,000 dollars. It appeared, further, that the income of the estate was as follows:

Rents from the houses, before the embargo, about	$900
Since the embargo, a smaller sum, not exceeding, it was said	700
Produce of the plantation for the years 1806, 1807, and 1808, averaging for each year	$1,100

So that the whole income might be stated at about 1800 dollars per annum. It further appeared, that the proper expenditures of the testator's family for the three last years of his life, averaged about 1200 dollars, exclusive of supplies from his plantation. The rent of the house, devised to the widow for life, is £50 per annum, or about 245 dollars, but had been as high as £60 per annum before the embargo.

These are the principal facts in this case material to the justice of the cause. At the trial, it was contended by the executors, who are defendants, that the Court could not supersede or alter the provision made for the widow by the will of the husband: that the provision made by him must be deemed an adequate one, for the Court could not

place itself in the situation of the husband, and judge what he ought to have done, and that to do so would be to invade the rights

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and prerogatives *of the husband: that the agreement was not sufficiently certain, but much was left to the discretion and affection of the husband; and that his decision, made by his will, ought to be conclusive.

Mr. Cheves, for complainant. The claim is for a sufficient maintenance, in consideration of the wife's renouncing her dower and other contingent interests. This was a particular stipulation, and was intended to guard against an intestacy and the effects it might produce on the estate of the husband by the claims of a wife. The wife would have been entitled to a third part of the whole estate in case of intestacy. This is the proportion which, by the sense of the laws, the widow is entitled to, however numerous the children. But the family was not numerous. Mr. Rivers left only three children, advancing into life, and able to help themselves. The charge is not likely to be of long duration; she is elderly and infirm, and requires every comfort. She was the tender companion and nurse of Mr. Rivers, in his old days full of infirmity.

The actual provision by the will is very trifling, not adequate to the income of the estate, though that is too low, for it is badly vested, and the decree might vest the estate so as to make it more productive. The income of the houses is 908 dollars—of the crops, 1101 dollars; which together make a total of 2,009 dollars. The one third of this sum is 669 dollars. The plantation supplied many articles which may be said to be an addition to the income. She claims a third of the income, or more properly, a third of the interest of the amount of the value of the estate; and the master's report states its value at 40,000 dollars. The house, devised to the wife for life, is worth £55 per annum, less than 240 dollars.

Mr. Ford, for defendants. The will of the testator cannot be altered; the property cannot be altered even by the Court: that would be too great an interference. His will divides the property among the children. Will the Court change lands and negroes, and houses,

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to mo*ney or stock? Surely not. Take it as the estate now stands. Can, or will the Court superadd to the provision made by the testator, by his will, for his wife? The Court will not place itself in the situation of husbands, and enter into their feelings, and judge of the competency of the provision made by them for their wives. It would be invading the rights and powers of husbands.

The rule and the provision made by the law abolishing the rights of primogeniture, cannot apply to this case. It was made for the case of intestates. That act makes large provision for the wife; almost to a disinherison of the children in small estates.

The wife had renounced her dower in the lands of the husband, for his giving up all her private estate. The contract then cannot look to the real estate—only the personal estate. The rents fell after the embargo; they bring only 908 dollars, and the school room is frequently not rented at all. Deduct that, and she has a house which brings £55 or about 240 dollars, which is about a third of the above income.

The sons have claims too. The eldest has an increasing family; the second is in a course of expensive education; the third is an apprentice in town. The whole estate may be worth 40,000 dollars, but it is not all productive. To give the widow a child's share, under the testator's agreement, would be a kind and favorable provision; for he was as much bound to provide for his children as for his wife. To give her a fourth would be to place her on a very favorable footing.

The husband gave up all his marital rights by the agreement. The wife has no positive interest in the personal estate like dower in land. What does comfortable maintenance mean? A decent and comfortable support, proportioned to the income and habit of living in her husband's life time. The expenditure of the husband in 1806 was about 1200 dollars, in 1807 about 1600 dollars. This was for all the family; the husband, wife, three sons, and one of her sons. The propor-

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tion of this *will be from two to three hundred dollars for her. The executors could not alter the will.

Mr. Cheves, in reply. The right of the Court is, beyond all doubt, sufficient to interfere, and even to remodel the estate. But if the party's defendants wish to keep it in the same shape, let them do so; but let justice be done to the wife. The renunciation is to all her possible interests in the estate, real and personal; and guarded the estate of the husband, in case of intestacy, from large demands on land and personal property, and even against acquired property. No provision is made by the will more than the house, which is old and a mere shelter—not a cent to go to market. This is not reconcileable to the feelings and duties of a husband to a tender wife, nor to the spirit of the agreement. Can she live for much less than she had during the life time of the husband? Surely not: and the contract is for a competent maintenance, conformably to the agreement.

Decree.

If this case had been the ordinary one of a husband, who being bound by no agreement to provide for his wife, was left by the laws to make such provision as he deem-

ed sufficient for her, proportioned to his own views of his estate, and to his affections, there could be no doubt that the argument would be conclusive; and the Court certainly would not be at liberty to examine or to decide upon the competency of the provision. His will would make the law, leaving to his widow no other alternatives than to accept the provision, or to renounce it, and resort to her claim of dower in his real estate. But this is a very different case. The husband has bound himself by an agreement, that for a consideration, which was in reality a valuable one, and which he considered in that light, "he would bequeath to her by his will a competent and sufficient maintenance during her life." By this agreement he has renounced that absolute power, of disposing of his estate at his pleasure, or even at his caprice, with which the law had clothed him: and I cannot doubt that he could bind

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himself to do so. *No cases were cited on this point. But there are cases which shew that men may bind themselves to make their wills in a particular way. I allude to the cases where two men have agreed to make mutual wills, whereby they were to derive certain advantages on the happening of certain stipulated events. In these cases the Court of Equity has held the parties to be bound, and has made the estate of the party, who did not comply with the agreement, liable to the other party who had complied; on the happening of the events which entitled him to the benefit. So, too, there are cases where a father has promised, in consideration of the marriage of a child, to leave such child a legacy. This has been held to be binding on his estate, after his death, when he had neglected to provide. (See 3 Vesey, 402, 412, 416, Lord Walpole v. Lord Orford. In this case is cited, 1 Vernon, 48, Goilmore v. Battison; and the case of Durour v. Perraro and al. decided by Lord Camden. See 2 Hargrave's Juridical Arguments, 304.) But independently of any preceding decisions, I should feel no hesitation to decide this point on principle.

A man may renounce every power, benefit, or right, which the laws give him, and he will be bound by his agreement to do so, provided the agreement be entered into fairly, without surprise, imposition, or fraud, and that it be reasonable and moral. In the case under consideration Mr. Rivers did enter into a deliberate agreement, fairly, and upon a valuable consideration, to leave his wife a competent maintenance during her life. There is nothing immoral, or unjust, or unreasonable, in this. She is barred by her agreement from all other claims on his estate. And shall she be bound, and he be free? Surely this would be unjust in the highest degree. It appears to me that to make a will in a particular way, on proper considerations, is as much a subject of contract as any other; and he who makes a contract on this subject, is as much bound thereby as he would be by any agreement on any other subject. To be sure the Court

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would be more strict in examining in*to the nature and circumstances of such agreements than any others, and would require very satisfactory proofs of the fairness and justness of the transaction. I conclude, therefore, that the party had a right to bind himself to make his will in a particular way by an agreement, and the Court has the power to enforce the agreement.

The next question then is, Has Mr. Rivers complied with his agreement, and has he left by his will a sufficient maintenance for his wife during her life? This is certainly a very delicate question, into which the Court enters reluctantly, and must decide cautiously. But it is called upon to decide, and the party has a right to its decision.

The want of certainty, in the extent of the provision to be made, was urged with force; and it certainly has weight, but it is not conclusive. It was to be adequate, and that adequacy can be ascertained. Suppose Mr. Rivers had made so very small a provision for his wife, that at the first blush it would have appeared to every person to be inadequate, could there have been any doubt at all that she would have been entitled to redress? A provision, for instance, of £10 per annum, would have been so palpable a violation of the spirit of the agreement, that no court could have tolerated the act. Relief must have followed of course. This shews that the Court is bound to look to the estate, and to the provision made out of it for the benefit of the wife, and pronounce whether it be sufficient. I have done so, and I feel myself bound to say that the provision made is not sufficient in the true spirit of the agreement. Taking the income at 1800 dollars, the provision of about 240 dollars, per annum, is less than a seventh part of the income. This I must consider inadequate. It is true that the expenditures of Mr. Rivers, in his family, did not exceed 1200 dollars per annum; and 240 dollars per annum is exactly a fifth part of that income. But it should be remembered that he derived many essential and economical supplies from his plantation,

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and that he *lived in his own house, free from rent, and that she partook fully of all these advantages. I feel, therefore, that it is an inadequate provision, looking to her character as a wife, to his fortune and to his agreement. What then would be a sufficient maintenance, according to the stipulation in the agreement? I am reluctant to exercise an arbitrary discretion on this question. It would perhaps be safer to follow the rule furnished by the law, than to create one from my own fancy or judgment. That would have given her a third of the estate in

case of intestacy. Mr. Rivers's object, in the agreement, seems to have been to avoid the troubles and the disputes which might have resulted to his family in case of an intestacy; and to give a sufficient provision to his wife instead of a share in the estate itself, which might have involved litigation and inconvenience to his children. That object would perhaps be properly attained, by allowing his widow that proportion of the income of his estate during her life, which she would have been entitled to absolutely if he had died without a will.

Perhaps, however, in a family case like this, no claims should be pushed, or allowed to go to extremes. Moderation in demanding, and liberality in conceding, would best become all parties; and in a cause requiring a delicate discretion, not an arbitrary one, which I disclaim, it may be considered most proper to put the wife on a footing of one of the children, and to allow her a fourth part of the actual income. If she obtains as much for her annual support as one of the testator's children, I think this might come up to the idea of a competent and sufficient maintenance, intended by the agreement, having due reference to the testator's property and family. I confess that my mind has fluctuated between the third and the fourth part of the income; but upon the whole, I think justice would be done, and the intention of the parties answered, by allowing her a fourth part. It was contended, by the complainant's counsel, that the estate was worth 40.000 dollars, and that the actual income

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was too small for such a capital, being *far below the legal interest; and that the Court might vest the estate in such a manner as would make it more productive, and then give the widow a third part of that increased income. In my judgment that would be going much too far. I cannot take upon me to alter the estate, to speculate, and to risk the chances of a change which might be disadvantageous. I think I am bound to take the estate as I find it, and to make the allowance out of the income as it exists, and not upon a supposition of what it might be made to be. It might be more correct to refer it to the master, to report annually the precise amount of the nett income, after deducting all general plantation expenses, taxes, &c. But as I am desirous to prevent further vexations, and disquieting enquiries and discussions, in this family cause, and particularly the disagreeable and irritating circumstance of a future annual account, I will have no objection to take upon me to decide from the information before me, which seems to be tolerably correct. Taking therefore the amount of the income to be $1800, and deducting 200 for general expenses, I will allow a fourth part of that amount to the widow.

It is therefore ordered and decreed, that the executors do allow and pay to the complainant the sum of 400 dollars per annum, from the testator's death, during her life; deducting therefrom the amount of the sums she has received, and the value of the articles of the estate she has selected and taken; which allowance shall be in lieu of the inadequate provision made by the testator's will and in performance of the agreement. In this case the executors were not only justified, but compelled to come into this Court to obtain a sanction for any allowance exceeding the provision made by the will. Their conduct has been perfectly correct. The costs, therefore, must be divided among the parties according to their respective proportions. The complainant must pay one fourth of them out of her estate, and the defendants the remaining three fourths out of

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the proportion of *the income of the estate to which the children are entitled.

As the demand upon the estate may come somewhat unexpectedly upon the heirs, it is proper that a reasonable time should be allowed for the payment of the arrears. Let one half the arrears, therefore, be paid on or before the 1st of April, and the balance on or before the 1st of January, 1812.

[See note to the case of Ralph Izard v. Middleton, executor of John Izard.]

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3 Desaus. 199

Case XXXVIII.

Ex parte WILLIAM LAWTON, on Petition for Writ of Partition of the Real and Personal Estate of Winborn Lawton, Deceased

[Tried before Chancellor Desaussure, January 1811.]

[*Descent and Distribution* ⇐104.]

A child bringing into hotch pot, the advance made by the parent, the widow is not entitled to the benefit of it—it goes wholly to the children.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 414; Dec. Dig. ⇐ 104.]

The late Mr. Winborn Lawton died intestate, leaving a widow, Mary Lawton, and three children, Mrs. Beulah Hughes, Winborn Lawton and William Lawton.

At the time of the intestate's death he was seized and possessed of several tracts of land, a house and lot in town, and of 45 negroes, and some other personal property. Before his death the intestate had made sundry advances to his children, to wit: ten negroes to his son Winborn Lawton, eight negroes to his son William Lawton, and six negroes to his daughter Beulah Hughes.

The parties interested are all of full age, and have consented to a sale of the real estate; and are desirous of a partition of the personal estate, according to the respective rights of the parties.

The only question made in this case, which requires the consideration of the Court, is, Whether, in allotting to the widow her third part of the estate of her intestate husband, the advances made by him in his life time to the children should be brought into ac-

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count? By the *statement made, it appears that he had made advances to each of his children, but in unequal degree. By one of the clauses of the act for the abolition of the rights of primogeniture, and for the equitable distribution of intestates' estates, it is provided, "that nothing herein contained shall be construed to give to any child, or issue, (or his or her legal representatives) of the intestate, a share of his or her ancestor's estate, where such child, or issue, shall have been advanced by the intestate in his life time, by portion, or portions, equal to the share which shall be allotted to the other children. But in case any child, or the issue of any child, who shall have been so advanced, shall not have received a portion equal to the share which shall be due to the other children, (the value of which portion being estimated at the death of the ancestor, but so as that neither the improvements of the real estate by such child or children, nor the increase of the personal property shall be taken into the computation) then so much of the estate of the intestate shall be distributed to such child, or issue, as shall make the estate of all the children to be equal."

The effect of this provision is to equalize all the children of the testator, by diminishing the quantity of property to be given to a child, who has been advanced by the parent, exactly so much as has been given him in advance. But it is contended, that the right of the widow, under the act, to one third part of the real and personal estate of her intestate husband, is varied by the circumstance of there being children to whom the intestate had made advances out of his estate during his life: and that, in such case, she is entitled not only to the third part of the estate left by her husband, but to a third part of the estate left, swelled by the addition of the advances made by her husband in his life time to any of the children; which advances they must bring in on claiming a further proportion.

By a recurrence to the act it will be found, that the rights of the widow are confined to the property left by the intestate husband.

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The words are, "that when any *person, possessed of, interested in, or entitled to a real estate in his or her own right in fee simple, shall die without disposing thereof by will, the same shall be distributed in the following manner: first, if the intestate shall leave a widow and one or more children, the widow shall take one third part of the said estate, and the remainder shall be divided between the children, if more than one; but if only one, the remainder of the estate shall be vested in that one absolutely forever. The same provision is extended to the personal estate of intestates. The provision is clear and distinct. The widow is to take a third of whatever estate the intestate is possessed of, interested in, or entitled to, at the time of his death, and no more or other estate. Nor does the first recited clause, making provision for the case of children who had been advanced, have any relation to the widow: that was intended merely as a rule of equalization among the children. The widow is to take, in all events, a third of what is left, and the children the remaining two thirds. The proportions in which the children take those two thirds among them is of no importance to the widow; but it is of importance to natural justice, legitimated by our act of the legislature, that the children should receive equal portions of the parent's property. Hence the necessity of a rule for the division of the two third parts of the intestate's estate intended for the children, which should prevent those who have been advanced from receiving as much of the two thirds as those who have not been advanced. And the clause of the act regulating this point, and furnishing this rule, expressly confines its provisions to the children, and says nothing of the share of the widow, which had been definitively fixed by the preceding clauses.

It is therefore ordered and decreed, that the widow shall receive one third part of the amount sales of the landed estate, and that one third part of the personal estate, left by the testator at the time of his death, shall be allotted to her: that the value of the negroes advanced to the three children by the

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father, in his life time, *shall be ascertained at the time of his death, (without regard to any natural increase) and added to the amount of the remaining two third parts of the estate of the intestate; and that the same shall be equally divided between the three children, Mrs. Beulah Hughes, Winborn Lawton and William Lawton, debiting the amount or value of the negroes advanced by the father in his life time, to each of them respectively, as part of his or her share.

From this decree there was no appeal.

Mr. Cheves and Mr. Ford, solicitors.

NOTE.—This decision is conformable to the English decisions: see Ward and Lant. Prec. in Chanc. 182, and Lord Kircudbright v. Lady K. 8 Vesey, 51, 64. In the last case Lord Eldon said that there had been a practical construction of the statute, that the advancement of chil-

dren is not to be bro't into hotch-pot for the benefit of the widow. So the doctrine of hotch-pot is not applicable by the English decisions to a widow's property. If a widow provides for a child, and dies intestate, leaving several children, the child advanced shall not bring what he received from his mother into hotch-pot. Holt v. Frederick, 2 P. Wms. 356–7. But this may be questioned in this country; for, in deciding that case, Lord Chancellor King said that it weighed with him that the act of distribution was founded on the custom of London which never affected a widow's personal estate; and he decided the question without much debate. Our act for the division of real and the distribution of personal estate, makes the positive and distinct rule that the child provided for shall bring into hotch-pot such provision, to entitle himself to any part of the distributive share, on the broad ground of equalizing the children: so that I apprehend the child advanced by a mother must bring the value of the thing advanced into hotch-pot as well as the child advanced by the father.

If a parent dies intestate as to part only of his personal estate, a child advanced by him in his life time is not obliged to bring such advancement into hotch-pot, in order to entitle himself to a distributive share of such part, whereof he died intestate. See the 3d vol. of the Amer. ed. of Bacon's Abridgement, 77, and 14 Vesey, 317, 322–3, Walton v. Walton; see, too, the case of Sinkler and Richardson v. Executors of Sinkler, decided in our own Court in the year 1802. 2d vol. of Manus' Decrees, 179. A grand child, whose parent has been advanced and died, must bring such advance into hotch-pot before he can be let in to claim, in right of his father, a distributive share. See Proud v. Turner, 2 P. Wms. 560–1, decided by Lord Chan. King.

Lands of inheritance by a father to a younger

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son, is an advancement *within the statute of distributions, Cox v. Baletha, 2 P. Wms. 274, note: and advancement to the eldest son, if personal property, must be bro't into hotch-pot. 8 Ves. 51, 8. And I apprehend that under our act, advancement of lands of inheritance, to the eldest son, must be brought into hotch-pot by him when claiming a distributive share; for the act meant to take away all distinctions between the children.

Provision made by a father, by a marriage settlement, is a provision which must be brought into hotch-pot by a child claiming under the settlement; though provision by a father for a child, by will, need not be brought into hotch-pot, as was solemnly settled in the case of Edwards v. Freeman, 2 P. Wms. 436, 446, decided by Lord Ch. King, assisted by Lord Raymond, the Master of the Rolls, and Justice Price. See, too, 2 Atk. 635, and 3 Atk. 419.

A gold watch, or wedding clothes, maintenance money at college, travelling expenses, and inconsiderable sums of money occasionally given to a child, are none of them such advancements as must be brought into hotch-pot; nor is alimony advanced to a child.—see 1 Atk. 526, Elliott v. Collier; 3 P. Wms. 317, note O. But an annuity is advancement, which must be brought into hotch-pot; 8 Vesey, 51, 8—and buying an office is advancement; 3 P. Wms. 317. Advancement must be by way of portion in marriage, or to set up in the world, and not things given for immediate use and emolument—see 3 Atk. 213, Hearne v. Barber; 3 Atk. 450, Hume v. Edwards. Provision by deed to take effect after parent's death, is such advancement as must be brought into hotch-pot. 2 P. Wms. 441–2. See generally on this subject, 3 Wilson's American edition of Bacon, p. 76–7; Co. Litt. 177; Toller's Law of Executors, 376 to 398; Cooper's Justinian, 575.

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*Case XXXIX.

JOHN WODDROP v. JOHN WARD, the Executor of John Price.

[Tried before Chancellor Desaussure, February, 1811.]

[*Partnership* ⟸178, 258.]

Copartnership funds first applicable to copartnership debts and private funds to private debts.

[Ed. Note.—Cited in Sniffer & Paxton v. Sass' Adm'r, 14 Rich. 22, 24, note; Kuhne v. Law, 14 Rich. 24; Adickes v. Lowry, 15 S. C. 136; Hutzler Bros. v. Phillips, 26 S. C. 148, 1 S. E. 502, 4 Am. St. Rep. 687.

For other cases, see Partnership, Cent. Dig. §§ 312, 587; Dec. Dig. ⟸178, 258.]

[*Judgment* ⟸645.]

Decrees bind as judgments.

[Ed. Note.—Cited in Blake v. Heyward, Bailey, Eq. 220; Price v. White, Id., 265; Ex parte Farrars, 13 S. C. 258; Morgan v. Morgan, 45 S. C. 336, 23 S. E. 64.

For other cases, see Judgment, Cent. Dig. § 1158; Dec. Dig. ⟸645.]

This case comes on upon the bill and answer. The complainant sets forth that a suit was formerly brought by James Gordon against John Price, as survivor of John Price & Co. James Theus, the present complainant, and others, for the purpose of settling the copartnership concerns of the parties, who were concerned in a particular trading adventure. That in the settlement of the accounts it was ascertained that the late John Price & Co. were indebted to the present com-

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plainant in the *sum of $1551 8-100, with interest from August 1st, 1803. That the Court confirmed the report of the master, made in that cause, and made a decree, which was enrolled in the life time of John Price, who afterwards died, leaving John Ward and John Parker executors of his last will and testament, of whom the former alone qualified as executor, and took possession of the estate and effects of John Price: and that the said executor alleges that the judgment and bond creditors of the said John Price are entitled to a priority of payment out of the effects of the estate, and that the estate will be exhausted by such judgment and bond debts. But the present complainant insists, that under and by virtue of the said decree, he is entitled to rank and to receive payment of his demand as a judgment creditor of the estate of John Price, from the time of the enrolment of the decree.

The answer admits that the late John Price made his last will and testament and died, and that the defendant qualified as executor thereon; but denies that the estate is adequate to pay its debts, the same being insufficient to satisfy the judgment and bond creditors of the estate.

The defendant neither admits nor denies any other of the allegations of the complain-

ant's bill, and submits to the Court, whether the complainant is to be considered as a creditor, whose debt is entitled under the decree to come in as a judgment creditor's, and to be preferred to the bond creditors of the private estate of John Price.

The complainant produced in evidence the decree on which he relies to establish his claim as a judgment creditor; by which it appeared that John Price & Co. are adjudged to pay the money in question.

Mr. Simons, for defendant. The question is between the copartnership and the private creditors of John Price; and whether a decree gives a lien like a judgment at law. He insisted that the copartnership funds are primarily liable to the copartnership debts, and the private estate to the private creditors.

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Mr. *William Bee's testimony would give the facts to the Court. William Bee stated that he was the clerk of John Price & Co. and he afterwards continued to act as clerk of Mr. John Price. He was well acquainted with the transactions relative to the business of Monroe & Co. Price as the survivor of his different copartnerships made settlements with Caig & Co. and included in them some of the affairs of Monroe. He received of Caig & Co. about $2,000 of the outstanding effects of Monroe. The whole amount decreed by the Court has been received by Price from Monroe's funds. Price settled his proportion with Gordon by note of Tunno & Price, which has been paid. John Price was in the habit of paying the debts of John Price and company, and charging them in his private books to J. Price & Co.

Cross examined. Mr. Bee said that the money received by Price from Caig & Co. on account of Monroe, was applied to the payment of the debts of John Price & Co. The $2000 above mentioned were received by Price some years after the dissolution of the copartnership. It was credited to John Price & Co. When he made payments he entered them in John Price's books and charged John Price & Co. John Price is a large creditor of John Price & Co.

Mr. Drayton, for defendant. There is no doubt that the debt in question was the debt of J. Price & Co. for though the bill was answered by J. Price, it was as survivor of his company; and if he had answered it singly, it could not have changed the nature of the original debt. The money was clearly received by John Price & Co. as a copartnership debt. J. Price & Co. continued to receive the money after the dissolution of the copartnership. As to the blending of the funds the fact did not exist; but even that would not have altered the nature of the transaction. He did not assume the debts of J. Price & Co. nor has he applied the funds of J. Price & Co. to pay his own private debts. The property assigned by Theus towards the payment of the debts of J. Price & Co. of

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which house he was a co*partner, has been applied to that purpose and exhausted. Submits whether the decree of this Court is equivalent to a judgment at law. 2 Ves. 265.

Mr. Pringle, for complainant, insists that after the dissolution of the copartnership, John Price, by his own acts, diverted or misapplied the specific funds derived from Monroe, (through Caig) which were applicable to the debt under the decree. Theus could not be chargeable for this debt. He might plead that J. Price had expended the proper fund, and that it was no longer a partnership debt. The funds of Monroe were received by John Price himself, and expended by him: therefore his private estate must be liable. If this were not so, the decree of the Court would be eluded. It appears by the decree that Monroe was to be exonerated on J. Price's Co. paying the amount due by them to Monroe, who was indebted to Woddrop and others, who were complainants in the first suit. The funds of Monroe & Co. were applicable to the payment of Woddrop and Gordon, yet Price applied them to pay the debts of John Price & Co. and John Price thus assumed the debt. This act was altogether Price's and Theus might disavow his acts, and require Price and his private estate to be alone made liable. The injury would result altogether from the conduct of Price. It is as if Price had borrowed the fund and with it paid the debts of John Price & Co. If so, he is liable to the fund and its creditor in his own private capacity. The decree is a lien equal to a judgment: therefore the complainant is a judgment creditor on John Price's funds.

Decree.

There can be no doubt that the decrees of this Court rank as judgments, and bind the property of the debtor, and must be paid as

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judgment debts by the executors.† *But the

† The decrees of the Court of Chancery are put upon the same footing in Equity with the judgments at law. 1 Ves. 214, 2 P. Wms. 621, 2 Vern. 89, 2 Salk. 382, 2 Ves. 125, Perry v. Phillips, 10 Ves. 34. But a decree quod computet does not pass in rem judicatam, till the final decree. 2 Atk. 386. Where a decree is obtained at the suit of creditors, for an account of the testator's personal estate, it will bind

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other *creditors, and if they sue at law the Court will award an injunction. 1 Ves. 211, 2 Atk. 386, 1 Bro. C. C. 182, 184; 4 Bro. C. C. 163, 167. The great case on the subject which settled the doctrine as to the effect of decrees was that of Morris v. the Bank of England, reported in cases Temp. Talbot 217, which was first decided by the Master of the Rolls, then affirmed by Lord Chancellor Talbot, and afterwards by the House of Lords. See 3 P. Wms. 401, 2, in a note, and 4 Bro. P. C. 287, 2 Eq. Cas. abr. 525. (It is best reported in 4 Brown.) See too 1 Ves. sen. 211, 213.

Even in the case of residuary legatees suing, to clear the funds for payment of debts, the Court granted an injunction against persons su-

question is, whether the decree against John Price & Co. binds his private estate, so as to put complainant's demand on the footing of judgments against J. Price in his private capacity with priority over his bond creditors, there being no joint estate out of which the debt can be paid.

Upon this question a Judge sitting here is not at liberty to entertain a doubt. It has been settled by repeated decisions of this Court, that the private estate is primarily liable to the private creditors; and the copartnership effects to the copartnership creditors.

This doctrine is distinctly laid down in the case of Dickinson v. Legare and Smith, decided in 1797, [1 Desaus. 537,] and recognized in the case of the administrator of Craven v. John Owen, executor of Philip Hawkins, [3 Desaus. 175,] decided in 1809, as well as in other cases.

In the case of Jacomb v. Harwood, 2 Ves. 265, it is expressly stated by the master of the rolls, that if a surviving copartner give

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a bond or judgment for a co*partnership debt, though it extinguishes the simple contract debt, yet it would still be a copartnership debt on the bond or judgment.

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ing at law, because the final decree of this Court being equal to a judgment at law, the Court is bound to maintain its jurisdiction and its own proceedings; and it is necessary to protect the executor in obeying the exigency of that equitable judgment, which could not be made matter of a valid plea at law. If it were not so, after a decree where the Court has taken upon itself the administration of the assets, there would be inextricable difficulty for the executor. Brooks v. Reynolds, 1 Bro. C. C. 182; Kenyon v. Worthington, 10 Ves. 40.

Some creditors suing and getting a decree it is good for all. 12 Ves. 409; 1 Schoals and Lefroy's rep. 156, 296; 10 Ves. 40. Where there is a decree for a debt, and defendant dies, such decree does not bind lands descended to the heir, as a judgment at law does; because the decree acts in personam and not in rem. The

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remedy on a decree is only *a proceeding as for a contempt in not obeying the decree. 2 P. Wms. 621, 1 Ves. sen. 182, 214, 496; 3 Atk. 594; Cas. Temp. Talbot 222. But as our act of Assembly does provide an additional remedy, and authorises an execution to be issued to enforce the decrees of the Court, which acts in rem, it is fairly inferrable that the decrees of the Court do bind lands in the hands of the heir.

The death of one of the defendants, after argument, and whilst the cause stood for judgment does not necessarily prevent the decree being pronounced. 9 Vesey, 461. A decree between two co-defendants, is grounded on the pleadings and proofs between plaintiffs and defendants, and is regular. The Court is bound to make such decree, to avoid multiplicity of suits. This was decided by Lord Ch. Redesdale in Ireland. See 2 Schoals and Lefroy, 709, 718, Chamly v. Dunsany, and affirmed by the House of Lords; the Lord Chancellors Eldon and Erskine agreeing. (But see 2 Atk. 371, Howard and Hopkins.) And a ne exeat has been granted in favor of one defendant against another, where both were called upon to account by complainant.

It was argued, however, that Mr. Price had assumed this debt in his own private capacity, and that his private estate was therefore liable; that this assumption was not gratuitous, but was founded on Mr. Price's having received the funds expressly liable for, and remitted to him for payment of this debt to Mr. Woddrop the complainant, which he had applied to his own use—whereupon a lien attaches to his estate.

With respect to the assumption, there was no proof of any express assumption. The executor in his answer does not admit it. It could only be inferred from John Price's having received the fund above mentioned. But how did he receive and apply that fund? Certainly in his character of surviving and acting copartner. And Mr. Bee, the confidential clerk of Mr. Price, swore expressly that the money received was carried to the credit of Price & Co. and applied to the payment of J. Price & Co.; and that John Price's private estate is a large creditor of John Price & Co. Let us however suppose that John Price had voluntarily assumed this debt of J. Price & Co. or had received and ap-

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plied the *fund destined to pay the debt, to his own use, so as to become liable therefor, it does not necessarily follow that the decree against J. Price & Co. would attach and fix itself upon his private estate, so as to entitle this creditor to come in with the judgment creditors of J. Price against his private estate. For it is evident that his liability in his own private capacity in the case supposed would not arise under the decree, but under the new assumpsit expressed or implied, which could not amount to more than a simple contract debt.

There are cases undoubtedly in which the Court has felt itself called upon and authorised under very peculiar circumstances to follow a particular fund, which an executor (for example) has received on judgments or bonds of the estate in his hands, and to make the executor or his estate liable, in the degree or rank in which the original debt stood. But it has always been under very peculiar circumstances. It does not however appear to me that this case comes up to those to which I have alluded. In the case of M'Cawly and others, executors of Edgar Wells v. M'Farlane, Player and their assignees, [2 Desaus. 239,] this Court decided in 1804, this very point, and refused to follow the fund, or to allow the representatives of Edgar Wells to have any preferable lien on the copartnership effects of M'Farlane and Player, though it was proved that M'Farlane had taken out of the copartnership estate of Wells and M'Farlane considerable sums of money, and carried them into the funds of M'Farlane and Player.

This is a hard case on the complainant, and I am much disposed to give him the relief he prays; but I do not perceive that it

is possible to do so, if the views which I have taken of the subject be correct.

The bill must be dismissed.

From this decree there was no appeal.

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3 Desaus. *210

*Case XL.

JOHN HOLMAN, by His Attorney, George Parker, v. SAMUEL HOLMAN and ANT. CHANET.

[Tried before Chancellor Desaussure, February, 1811.]

[*Equity* ⊂⊃363.]

The Court will not dismiss the bill of complaint, without going into a plenary hearing, unless it appears very clearly on the face of the proceedings that the complainant has no ground of complaint, or that the court cannot grant the relief prayed.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 765; Dec. Dig. ⊂⊃363.]

This is a motion to dismiss the bill of the complainant, without going into a plenary hearing.

Such motions are sometimes granted when it appears on the face of the proceedings that the complainant has no just ground of complaint, or that the Court cannot give the relief prayed. But it is very rare that the Court will, in this short-hand way, dismiss the parties without giving them an opportunity of substantiating their case. The want of right must be very clear to induce the Court to act in a manner which, in substance, is a refusal to hear the party.

In the present case the grounds relied upon, in support of the motion, are various. It is said that this bill interferes with an enrolled decree of the Court, in the case of Esther Anderson and sisters against their brothers, the Holmans, who were executors of their father. This, however, does not appear on the face of the proceedings, and the counsel for defendants found it necessary, in order to shew this alleged interference, to travel out of the record; and his statement of facts and his conclusions from them were in part at least controverted. How can the Court, on this motion, which goes to preclude enquiry, go into an examination of all the facts and questions growing out of them? It would be acting very much in the dark. Besides, the objection has not the weight which is attributed to it by the counsel. For no decree, made in this cause, could affect the rights of third persons, not parties or privies to it. The proper way to set up a decree in bar is to plead it; and then, to give it effect, it must appear to be between the same parties, and having relation to the same subject. But suppose the formal pleadings be dispensed with, yet the substantial rule must

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be adhered to. If Mrs. Anderson and *her sisters, the complainants in the suit on which a decree has been given, have any interests which, by any possibility, could be affected by any decree which may be made in this cause, it would be proper to make them parties to the suit, and their rights could be stated and vindicated; and due respect would assuredly be paid to the decree heretofore made, as far as the same could apply to this case and these parties.

The next ground relied upon, in support of the motion, is, that George Parker, the attorney of John Holman, has set up a pretence, on the part of his principal, which is founded in mistake, to wit, an alleged renunciation, by Samuel Holman, of his rights to his brother John. But surely the question, of the existence, of the nature, and of the extent of such alleged renunciation, is a matter for proof. The Court cannot act upon suggestion and statement; and it was very properly urged by the counsel for the complainant, that it would be improper to allow Samuel Holman extra-judicially to disavow his interest in the very negroes who are in dispute.

The next ground, and that on which the defendants' counsel relied most strongly, was, that John Holman, the complainant, had disavowed the act of his attorney, Mr. George Parker, and wished the suit to be discontinued.

Undoubtedly if this were the naked and undisputed state of the question, the Court could not hesitate to dismiss the bill. But circumstances have been disclosed which shew that the Court is bound to look deeper into the case than this alleged disavowal of the suit.

It seems that George Parker, the attorney of John Holman, who has filed this bill, is a creditor of John Holman, and has obtained a judgment against him. Thus it would appear that he has an interest coupled with his power; and when that is the case, it is not of course in the power of the principal to revoke his power, or to disavow the acts of his attorney, done to establish the rights of his principal, and to increase or secure his funds, out of which he expects to be paid. To

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this it *should be added, that there appears to be a great contest among the creditors of the Holmans, whose interests may possibly be affected by the dismissal of this bill. Various orders have been made by the Court in this cause, and security ordered to be taken. It would certainly be very hazardous for the Court, at this stage of the cause, and with so little real information of the merits of the case, to dismiss the bill, and thus vacate the securities, heretofore ordered to be taken, without perceiving the extent of the injury which might be done to their claims or interests.

It was further urged by the defendants' counsel, that Mr. Parker, the attorney of

John Holman, had possession of the property; and that it was his interest to delay a judicial determination as long as possible: but that if the bill were dismissed, he would then be obliged to bring the controversies between himself and the parties, in adverse interest, to a conclusion. It is possible this may be so, but the Court cannot presume this, or at least cannot act upon such a presumption; and it is in the power of the parties, with opposite interests, to hasten the steps of their adversary.

The two brothers, John and Samuel Holman, appear to have acted at different times in an inconsistent and contradictory manner; and though it is very possible that on a plenary hearing their conduct may be explained satisfactorily, the Court is made at present more cautious in lending an ear to the applications of either of them; especially those which are of an extraordinary nature, as this motion is.

Upon the whole it does not appear to me that there is such a clear defect of right in the complainant's case, or such a want of authority to prosecute the suit, as would justify the Court in dismissing the bill in the summary way required.

Mr. Simons, solicitor for defendants.

Mr. Cheves and Mr. Pringle, for complainant.

From this decree there was no appeal.

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3 Desaus. *213

*Case XLI.

SEBBE SEBBEN and Others v. PETER TREZEVANT, Escheator, and GEORGE GIBBES.

[Tried before Chancellor Desaussure, February, 1811.]

[*Frauds, Statute of* ⊂=143.]

The Court will not decree a specific execution of a parol contract for the sale of land; in order to avoid the effect of an escheat. The personal estate to pay the debts, and the land to escheat.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 350; Dec. Dig. ⊂=143.]

In this case the complainants allege themselves to be the nearest relations of the late Sebbe Sebben, deceased, to wit, one of them the father, and the others the brothers and sisters of the said Sebbe Sebben.

The case made by the bill is, that the late Sebbe Sebben was a native of the electorate of Hanover, and coming to this country, settled in Charleston, and became a naturalized citizen. He purchased a house and lot of land in Charleston, situate in Church street, and received a title in fee simple for the same.

The bill alleges that the said Sebbe Sebben in his life time made a verbal contract with George Gibbes for the sale of the said house and lot, in fee simple, for the sum of 800*l.* payable one half in cash, and the remainder at a future period, not specified in the bill. That a few days after entering into this contract Sebbe Sebben departed this life, on the 16th or 17th February, 1803, without having consummated the same, and without either party having signed or executed any writing expressive of the said contract. And that the said Sebbe Sebben died intestate, leaving the complainants his only legal heirs and representatives. That the said George Gibbes is willing to complete the said contract, and carry the same into effect; but that he is prevented from doing so by a claim made to the land by P. Trezevant, the escheator, who insisted, that as the complainants are aliens, and the said Sebbe Sebben had died without leaving any relations competent to take and hold the estate, the same had escheated, and he had taken measures to enforce the same.

The complainants pray relief generally.

Another question was made by the bill, up-

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on a suppo*sition that Hanover was, at the time of the death of Sebbe Sebben, under the dominion of the king of Prussia; and that the inhabitants of that electorate, as subjects of the king of Prussia, are entitled, by treaty with this government, to hold real estate in this country, or to sell the same in case of any devolving on them. This, however, was given up on the trial, because it was found upon enquiry that Hanover was not at that time under the dominion of the king of Prussia.

The defendant, George Gibbes, admitted that he did bargain with Sebbe Sebben, deceased, a few days before his death, and did agree to purchase from him the house and lot in the bill described, for the sum and on the terms mentioned, but without specifying those terms; that his death prevented the immediate execution or consummation of the contract; that the said George Gibbes is willing still to execute on his part the said agreement, notwithstanding there is no evidence in writing of the terms thereof to render it obligatory on him, provided he can obtain a good and legal title thereto.

The defendant, P. Trezevant, the escheator, states that he is entirely unacquainted with the facts charged in the complainants' bill of complaint, and can neither admit nor deny the same; except that he believes Sebbe Sebben was a native of the electorate of Hanover. That the defendant, believing that the house and lot of Sebbe Sebben had escheated in consequence of his death, without leaving any heirs competent to take according to law, has proceeded, according to the provisions of the escheat law, to give notice, and to take other legal steps for evidencing the right of the state to the said property under the escheat law. This defendant also pleads the statute

of frauds, and claims the benefit of it to protect the right of the state against such an alleged parol contract; of which, however, this defendant is totally uninformed.

On the trial no evidence was given as to the relationship of the complainants to the

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deceased Sebbe Sebben, *nor was there any proof offered relative to the parol agreement, or any of its terms, as charged by the bill to have been made between Sebbe Sebben and George Gibbes, the defendant. But the complainants relied upon the admission, made by George Gibbes, of the existence of such parol agreement between himself and Sebbe Sebben. No proof was given that any money was paid, or possession given, or any instructions given for drawing up any agreement. The argument, therefore, turned upon the question, Whether this was such a contract as was obligatory on the parties, and as would be enforced specifically in this Court? also, Whether under the circumstances stated, the escheator could set up and avail himself of the plea of the statute of frauds?

Mr. Grimke, for complainants. There is no doubt that the contract was obligatory on George Gibbes, unless he pleaded the statute of frauds. He has not done so, but admitted the contract as set forth. Complainants have an interest in the contract, and can enforce it. The absence of the mutual signatures is not an absolute bar. George Gibbes is not a volunteer: he comes in honestly to confess an agreement, which, though not legally binding on him, was a fair and just one; and the agreement is set up properly against him. The death of Sebben precludes the idea of the suspicion, of any pretended contract to elude the effect of the escheat law. The escheator cannot admit or deny the agreement; he knows nothing of it. The statute was made for the benefit of the parties contracting; not of third persons, who have a derivative interest like this, as an escheator. The contract is to be decreed nunc pro tunc, and will have relation to the time it was entered into. George Gibbes affirms the contract: the escheator says, negatively, that he knows nothing about it. Suppose a legal heir of Sebbe Sebben had been here, and George Gibbes had filed a bill against him, would he not be obliged to carry the contract into effect? Escheat is allowed merely to prevent litigation, where heirs fail.

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*See Viner's abr. title escheat. Vesey, junior, p. A devise of land will prevent the land escheating, though the devisee is not entitled till the death of the testator still the devise takes effect to prevent escheat. The case from Nelson's reports seems to be against the complainants; but is distinguishable, inasmuch as George Gibbes here is the living contractor, and admits the contract, and is willing to go on and complete it.

Mr. Gadsden, for the escheator. The real question is, whether this be money or land? It is not pretended that there was any execution of this agreement, nor any reason for the delay. The statute bars the claim.

Is there a confession in this case? Where there is a confession of the parol agreement, it is, in fact, where both parties are existing and still consenting to the agreement. It is in fact a confirmation of the agreement; or a new one even. But the original parties are not before the Court. Only one of them is living, and he confesses the agreement: the other party is dead; he is no claimant to have the agreement executed. But persons, calling themselves heirs, insist on the completion of the agreement. As aliens they cannot be heirs. The escheator stands in the place of the heir, and he knows nothing of this parol agreement, or its terms, and sets up the statute as a bar. In a confession there is a waiver of the statute; in this case a denial of it, by the escheator. There is no appearance of any attempt to reduce the contract in writing, or of any part being executed. There would be great danger of defeating all escheats, if such loose, pretended agreements of sale, were allowed to be set up. The defendant, Gibbes, is in reality a complainant, seeking to have the benefit of this parol agreement; and he takes this method of setting it up, to defeat the escheator. Personal representatives could use this mode of defeating heirs.

Mr. Grimke, in reply. It is contended that even a case of a suit by the heir or representative of Sebbe Sebben, (and no case of the escheator) against Gibbes the confession of

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Gibbes is sufficient to set up the agree*ment; for the heir coming in, and claiming the execution of the contract is a confirmation of it on one side and the confession by the other party completes it. The escheator is merely the grantee of the king, or of the state, and is not favored. The escheator seized the property as escheated, therefore the complainants were obliged to make him defendant. The contractor, Gibbes, is a purchaser; the escheator, a volunteer.

Decree.

This contract was certainly in a most imperfect state at the time of the death of Sebbe Sebben. It was not reduced to writing, nor signed by the parties, nor any instructions given to reduce it to writing: no money was paid, to bind the contract; no possession was given by one party, or taken by the other; and no part execution of any kind took place. It was so incomplete that the locus penitentiæ was still left to either of the parties, and it could have been revoked by either of them. It was a mere imperfect parol agreement, and was not binding on either party, or the representatives

of either. Neither could have enforced it against the other, or the representatives of either. The very text of Fonblanque shews how absolutely necessary it is that a contract should be perfect to be obligatory. He says, "The agreement ought also to be complete and perfect; for pacta contractuum præparatoria are not binding in law or in equity;" therefore going to counsel and giving the heads of the agreement is not obligatory, for the terms might have been afterwards altered, or entirely broken off. So, too, "the agreement must also be fixed and settled, and not wavering and revocable; or else the representative will not be bound by it, if not perfected before the party's death." The agreement must be made perfect in the life time of the parties, else it will not bind: for the lien never vesting in the ancestor or testator, cannot descend upon the heir or devolve to the executor. Against this it is alleged, that although under the circumstances stated, neither party was bound by this parol contract, yet it was

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in their power to car*ry it into effect if they pleased. And their representatives were equally free to complete the contract, however imperfectly left by the ancestor. That in fact the representatives of Sebbe Sebben, one of the contracting parties, having filed a bill to carry the contract into execution, and thereby expressed their confirmation thereof; and George Gibbes, the other contracting party, having, in his answer, admitted the contract and consented to the execution of it, the Court cannot hesitate to give its aid to carry it into specific execution.

It may be here asked, if the representatives of one contracting party, who is dead, and the other contracting party, who is living, are agreed to give effect to the contract, why do they come to the Court to enforce a specific execution? The answer is, that the heirs of the party who had agreed to sell, being aliens, are incapable to take this property by inheritance; consequently they cannot, upon the death of Sebbe Sebben, convey a good title to the defendant. The legal title devolved somewhere, on Sebbe Sebben's death, but not on them: they were aliens, and could not take. It devolved then on the escheator. In what capacity then do these complainants sue? They state themselves to be heirs, and they sue as heirs. But the law of this country denies them this character. At the instant of the death of Sebbe Sebben, without heirs capable of taking the estate, the rights of the state by escheat attached: and they cannot as heirs make good title to the land, nor carry this contract into execution. Nor would they have been entitled, as administrators, (if they had administered) to compel the execution of this contract; for their claim would still have been to sanction the contract, and authorize their conveyance of the land to George Gibbes and to compel the payment of the money agreed to be paid for it. But they cannot convey a good title; and the Court will neither make good a defective title nor oblige George Gibbes to pay the money, as these claimants cannot make him a good title.

It was attempted to assimilate this case to

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that of an *owner of land devising it to another, both of them being citizens capable of holding land; but the heir of the devisor being an alien; such devise is said to be good, though the devise cannot take effect till the testator's death; though it might have been argued that eo instanti, the escheat would attach, so that the devise could not be supported. Yet such devises are supported. Therefore it was argued that such a contract as this could be supported and would be enforced. It is enough to say that this case does not apply to the one under consideration. The devisor is authorized by law to devise, and the devisee being a citizen is capable of taking; and the will of the testator, though it does not take effect until the death of the testator, takes effect eo instanti, and prevents the application of the doctrine of escheat. So, too, where a testator, who has no heirs, devises to a person capable of taking, such devise will be effectual; though if he had not made such devise, the land would have escheated for defect of heritable blood.

But these cases have no application to the one under consideration. It was argued that if a legal heir of Sebbe Sebben had appeared, and George Gibbes had filed a bill for the specific execution of this contract, it would have been enforced. To this I answer, that if such an heir had chosen to admit the agreement, he could have done so: as he might have made a like agreement de novo with the other party. But he would have been at liberty to plead the statute; and if he had it would have protected him. This shews how imperfect and incomplete the contract was. I cannot consent to set up and enforce such a contract under such circumstances.

The escheator representing the state was made a defendant in this case, and he has pleaded the statute of frauds. But it is said he cannot avail himself of that statute, which was made to protect the immediate contracting parties and their heirs against parol agreements respecting lands, and not other persons, claiming in any other character than heirs. I do not perceive any such

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*limitations in the statute of frauds. It certainly would protect a residuary devisee, though a stranger, from any attempt, either by the heir or the executor, to set up a naked, unexecuted, parol agreement, relative to part of the real estate, which would oth-

erwise pass to him under the residuary clause; and so, I apprehend, it will protect any person, claiming any legal title to the land, on the death of the former owner, The escheator comes in by law to the legal title, either as the ultimus hæres, and therefore taking by descent, in a kind of caducary succession, or by purchase; for the law-writers are not perfectly agreed in which character he takes. See 2 Black. Com. 244. But he takes in one or the other character, for our law knows only of those two methods of taking real estate. Now either as purchaser, or as heir, he is, in my opinion, perfectly at liberty to avail himself of the statute of frauds to protect the estate from such a parol contract; and he having pleaded the statute, I think it is a complete bar in this case. This contract has not one feature of a perfect agreement, which can be carried into execution against the will of either party, or the legal representatives of either party. If Mr. George Gibbes had filed a bill for the specific execution of this contract, the escheator, as a necessary defendant and claimant, would have been at liberty to plead the statute; the form of the suit cannot make any difference.

This Court has narrowed the doctrine of specific execution of contracts within the scope of the statute of frauds. In the important case of Givens v. Calder [2 Desaus. 171, 2 Am. Dec. 686,] decided in May, 1803, which was twice fully argued, the Court declared that great mischiefs and uncertainty had resulted from relaxing the operation of the statute, and professed a determination to be more cautious in future; especially in cases where one of the parties was dead, when the danger of frauds and perjuries was greatly increased. And the Court in that case refused to carry the agreement into effect under much stronger circumstances to shew a regular and formal contract than the present.

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*I will not dwell on the dangers of fraud and perjury, which the statute meant to guard against: they are plain. Great evils must have existed or the statute would not have been passed. Where one of the parties is dead those dangers are increased. Heirs and others claiming by law might be totally defeated if the statute is refined away.

It is therefore ordered and decreed that the bill be dismissed. But as the complainants had certainly reasonable ground to come into this Court to enquire into their rights, and know why they are cut off from the inheritance of their relation, I do not think they ought to be made to pay costs; and as there is no blame on them, I am of opinion that they ought not to be made to pay the costs: and as the defendant, George Gibbes, could not prevent his being brought in to Court, and there is no blame in him, I am of opinion that he ought not to pay any costs. Let the costs be paid out of the escheated property.

From this decree there was an appeal on the following grounds:

First—The escheator has no equity to entitle him to favor. 1. From the reason of escheat. 2. Because not even a volunteer. 3. Not favored in England, much less therefore here. 4. Not on a footing with the heir.

Second—Complainants have strong and various equitable grounds.

Third—The existence of the agreement, the terms, their fairness and equality are sufficiently proved by George Gibbes, a disinterested, if not an indifferent witness. The reason is also given why the contract remained unexecuted. As then between George Gibbes and complainants there is ground enough to warrant a specific performance; to rebut this equity the escheator must raise a still greater. The confession is amply sufficient, when we consider that the reason of the statute is not strictly applicable: that the absence of mutuality of consent is sup-

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plied by the relation of the parties *and the merits of their respective claims: that the face of an agreement so fair and distinct implies consent: that the very change contemplated evidences an intention favorable to his relations; and vice versa, from the very fact of their inability to inherit, the existence of intended execution of such a plan is presumeable: that they are unquestionably entitled to more favor than the escheator, on the strongest grounds of equity, policy, and law. In fine, that we do not deprive a third person of an equitable right, nor charge him with an unequitable burthen: and surely a technical right, founded on the pre-supposed non-existence of every other, should never prevail over equity so various and substantial.

Northrop, appellants' solicitor.

March, 1811.

The appeal came to a hearing, and Mr. Grimke argued in support of it.

Even in England escheats are not favored, and technical objections are used in favor of other claimants: 10 Viner. A devisee shall take in preference of the escheator, though devisor dies without legal heirs, capable of inheriting. 2 Vesey, jun. 170, Walker v. Denn; 3 P. Wms. 52, Williams v. Lonsdale; 1 Fonbl. 7, note (w.) The contract preceded the right of escheat, and must be decided separately and previously. The question then is, is this such a contract as is obligatory on the parties, and will be enforced by this Court? The contract is proved, or rather confessed, and there must be evidence of fraud or perjury to prevent its enforcement. Roberts on frauds, 124. Only the party to be charged is necessary to have signed, or to confess by his answer. The time of the payment of one half not being

fixed at any period is immaterial; the Court will fix a reasonable time. Examines the case of Givens and Calder, decided in this Court, and thinks it inapplicable.

The Court of Appeals, consisting of Chancellors James, Thompson, Desaussure, and
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Gaillard, una*nimously affirmed the decree of the Circuit Court, for the reasons given in the decree.

T. S. Grimke, for complainants.
J. Gadsden, for defendant, the escheator.

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Case XLII.

EDWARD CROFT v. GEORGE ARTHUR, JAMES HIBBEN and BENJAMIN HARVEY, Administrators of Stephen Townsend.

[Tried before Chancellor Desaussure, February, 1811.]

[*Witnesses* ⟸98.]

A person to whom a conveyance is made to cover property from creditors, with a secret trust for the grantor and his heirs, may be examined as a witness to disclose the fraud.

[Ed. Note.—Cited in Haig v. Newton, 1 Mill. Const. 443; Merck v. Merck, 83 S. C. 336, 65 S. E. 347.

For other cases, see Witnesses, Cent. Dig. § 305; Dec. Dig. ⟸98.]

[*Fraudulent Conveyances* ⟸96.]

Deeds conveying property to third persons without val. consid. to cover the property from impending judgments, void as to creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 298; Dec. Dig. ⟸96.]

[*Fraudulent Conveyances* ⟸94.]

Marriage settlement, made when deeply in debt, covering the greater part of the grantor's property, on the eve of judgments, and not recorded, void as to creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 239; Dec. Dig. ⟸94.]

[*Limitation of Actions* ⟸100.]

Stat. of lim. does not run, till the time of the discovery of the fraud.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 480; Dec. Dig. ⟸100.]

[*Executors and Administrators* ⟸281.]

[Where a marriage settlement was set aside as fraudulent after the death of the husband, his administrator, who had been in possession of the premises, and had maintained and educated the children of the settler out of the income, in ignorance of the fraud, was allowed, upon accounting with the creditors of such settler, to deduct his reasonable expenses on account of the children.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1107; Dec. Dig. ⟸281.]

[*Husband and Wife* ⟸29.]

[A marriage settlement made after the act of 1785, and not recorded according to that act, is void, though made prior to the act of 1792.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 167; Dec. Dig. ⟸29.]

On the trial of this case a question was made as to the admissibility of Mr. Benjamin Harvey as a witness in this cause; and his testimony was taken subject to the opinion of the Court upon his competency.

The objection is, that as Mr. Harvey had accepted a bill of sale of some of the negroes in question, which is expressed to be for valuable consideration; and as he afterwards conveyed the negroes to Mr. Hibben in trust, for the children of Mr. Townsend, he ought not to be permitted to give evidence to invalidate those deeds.

This rule of evidence, relied upon, as laid down in the famous case of Walton and Shelly, reported in 1 Durn. and East, p. 300, is, "that no party who has ever signed a paper or deed shall ever be permitted to give testimony to invalidate it."

This rule, however, was itself a departure from the plain and simple doctrine of evidence, which excluded none from giving testimony, but those who were interested, or infamous, or incapable from infancy, idiocy or insanity, and admitting all others, left the credibility of their testimony to be judged of by those marks which distinguish truth from falsehood.

The rule as laid down in Walton and Shelly has been found inconvenient in practice. It has been found to shut up the avenues to
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truth in many cases, where ac*complices, or persons unwarily drawn in to partake in some illegal or fraudulent transaction, were willing to redeem their error and to disclose the truth. It has therefore been the endeavor of the judges to break down the new rule and to return to the old law.

In Bent and Baker, 3 D. & E. 35, Lord Kenyon confined the rule to negotiable paper; and afterwards, in Jordaine v. Lashbrooke, 7 D. & E. 601, Lord Kenyon denied the rule altogether.

In the United States, the rule in Walton and Shelly has been recognized in several of the state courts and doubted in others; but the better opinion seems to be established, that the rule, if admitted, must be confined to negotiable paper. Chief Justice Tilghman, of Pennsylvania, in the case of Baring, assignee of J. B. Cutting, v. Shippen, stated that the rule was confined to negotiable instruments, by a decision of the Supreme Court of Pennsylvania in Pleasant v. Pemberton, 2 Dallas, 196, which he considered as having settled the law.

In this collision of opinions among such eminent judges, we are left free to resort to principles; and upon the best view, which I have been able to take of the subject, I am of opinion, that if the rule in Walton and Shelly be admitted at all, its operation should be confined to negotiable instruments. The truth is, that if Harvey was interested at all, it would be to support the deeds and not to

destroy them. But in reality he has no interest; he comes to disavow all interest.

As the deeds in question are not of the negotiable character, I consider Mr. Harvey a competent witness and his evidence admissible. The objection was not taken to the competency of Mr. Hibben, though if it had been good against Mr. Harvey it would have applied in part to him.†

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*Having cleared the way of this objection, let us look at the general features of the case, explained by the testimony given by these gentlemen; as well as by the other evidence given in the cause.

Stephen Townsend made an absolute conveyance, on the 14th September, 1785, of his land of 100 acres, in Christ Church, to Mrs. Arthur, a widow lady, expressing to be for the valuable consideration of £250.—and afterwards executed two bills of sale to her, dated the 14th October and 1st December, 1785, of 17 negroes, also for valuable consideration, amounting to £1320. Some time afterwards, to wit, on the 28th December, 1785, he executed a marriage settlement, by which, after reciting that a marriage was intended

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to take effect *between himself and Mrs. Arthur, and that she was entitled to certain negroes and other personal property under the will of her first husband; also, to a tract of land of 100 acres, in her own right, and to certain other negroes and personal property acquired by her since the death of her first husband, he then proceeds to stipulate and agree, that the said property should be and remain in the hands of trustees therein named, for the uses and purposes therein expressed, to wit, for the use of the husband and wife, and afterwards, of the children of the intended marriage. The marriage took effect, and there was issue of it. After some years, Mr. Townsend conveyed by bill of sale, dated the 7th February, 1792, thirteen of his negroes to Mr. Harvey, expressing it to be for the valuable consideration of £650. Mr. Harvey, on the 27th March, 1792, conveys six of these negroes to Mr. Hibben, in trust for the use of the two minor sons of Stephen Townsend. On the 22d February, 1792, Mr. Townsend executed a bill of sale for seven negroes, to Clement Brown, executor of George Arthur, in consideration of £210. On the 31st December, 1791, Townsend executed a bond to Clement Brown, conditioned to pay £200 on or before the 1st January, 1792, which was put in suit on the 3d January, 1792, and judgment confessed, and execution issued immediately: whereupon a levy was made on a tract of land of 100 acres in Christ Church, and the same was sold, and purchased by J. Hibben, Esq. and conveyed to him by the sheriff for the sum of 152*l.* 5*s.* on the 7th Oct. 1792.

On the 7th March, 1792, Moses Whitesides, in consideration of £5 and the uses and trusts of the deed, conveys 60 acres of land in Christ Church to Mr. J. Hibben, in trust for the use of the two minor sons of Stephen Townsend.

These seem to be the principal circumstances of the case, as they appear by the deeds and other papers produced. But to a right understanding of the truth of the case, we must examine much deeper, and we shall

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find *them very fully explained by the testimony given in the cause.

It appears then that Mr. Townsend was a man of moderate property, and owing a good deal of money. Many of his debts were incurred in 1784 and 1785, as appears by the judgments subsequently obtained on them. The sheriff had levied on his negroes, and he began to be apprehensive of the loss of them. After this he conveys 17 of his negroes and his tract of 100 acres of land to Mrs. Arthur, in fee simple, and for a pretended valuable consideration. No proof, however, is given, that it was for a valuable consideration.

† The objection made to the competency of Mr. Harvey, as a witness, was confined to the point argued above. It was not insisted upon, that his character of trustee prevented his being a witness to destroy the deed of which he was the trustee. That point had, however, been made

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*in the case of Mrs. Winifred Wilson, by her prochein amie, v. John Wilson, her husband, which was decided in July, 1791. The husband in that case examined the trustees, to prove that the deed was not made bona fide as a marriage settlement, nor at the time it bore date, before the marriage, but at a subsequent time after the marriage, and merely to elude a forfeiture. But the Court, after great argument, refused to admit the evidence of the trustees, on the ground that trustees are created to support the objects of trust deeds, and shall not be permitted to give evidence to destroy them. See the case reported in the 1st volume of these reports, pages 219, 230, 232.

The want of printed reports, and the difficulty of always getting readily at manuscript decrees, perhaps prevented the counsel in the case under consideration from citing and relying on that decree. But that case, whatever weight is given to the decree, is distinguishable from the present. The trustees were really the friends of the husband, actors, and voluntary parties in the transaction and execution of the deeds. And the deeds or bonds expressed the trusts and the uses which they professed to be intended for. The conveyance to Mr. Harvey was of 13 negroes absolutely, and for an alleged valuable consideration, without the smallest expression or intimation of a trust. No possession was ever given of these negroes to Mr. Harvey; but he afterwards (in about seven weeks) conveyed six of the thirteen negroes to Mr. Hibben, in trust for Townsend's children.

Harvey proved that he never paid a cent for the negroes, nor ever had possession; nor was the deed recorded—and Mr. Hibben (to whom the objection, as a trustee swearing to destroy his trust deed, was more applicable) swore he never had possession: and both Harvey and Hibben swear they believe all these deeds were made to cover the property from creditors. Harvey, under these circumstances, cannot be considered a trustee, destroying his deed of trust.

Mrs. Arthur had a very small property under the will of her first husband, and could not make these purchases; and to crown all, Townsend remained in possession of all the property, so pretended to have been sold; and none of the deeds are recorded. Indeed the idea of a sale was given up on the argument, and the counsel for the defendant rested upon this ground—that these conveyances were made in contemplation of an intended marriage with Mrs. Arthur, which was perfected by a subsequent marriage settlement, and consummation of the marriage.

This was, however, a most extraordinary procedure, to convey absolutely the greater part of his property to a lady in contemplation of marriage, and yet to make no statement or reference to such an event, but to put it wholly on the ground of a valuable consideration, which is acknowledged to be false; without making the smallest provision to vacate the deeds in case the marriage should not take effect.

The marriage articles treat the property as belonging to Mrs. Arthur; they refer to her property under her first husband's will, and to her acquisitions of land and negroes since his death, and agree that her property so described should stand and enure to the trustee for the use of the family. But her possessions under her first husband's will were very trifling; only the negro woman Betty and her future issue—a chair and two horses were given absolutely, and a fourth

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part of his move*ables, for life, with liberty to reside on the plantation during widowhood. The newly acquired property seems to be no other than the land and negroes conveyed by Mr. Townsend to her a little time before.

With so many circumstances appearing in this case to shew a deliberate intention on the part of Mr. Townsend to cover his property from his creditors, I cannot look with a favorable eye on these transactions, and go so far as the ingenious counsel did, to connect the marriage settlement with the preceding deeds of absolute conveyance, and thereby to give life and validity to these deeds, which were fraudulent and void. The bill of sale made by Mr. Townsend to Mr. Harvey of thirteen negroes, part of which he afterwards conveyed to Mr. Hibben, in trust for Townsend's children, expresses to be for valuable consideration; yet Mr. Harvey swears that he never paid a cent for them, and that he never had the negroes in possession; they remained always with Townsend, and the deed was never recorded. Mr. Hibben swears he never had the negroes in his possession—they remained with Townsend; and both swear that they are satisfied all these measures were taken to cover the property from Townsend's creditors. Indeed he acknowledged to Mr. Harvey that this was his object in the several deeds.

With respect to the bond given by Townsend to Clem. Brown, executor of George Arthur, on the 31st January, 1791, and judgment immediately confessed on it, there are strong marks of a design to cover the property from his creditors, who were then suing him, and several of whom got judgments in March, 1792, a few days after the judgment was entered up for Clement Brown. Some of them in August and October, 1792, and some afterwards.

It is evident that the precipitation in this case was to anticipate and elude these judgments. Mr. Winstanly said he thought the bond was ante-dated. It is indeed alleged, that the bond to Brown, executor of Arthur, was for a bona fide debt due by Townsend to

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the execu*tor, for the hire of the negroes of the estate of Arthur. This however is very doubtful. How is it that Brown never got any settlement or acknowledgement of debt, or took any steps prior to the moment that the creditors were threatening Townsend? How is it that no statement how the debits and credits stood, and on which the settlement was made, is even yet exhibited? And we find that several respectable men, who afterwards examined the accounts as arbitrators, were of opinion that nothing was due by Townsend to Arthur's estate, for that his charges for board, clothing and educating the children of Arthur, were equivalent to the demands of the estate of Arthur against him for the hire of the negroes. And finally, Clement Brown, by a letter of the 9th Nov. 1792, to his attorney, declares that Stephen Townsend had satisfied him on account of the judgment, and that he had nothing to do with the money arising from the sale of the land under that judgment.

With respect to the bill of sale of seven negroes, made by Townsend to Clement Brown, executor of Arthur, of the 22d February, 1792, it is subject to all the objections made to the other bills of sale—it is not recorded; no proof of valuable consideration was shewn; no grounds to suppose a bona fide debt due by Townsend to Arthur's estate; no possession went with the bill of sale: and it immediately preceded the judgments then about to be obtained.

It was insisted, that the possession not going with the deeds, is not of itself a fraud, but a mere badge of fraud; and that possession might sometimes remain with the vendor, and be consistent with the deed. There has been some diversity on this point; but the later cases have rather gone to establish the point, that possession not going with the deed is of itself a fraud, and vitiates the deed, unless the vendors remaining in possession of the property be consistent with the provisions of the deed. But it is unnecessary, in this case, to examine this point minutely. It is admitted to be a badge of fraud on all hands: and that badge remains immove-

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*ably fixed upon these transactions. No explanations, no circumstances, have been shewn to remove it. In the case of De Bardeleben v. B. & S. Beekman, (decided in this Court in June, 1793 [1 Desaus. 346,]) the possession not going with the deed and the deed not being recorded, the deed was decreed to be void as to the creditors, though the transaction was acknowledged to be fair.

Under all these circumstances it is impossible to doubt. We may pity the infirmity of the human mind, sinking under an approaching pressure of distress, and resorting to such means of protection and provision for a family; but we cannot approve, and the law will not sanction these measures—it pronounces them void.

With respect to the one hundred acres of land, seized and sold under the execution of Clem. Brown, which were purchased in by Mr. Hibben, to whom titles were made; it is equally obvious that the sale was effected to shelter the land from the effects of the judgments of the creditors. The titles to Mr. Hibben are dated the 7th of October, 1792; yet on the 9th of November, 1792, Clement Brown writes to his attorney that he is not entitled to the amount of the purchase money, for that Townsend had sometime before satisfied him for the debt and judgment, under which the sale had been made.

Again, Mr. Hibben swears that he bought in the land at the desire of Townsend, and for the benefit of his family. And that Townsend furnished the amount of the purchase money which he paid, through a negro boy. With respect to the 60 acres of land conveyed by Moses Whitesides for £5 to Mr. Hibben in trust for the use of the two minor children of Stephen Townsend, there is not much testimony explanatory of that. But I fear it partakes of the nature of all the rest of the transactions of this case. The deed is not recorded. Mr. Hibben says the conveyance was made to him without his privity or consent. He paid nothing for it. It was part of the land bought by Townsend from Harvey, and Townsend always remained in possession of that as well as the negroes. Now what was the consideration moving

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*from Whiteside to Townsend to induce him to convey this land to Whitesides, which must have been done before he conveyed to Hibben? None has been shewn. Whitesides conveys, a few days before judgments are entered up against Townsend, this land for £5 to Hibben, in trust for Townsend's children.

It was insisted that a man may purchase lands and take the conveyances to his children; that the statutes were made to prevent fraudulent sales; but that it was a new pretence, to say that there could be fraudulent purchases. And some authorities were cited to support this doctrine.

Undoubtedly a man may do so; and if it be done bona fide, whilst he is in good circumstances, not overwhelmed with debt, and without any of those indications, that it was a mere cover for property against creditors, the Court would protect such purchases. But under the circumstances disclosed in this case, this conveyance partakes of the character of all the other transactions—it does not appear to have been bona fide, but to have been intended merely as a shelter to the property. And the witnesses attest the declarations of Townsend, that if he recovered a large debt due to him, and could pay his debts, he would destroy all these deeds. It is of importance to remember in this case, that after all these transactions, nothing, or but little, was left of Townsend's property for the creditors. The administrator Harvey can find nothing wherewith to pay them.

We should not have arrived at the conclusion of our painful enquiry, if other questions had not been made by the ingenuity of counsel. It is alleged that the marriage settlement made in this case was bona fide, and is entitled to the highest consideration in this Court; and that the property being in part, if not wholly, the wife's, the existence of debts did not interfere with it—and also, that though not recorded, it is valid and effectual to protect the property comprised in it; as it was one of those cases which did not come within the provisions of the acts requiring a record within a limited time.

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*It is very true, as the counsel for the defendant urged, that though a man be indebted, he is at liberty to make a marriage settlement; more especially of his intended wife's property. Yet this position, like most others, must be taken with reasonable restrictions. As to the intended wife's property there can be no doubt: and generally speaking, a man possessed of property, and owing some debts, which however have not yet obtained any lien, may make a reasonable settlement on his intended wife. And if adverse accidents occur, and diminish his property, the settled part of it will be protected for the benefit of the family. But all this proceeds upon the ground of a bona fide transaction. Now can it be said, if a man of small property, and considerable debts, conveys the bulk of his own property in a marriage settlement, so as to elude the just demands of his creditors, that he acts bona fide? I think not. This is precisely the case here. The deed of settlement in this case professes to comprise all the property which Mrs. Arthur, the intended wife, held under her first husband's will, and all the property she had acquired since his death. What she held under her first husband's will was, as we have seen, very trifling. What she acquired appears to have been the tract of

land and negroes, conveyed to her for a nominal valuable consideration some time before by Townsend. But it has been conceded that there was no consideration, these deeds being alleged to be made in contemplation of marriage. But I cannot view these conveyances in that light, or connect them with the subsequent marriage, to which they bear no relation, and have no connexion on their face.

Considering them as voluntary conveyances, made by a man much indebted, and the deeds not recorded, and no possession going with them, I must declare them null and void; consequently, the greater part of the property in the settlement, nay, almost the whole, was Townsend's property.

In my opinion, the settlement of so large a proportion of a man's estate, under Town-

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send's circumstances, *would have been very questionable, even if the deed had been recorded.

The deed is executed on the 28th December, 1785, by Stephen Townsend alone; no subscribing witnesses sign it on the day of its date. On the 30th December, 1785, Richard Rowser and Adden Froggat endorse a memorandum, that peaceable and quiet possession and seizin of the real and personal property, contained in the deed, was given, by a key being delivered to the trustee, in the name of the whole, in their presence. And on the 17th November, 1789, Adden Froggat attests the execution of the deed, but without stating at what time. The deed has never been recorded, and it is contended, by the defendant, that it was not necessary to do so. That the case of Lennox and wife v. William H. Gibbes, [1 Desaus. 305,] decided that the act of 1785 was obscure and inoperative; and that the penal clause, declaring the settlement void for want of recording, did not attach to the enacting clause. That the act of 1792 amends only the first clause of the act of 1785; which first clause speaks only of marriage settlements made anterior to the act of 1785, and not to those which might be made after the act of 1785. That the settlement of Townsend being executed in December, 1785, was subsequent to the first act and prior to the second act. That settlements made between the two acts, formed a casus omissus not provided for, and consequently they were good without recording. The candor of the counsel conceded that the decision made by the Court, in Wilson and Wilson, [1 Desaus. 219,] was different from that of Lennox and Gibbes. Let us examine these acts, and these cases, accurately.

The first act was passed on the 8th March, 1785. The second act on the 21st December, 1792. The settlement made by Townsend bears date the 28th December, 1785. The case of Lennox was decided in September, 1792. The case of Wilson in September, 1794.

The act of March, 1785, directs—1st. That every marriage contract, deed, or settlement, then in existence, should be proved and re-

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corded in the secretary's *office within a limited time. Persons out of the state have twelve months.

2d. That all marriage contracts, &c. entered into after the passing the act, shall, within 3 months after the execution, be in like manner proved and recorded.

3d. That whosoever, interested in such marriage deed, contract or settlement, shall neglect or refuse to record the same in the manner, and within the times beforementioned, and in the office aforesaid, then the same in respect to creditors shall be deemed fraudulent; and the estate intended to be secured shall be liable to the payment of the debts due by such persons, as if no such deed, contract, or settlement, had been made.

The trial of the case of Lennox and wife v. Wm. H. Gibbes took place in Sept. 1792. That was the case of a marriage settlement executed prior to the act of 1785, and not recorded. The Court was of opinion that the act of 1785 was not clearly drawn: that the word "such," in the 3d clause, must be considered as a relative, and by the rules of grammatical construction confined to the immediate preceding clause, as its antecedent; and the preceding clause provided only for recording settlements, which should be executed after the passage of the act. That the Court could not, from the obscurity of the wording, ascertain whether the legislature intended to extend the provision or sanction of the third clause, to both the preceding clauses, or merely to the next antecedent; and that the Court could not add words to give the law a different effect from that which it admitted on its face, nor to make that clear and perfect which was doubtful and imperfect—especially as penal laws are to be construed strictly, and the penalty here would operate as a penal statute. Therefore the Court supported the settlement, though not recorded as the law directed.

With the highest deference for the authority of the learned judges who decided this case, I have not been able to satisfy my mind with this decision, after the maturest consideration. Doubtless the act was

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very ob*scurely worded, but still I think the intention of the legislature was clear, and that intention was sufficiently though darkly expressed. It could not be presumed that the legislature meant to enact a nullity; to direct an act to be done, to wit, the recording settlements made before the act was passed, without some consequence resulting from a disobedience to its direction. Yet that was the effect of the decision. Nor can I perceive that it was requisite to supply words, to give effect to the meaning of the legislature. For admitting there was a doubt whether the words, "such deed or settlement" could be extended beyond the im-

mediate antecedent, (which was the provision relative to future settlements) that doubt I think was solved by the subsequent words. For the third clause goes on to say, that if such marriage deed, &c. should not be recorded in the manner, and within the times beforementioned, then the same in respect to creditors shall be deemed fraudulent, &c. Now the use of the word "times" shews, I think, clearly, that the legislature meant to extend this third clause to both the antecedent clauses. If it had been intended to limit its extent to the last antecedent, it would have said "time;" for the last antecedent clause relative to settlements, to be thereafter made, has but one provision of time. It fixes three months after the execution for recording. The first clause gave a different and a longer time for recording settlements in existence at the time of the passing of the act. "Times," therefore, was the word proper to be used in the 3d clause, if it was intended to refer to both the preceding clauses. "Times" is the word used. I should therefore have concluded that the penalty for not recording, provided by the 3d clause, extends to the different settlements spoken of in the 1st and 2d clauses. And when I recollect the rule in the construction of statutes, that if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant, I confess I should not have been willing to give this statute such a construction as completely defeated,

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and made of no effect, its 1st *clause. Notwithstanding this opinion, I should still be unwilling to shake a decided case, upon which much property is held. And, unfortunately, no necessity exists to do so, in order to attain justice in the case under consideration; for it stands clear of the first clause altogether. That provides for the case of settlements existing at the time of the enactment of the law, which was on the 8th of March, 1785. The settlement now under consideration bears date the 28th December, 1785. It comes therefore under the 2d clause of the statute of 8th March, 1785, which directed that all marriage settlements, executed after the passage of the law, should be recorded within three months after the execution. And the third clause, declaring that if such settlements were not recorded within the time prescribed, they should be deemed fraudulent, and the estate liable to the payment of debts, has a direct and incontrovertible application to the settlement now under discussion.

This being my opinion, it might be sufficient to stop here. But as the able counsel for the defendant thought that this case was strengthened by the view he took of the act of the 21st December, 1792, amendatory of the act of the 8th March, 1785, I will examine that point.

The law of December, 1792, after reciting that settlements, made prior to the 8th March, 1785, had been judicially determined not to be within the operation of the sanction or penal part of that law, enacts that such settlements shall be recorded within a time newly prescribed; and, for default thereof, declares such deeds to be fraudulent, and null and void with respect to creditors and purchasers and mortgagees. This is a clear and perspicuous provision; but it has no relation to the settlement under consideration; which is one made after the passage of the act of 8th March, 1785, and comes clearly, as I have shewn, within the provisions of the second and third clauses of the act of 8th March, 1785. The next and only remaining clause of the act of 1792, has no relation to any settlements in existence before the 1st June, 1793, consequently

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can have no bearing on *the question before the Court. The case of Wilson and Wilson, decided in September, 1794, is supposed to be in collision with the decision in Lennox and wife, decided in 1792. But it is due to the judges, who decided those causes, to shew that there is no inconsistency between them. The settlement in Wilson and Wilson was made after the act of 8th March, 1785, and before the act of 21st December, 1792. The Court took a view of both the acts, and shewed clearly that the act of 1792 has no sort of relation to such cases; for its first clause barely amends the supposed defect of the first clause of the act of 1785, with respect to settlements made prior to 1785; and the second clause is entirely prospective, and leaves all settlements made after the 8th March, 1785, and before the 21st December, 1792, to the operation of the second and third clauses of the act of 1785, which alone related to them. The Court then pronounced that the settlement in Wilson's case, being made after the act of 1785 and before the act of 1792, is within the 2d and 3d clauses of the act of 1785, and not being recorded, according to its provisions, is void. This is precisely the judgment which I am bound to give in the case under consideration.

The settlement was made after the 8th March, 1785, and before the act of 1792. It is included in the 2d and 3d clauses of the act of 1785, and not being recorded according to the provisions of that act, is void—and the act of 1792 has nothing to do with it.

I have been thus particular in the examination of these acts, (perhaps unnecessarily so) because much doubt and perplexity was supposed to hang over them. There never, in my opinion, was but one reasonable doubt; and that was as to settlements made before the passage of the act of March, 1785; and that doubt has no relation to this settlement, which was made after that act.

It was said that this case was not within the reason of the act. But it surely is within the general reason of the law, though not

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perhaps within the reasoning of the *preamble of the 2d act. And it is most clearly within the provisions of the law.

It was further contended, that even if the settlement should be considered void, still an obligation would remain, and the wife would stand as a creditor, and the Court would hold the property to satisfy her. The Court would gladly do any thing in its power to protect that portion of the property which was really and bona fide the wife's. But how can it be done? The marital rights of the husband attached on the marriage, and the property reduced to possession became his absolutely, and liable to his debts, unless the settlement interposed. That deed being pronounced under the law to be fraudulent and void, the Court cannot take away nor diminish the rights of the creditors. The wife and her representatives have no bond, nothing to stand upon, but a deed, which is void. There are cases, to be sure, where, though the bond or contract, or deed, be made void by the operation of some law, an obligation has been decided to be still subsisting, and the Court enforced it. But they are different cases from these; and they are decided as between the parties themselves, and not to the prejudice of other persons, in relation to whom such deeds have been declared void by law.

It was further contended by the able and indefatigable counsel for the defendant, that the statute of limitations runs against frauds from the time of the discovery; and that Mr. Harvey had given strong and distinct intimations of the fraud to Mr. Greenwood and Mr. Croft, two of the creditors. Since which the creditors had slept on their rights; and meanwhile the statute had run against them, and in favor of the possessor of the negroes—especially as the children take as purchasers.

Authorities were cited to prove that the statute of limitations would run, in cases of fraud, after the discovery; even against mortgagees and judgment creditors.

Let us examine them. 3 P. Wms. 143, 144. So. Sea Com. v. Wymondsel, was chiefly relied on; and undoubtedly the Lord Chan-

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cellor, in that case, was of *opinion that the complainant ought to charge in his bill, that the fraud was discovered within six years before exhibiting the bill. But it appears by that case, and another cited therein, that the Court even after the statute would permit the complainant to amend the bill by charging that he did discover the fraud within six years before exhibiting his bill.

So here, if I deemed it necessary I should permit the complainant to amend his bill by making that charge. I do not, however, think that this formality is necessary. For even admitting the law to be as stated, that the statute runs in cases of frauds from the time of the discovery, (which however is to be taken with considerable restrictions and qualifications,) yet the facts in this case do not shew that the discovery was made six years before the bill was filed. Mr. Harvey swore, that when questioned by two of the creditors he gave them intimations of the state of the case, and hinted that property could be made forth-coming. But he did not make that clear and full disclosure of the facts, which could enable the creditors to see the nature and extent of the frauds committed. Nor could he—for Harvey himself did not know the whole of the fraudulent transactions. This, then, is not that full and complete discovery of the frauds which would enable the possessors of the property under the fraudulent deeds to shelter themselves under the protection of the statute.

And if the statute could be supposed to run against the two creditors, to whom some intimations were given by Mr. Harvey of the fictitious deeds, in which he had been made a party, this would not extend to the other creditors nor to any other property than that conveyed to Harvey.

Having considered all the important points made in this cause, I come now to decree what appears to me the result of the reasonings used, and the justice of the case.

It is therefore ordered and decreed, that all the deeds, bills of sale and conveyances,

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in question, except the bill *of sale from Stephen Townsend to Clement Brown, an executor of George Arthur, for seven negroes, dated the 22d February, 1792, be, and the same are hereby declared to be null and void, and shall be cancelled. And the real and personal estate comprised in said deeds and bills of sale, shall be and remain subject to the claims of the creditors of the said Stephen Townsend, according to their legal rights. And it is further ordered and decreed, that the deed of settlement, executed by Stephen Townsend on the 28th December, 1785, be, and the same is hereby declared to be null and void, with respect to the creditors of the said Stephen Townsend. And that the estates, real and personal, comprehended therein, shall be and remain subject to the demands of his creditors.

It is further ordered and decreed, that the judgment at law, obtained by Clement Brown, an executor of Geo. Arthur, against Stephen Townsend, under very doubtful circumstances, be, and the same is hereby declared to be satisfied, the said Clement Brown, the executor, having acknowledged by letter to the attorney, on record, that the same had been satisfied.

It is further ordered and decreed, that the bill of sale of negroes, made by Stephen Townsend to Clement Brown, as executor of George Arthur, be held as a security for the payment of such debt as may be justly and bona fide due by the estate of Stephen Town-

send to the estate of George Arthur: and that it be referred to the master to examine the accounts and demands subsisting between those estates, and to report forthwith.

With respect to the income, or rents and profits, derived from the lands and negroes comprehended within the said deeds and bills of sale, and which have come to the possession of the defendant, George Arthur—as it is clear that he was entirely ignorant, and is entirely innocent, of all the frauds committed in this case: as the property came into his hands under a legal title, apparently fair and valid; as he represented minors, whose interests he was bound to defend; and

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as he has expend*ed a considerable part of the income for the benefit of the minors, who have no estate distinct from the property in question, out of which he could be reimbursed; and as the creditors have not investigated these transactions, and pursued their rights with the diligence which they might have done—It is ordered and decreed, that he shall be allowed, in his account of the receipts of rents and profits of said real and personal estates, all just and reasonable charges for expenditures by him made, for and on behalf of the education, support and maintenance of the said minor children of Stephen Townsend; or for and on account of the protection, improvement or safe-keeping of said property; with his commissions on such receipts and expenditures.

Messrs. Geddes, Croft, Cheves, and W. L. Smith, solicitors for complainants.

Messrs. K. L. Simons and Bee, for defendants.

There was no notice of any appeal in this case.

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3 Desaus. 241

Case XLIII.

JOSEPH DARREL v. EDEN and Wife, and REBECCA DARREL, Administratrix of W. Darrel, Administrator of Joshua Darrel, and Administrator with the Will Annexed of Jonathan Darrel.

[Tried before Chancellor Desaussure, February, 1811.]

[*Executors and Administrators* ⟸104.]

Interest is chargeable on the annual balances in executors' accounts unless necessarily kept in his hands for the purposes of the estate—and so he may charge interest on balances in his favor.

[Ed. Note.—Cited in Davis v. Wright, 2 Hill, 563, 564; Pace v. Burton, 1 McCord, Eq. 250; Wright v. Wright, 2 McCord, Eq. 201, 202; Livingston v. Wells, 8 S. C. 363.

For other cases, see Executors and Administrators, Cent. Dig. § 424; Dec. Dig. ⟸104.]

[*Executors and Administrators* ⟸303.]

Executor not liable for debts not recovered, unless there be gross neglect.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1233; Dec. Dig. ⟸303.]

[*Costs* ⟸146.]

Each party to pay his own assessor.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 567; Dec. Dig. ⟸146.]

This case came on upon the master's report and exceptions filed by Mr. and Mrs. Eden. The exceptions made three points:

1. That some of the items admitted by the master and put to the debit of the complainant were admitted without vouchers.

2. That the master allowed interest on the

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balances *at the end of every six months. Whereas no interest should have been allowed at all.

3. That the master has omitted to give credit to defendants for the bond of Jos. Darrel, the complainant.

On the 1st and 3d exceptions, it was agreed by the counsel that they would re-examine and settle those points between themselves; and the counsel have since withdrawn their first exception.

The second exception was fully argued, and requires the decision of the Court.

As the very right to allow interest was brought under discussion in this case, it seems proper to examine this question fully.

The old cases did not allow interest against executors where they had monies of the estate in their hands. So settled was this principle, that in the case of Radcliffe v. Graves, 1 Vern, 197, it was said there were at least forty decided cases against the allowance of interests against executors. The Court however in that case, broke through the old rule and allowed interest. But the decree was reversed on appeal to the House of Lords. This continued to be the rule, and even as late as in the time of Lord Hardwicke, interest was refused. In the case of Adams and Gale, 2 Atk. 106, Lord H. said, "As an executor may make use of money which is perpetually coming in by assets of the testator and turn it to his own advantage; and as it is not improper for an executor to take it on his own account, where he is a responsible man and ready to answer debts and legacies when called on, therefore I do not think it right to allow interest for the note."

The doctrine however was reconsidered by Lord Thurlow, in the case of Newton and Bennet, 1st Brown's ch. rep. 359, and the old rule was denied to be the law of the Court; a higher equity was introduced, and it was then firmly established, and has never since been denied there that where an executor or trustee has made or received interest on the money of the estate, he is chargeable in equity with interest. And by other decid-

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*ed cases, it has been settled that if an executor or trustee should keep money in his hands for any length of time, which he might by application to the Court, or by vesting in

the funds have made productive, he shall be chargeable with interest thereon. See 3 Brown, 73, Littlehales v. Gascoigne; 3 Brown 433, Franklin v. Frith; 1 Brown, 375, Perkins v. Bayntum. And the executor investing money in the funds shall be protected from any fall in the stocks. 3 Bro. rep. 147, Hutcheson v. Hammond, and the case of Champion cited therein, and 3 Bro. 147, Franklin v. Frith. In this state interest has been refused formerly. See the case of the executrix of John Stock v. Blake, executor of Rachel Stock, [1 Desaus. 191,] decided in July, 1791, where the Court took the broad ground, that no law obliged the executor to place money out at interest; and no authority being given in the will then under consideration, it refused to allow interest. In subsequent cases, however, interest has been allowed. See the case of Stuart v. Carson [1 Desaus. 500,] decided in 1796. The master reported in favor of the allowance of interest, and his report was confirmed. From that time it appears to have been the course of the Court to allow interest on executors' accounts; in their favor where they appear to have been in advance for the estate; and against the executor, where he appears to have had money of the estate in his hands, and which there was no reasonable ground for him to keep by him unemployed. † Doubtless there are many cases in which an executor may have money in his hands, and yet it would be improper to charge him with interest thereon; as where suits are pending against the estate, and he ought to be prepared for the event; and under many other circumstances. But it lies with the executor to shew the existence of such circumstances as would justify the departure from a rule founded in great justice and equity. In the

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case under our consideration, there *do not appear any circumstances which required the executors to keep money in their hands; no urgent debts; no demands which put the estate in hazard. I do think, therefore, that interest should be allowed. But the account is made up, allowing interest, half yearly. This is incorrect; for the law directs executors to make up their accounts yearly, and interest should be allowed on the annual balances, whether for or against the executor. The interest account should be kept in a separate column, and compound interest should not be allowed.

With respect to Mrs. Rebecca Darrel, one of the defendants, a question was made as to three notes of hand. One, of N. Legare, for £34 15s. 1d. and due the 1st of March, 1797; another, of Peter Croft, for £40 2s. and due 20th January, 1798; a third, of Robert Darrel, for £46 due 20th January, 1798. Joseph Darrel, the executor of Jonathan Darrel, died in 1796, and the notes fell into the hands of Wm. Darrel, the administrator.

It was contended for complainant, that by defendants' laches, all these notes were barred by the statute of limitations, and the money lost, and that the defendants were liable for them. On the other hand it was insisted that with respect to the first note, (that of N. Legare) Mr. Jonathan Darrel, brother and co-heir of the complainant, had given a receipt for that note on the 17th July, 1800, and had taken the note on him.

I am so reluctant to make executors or administrators liable for debts which they have not received, and which many circumstances (forgotten after many years, especially where the executors are dead,) might have prevented their receiving, that I am willing to be satisfied with any reasonable excuse to exonerate them from the responsibility which would necessarily attach to any gross neglect of collecting the debts, and suffering them to be lost for want of reasonable diligence. I am therefore disposed to admit that as one of the heirs received the note

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many years ago, without any objection *at the time, this shall exonerate the executors as to that note.

As to the second note, (that of P. Croft,) it is alleged that he was insolvent at the time the note fell due, and even when it was taken. This certainly would furnish a complete excuse for the executor, upon the fact being established; and Mr. Parker's testimony I think completely establishes his insolvency.

As to the third note, (that of Robert Darrel,) it was conceded that he was solvent, and no reasonable excuse was made for not collecting that debt. I think that the executors are liable for that note.

With respect to the allowance of sixty dollars to each of the assessors to the master, I think each is bound to pay his own. They are of their own choice; they were called in by consent; and I am not aware that the Court could allow the demand as part of the costs against the others—therefore let each pay his own assessor.

Mr. Simons, for complainant.
Mr. Drayton, for defendants.
There was no appeal from this decree.

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3 Desaus. 245

Case XLIV.

J. R. WITHERSPOON and D. M'CALLA WITHERSPOON v. Dr. THOMAS M'CALLA and SAMUEL B. JONES, Executors of Mr. Anderson.

[Tried before Chancellor Desaussure, March, 1811.]

[*Vendor and Purchaser* ⟸127.]

A purchaser evicted on account of defectiveness of title, or released by the seller on ac-

† I have conversed with the master on this subject, and he states this to have been the course of the Court for a considerable time past.

count of a defect in the title) is entitled to reimbursement for actual improvements, from the seller.

[Ed. Note.—Cited in Lowrance v. Robertson, 10 S. C. 30.

For other cases, see Vendor and Purchaser, Cent. Dig. § 231; Dec. Dig. ⊂⊃127.]

The bill in this case was filed originally to procure a dissolution of the contract made for the purchase of a tract of land which the late Rev. Dr. Daniel M'Calla had made from

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the defendants; on the ground that the *title was defective; and to procure reimbursement of the purchase money, with interest. Also, reimbursement for the buildings put upon the place by the purchaser.

At the hearing of the cause it was agreed, by the parties, that the contract should be rescinded;† and that the occupancy by the purchaser should be set against the interest on the purchase money which had been paid —and I confirm this agreement.

The only question then which remained, related to the price of the improvements which had been put upon the place, by the purchaser, during the occupancy.

The objections made were, that the purchaser knew, at the time of the purchase, there was a doubt about the title, and therefore ought not to have made any improvements; and that the improvements were chiefly ornamental, and not substantial and permanent.

The first objection goes rather to any reimbursement at all, even for the price paid. That objection turns upon the ground, that if the purchaser, before executing the articles, knew that there was a defect of title, or incumbrances, he shall be considered as having entered into the contract with his eyes open, and has chosen his remedy at law; and equity will not assist him, but leave him to his remedy at law. But that point cannot now be made here, for it is agreed that the purchase ought to be and shall be rescinded, and that the purchase money shall be restored, but without interest, as the occupancy was equivalent to the interest: and this agreement seems best to comport with justice; for there are very few cases in which the Court will not, upon a defect of title, assist the purchaser to recover the purchase money, and also money laid out in lasting improvements. †† Where indeed the defect was notorious, and the purchaser bought on a speculation, and obtained the property at a price far below the value, on account of

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*the known defect, it seems reasonable that he shall not afterwards claim a reimbursement even of the purchase money. But nothing of that kind appears to have existed here. It is not pretended that the defect was notorious, and that the property was obtained below the value on account of that defect, and on account of his running the risk of the title. I think therefore that the executors have done right to submit to the reimbursement of the purchase money; more especially as the purchaser, the Rev. Dr. M'Calla, upon being informed of some doubt existing as to the title, expressly declared he should look for reimbursement to the executors; and this was not contradicted. But the executors object that the buildings and improvements were ornamental, and not necessary or permanently useful.

From the facts stated, and not contradicted, it appears to me that the improvements were not ornamental, but substantial and useful. It being, however, the course of the Court to submit the enquiry, relative to such expenditures, to the master, I shall pursue that course. Let it therefore be referred to the master to examine and report what were the expenditures for the useful improvements in question, making deductions for the deterioration of the buildings during the occupancy of the party who made the improvements, and down to the time of the recision of the contract.

The master afterwards made a report, in favor of complainants, which was confirmed, and the case ended.

[This case was not much discussed, as there did not seem to be any opposition to the complainants' recovery of what had been paid for the land, and no disposition was manifested by them to recover more. Mr. Cheves, who was concerned for the complainants, insisted that the improvements which increase the value of the estate should be allowed, and quoted 1 Brown's Civil Law, 206, in which the Court concurred. He referred generally, also, to the question, Whether the value of the land at the time when the con-

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tract is rescinded, or the *purchase money with interest thereon, was the just rule in such cases? He stated that the decisions were contradictory on the point what was the proper measure of damages in an action brought on the covenant of seizin in a release. The cases which establish the purchase money and the interest as the standard, are in our sister states; 2 Hen. & Mumf. 164, Nelson v. Mathews; 1 Hen. & Mumf. 201, Lowther v. the Commonwealth; 2 Root's Rep. 46, Smith v. Pitkin; to which must be added the case of Bender v. Fromberger, 4 Dallas, 436, 441, [1 L. Ed. 898,] which was elaborately argued, and in which Chief Justice Tilghman and the Judges of the Supreme Court in Pennsylvania, decided that the price paid and the interest, was the true measure of damages, conformably to the decided cases in New-York. See also, on this important subject, Cooper's Justinian, 607-8, where the cases respecting damages on evic-

† See Sugden's Law of Vendors—210 to 243.

†† See Sugden, p. 482, and the cases there cited: 1 Vern. 159, 484; 6 Vesey, jun. 617; 8 Vesey, sen. 327, and others.

tion by title paramount are referred to. The real owner, when he recovered, has never been held liable for improvements made by the unlawful possessor, unless he lay by, and concealed his title. E. Ind. Com. v. Vincent, 2 Atk. 83; 2 Eq. Cas. abr. 357; 6 T. Rep. 554; Douglas, 22; Cowp. 473. In England, the measure of damages to the evicted purchaser was the value of the land at the time when the deed was executed. Cooper's Justinian, 618; 1 Reeves, 443. And so decided in New-York, notwithstanding the rise of property. 3 Caine's, 111; 4 Johnson, 1; 5 Johnson, 18, 49, Judge Spencer dissenting. So in 2 Mass. Rep. 407, 455, by Ch. Justice Parsons. But contra 4 Massach. Rep. 108, by the Court, which said that the value of the land at the time when the covenant was broken, was the proper measure of damages. So also 3 Mass. Rep. 523; so in Kirby's Conn. Rep. 3; so in Pennsylvania, 4 Dallas, 441, [1 L. Ed. 898.] Bender v. Fromberger. In Carolina some cases have decided that the value of the land at the time of the eviction is the measure of damages in an action of covenant broken. [Liber v. Parsons' Ex'rs] 1 Bay, 19; [Guerard's Ex'rs v. Rivers] Id. 265. But later decisions seem to be in opposition to that. If the purchaser can taint the sale

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with fraud, or prove a *scienter of bad title on the part of the seller, the purchaser would recover full damages on the increased value and improvements. Cooper's Justinian, 620; Co. Litt. 384; Comyn's Digest, 236; 4 Johns. 12.]

Mr. Cheves, for complainants.

Messrs. Smith and Bacot, for defendants.

There was no appeal from the decree in this case.

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3 Desaus. 249

Case XLV.

MORTON WARING v. ANN MIDDLETON, WRAGGS, and Others.

[Tried before Chancellor Desaussure, February, 1811.]

[*Wills* ⊂⊃598.]

Words of inheritance or perpetuity not necessary in a will to give a fee simple estate. It may arise by implication. If the intention to give a fee can be discerned, it shall take effect.

[Ed. Note.—Cited in Scanlan v. Porter, 1 Bailey, 428; Jenkins v. Clement, Harp. Eq. 83, 14 Am. Dec. 698; Dunlap v. Crawford, 2 McCord, Eq. 179; Canedy v. Jones, 19 S. C. 302, 45 Am. Rep. 777; Robert v. Ellis, 59 S. C. 156, 37 S. E. 250.

[For other cases, see Wills, Cent. Dig. § 1331; Dec. Dig. ⊂⊃598.]

The question in this case arises on the will of Miss Judith Wragg, which was executed in the year 1780. She died soon after, unmarried, and without having revoked her will. Among other dispositions of her property she made the following: "I leave to my brother, John Wragg, the house and land I have in Charleston, for his life." "I leave to my niece, Ann Manigault, (now Mrs. Middleton, the defendant,) my house and land in Charleston, after the death of my brother John Wragg; but in case she should die before she comes of age, or is married, I would have it sold and the money equally divided between the surviving nieces."

Mr. John Wragg, who was the eldest brother, was, according to the then law, heir at law of his sister. He survived her and enjoyed the property in question for life. He died in June, 1796. On his death Mrs. Middleton took possession of the house and lot under the devise to her; and believing she had a fee simple in the land, she sold it to Mr. Morton Waring, the complainant. He made great improvements, and being about to sell the estate, and his title being looked into, a doubt arose, whether Mrs. Middleton had a fee simple estate, or a mere life estate. To quiet this doubt, and to enable him to sell, he has filed this bill against Mrs. Middleton, and the heirs of the late Mr. John

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Wragg, who *would have been entitled as heir at law, if the devise in question should be construed to give only a life estate to Mrs. Middleton. All of them have renounced all claim, supposing a fee simple clearly vested in Mrs. Middleton, except some minors, of the Georgetown branch of the family, whose guardian was not at liberty to make any waiver of their rights, and one or two adults. In their answer it is insisted that Mrs. Middleton took only a life estate under the devise of her sister's will; and that on her death, whenever that event shall occur, the fee will devolve on all the heirs of the late Mr. John Wragg, who was undoubtedly the heir at law of the testatrix.

This cause came to a hearing.

Mr. Bee contended for the complainant, that there was a plain intent in the testatrix to give a fee to her niece, Miss Manigault, now Mrs. Middleton. The will devises the lot of land to the testatrix's brother, Mr. John Wragg, for his life; then to her niece, after the death of her brother; but in case her niece died before she came of age, or before she married, she directs the land to be sold and the money divided between her surviving nieces: but there are no words of inheritance to them. The testatrix when she means to give a life estate, as in the devise to the brother, expressly limits it to his life. She then instantly devises it to her niece, without such limitation. This raises a strong presumption that she meant to give a fee to her niece, provided she did not die before marriage, or attaining twenty-one years of age.

As to necessary implications, see the case in Will's reports, p. 142. There is no case in the books (but one in Comyn's reports) which has been overruled where a devise to

one person, and in case of that person dying under age, limitation over to another has been construed to give only a life estate. See 2 Bla. 381; Cowp. 307. A devise to A. and if he dies under age, then to the heirs of the testator, gives a fee to A. Dougl.

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754. See *also, Frogmorton v. Hollyday, 1 Bla. Rep. 535, and 3 Burr, 1618. See, also, Douglas 754. See, also, other cases in corroboration, 3 Burr, 1898, 1540; 1 Durnf. and E. 414; Swinb. 157; 2 Bos. and Puller, 250; 5 Bos. and Puller, 220; 5 D. & East. 562, 95; 3 Comyn's digest, p. 422, 430; 2 Dallas, 244; 3 East. 516; 9 East. 141; 10 East. 410.

Mr. Grimke, for the minors, claiming as part heirs of Mr. John Wragg, contended that the testatrix had not given a fee to Miss Manigault, now Mrs. Middleton. It must be shewn that there is a necessary and inevitable implication to exclude the heir at law. In this case there is no such necessary implication to raise a fee. It is only a devise for life to Mrs. Middleton.

In Frogmorton's case there was a residuary clause. The limitation over is not inconsistent with the devise for life to Mrs. Middleton. The limitation over is not to the heir at law her brother, but to the hœres facti, her nieces.

Decree.

The case has been very ably argued, but I think it a very plain case.

Before we go into the examination of the particular clauses in this will, upon the construction of which the decision must turn, I will notice one or two circumstances which were thought of some importance in the argument.

There is no clause in the beginning of this will, declaring an intention to dispose of the whole of her estate; nor any residuary clause. It is common in cases of wills, in which there is a clause in the beginning of the will declaring an intention to dispose of the whole of the estate, to infer from thence, that as the testator avowedly did not mean to die intestate of any part of the estate, the devises even of a doubtful nature should be construed favorably to extend the estate, and give a fee simple to the devisee; because a contrary construction would tend (where there was no residuary clause) to produce an intestacy as to some part of the estate,

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*against the express declaration of intent by the testator.

It was argued very ingeniously by the young counsel† who advocated the rights of the minors, that the absence of such clauses in the will in question, furnished a strong presumption that the testatrix did not mean to dispose of all her estates in the property devised by her, and therefore in all doubtful devises it was proper to look with an unfavorable eye to the enlargement of the estate into a fee simple. The use made of such preliminary and declaratory clauses in wills, is generally greater than they will bear. It is indeed an auxiliary in very doubtful cases; but I question if ever a decision was made merely on the ground of such a clause being inserted or omitted. They are make weights in an argument; but one of the scales must have been inclined downward, before any use can be effectually made of it. And this intent to dispose of all the testator's property and estate, is as inferrable from other circumstances as from an express declaration. In the very case under consideration, there is such a full, minute and particular disposition of all the testatrix's property down to teakettles, watch trinkets and smelling bottles, that no person can doubt that she intended to dispose of her whole property, and not to leave any part of it to go merely as the law would have given it. And with most persons unlearned in the law, a disposition of real estate without words of inheritance, is considered as absolute a gift of it, as of personal estate.

The testatrix was manifestly inops consilii, at least of legal counsel. And she does not appear to have been at all aware of the propriety of the use of words of inheritance as to real estate; for she disposes of her plantation and negroes to her nephew, Mr. Joseph Smith, without any words of inheritance; yet she manifestly intended him to be the chief object of her bounty. Could it be believed for a moment that she intended to give him merely a life estate, and that upon his death the estate should devolve to

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her brother, an elderly man *without a family? And without the prospect of any? Certainly not. Yet his claim to a fee simple estate rested on a provision exactly similar to the one under our consideration, to wit, that if he should die under twenty-one years of age, the estate devised to him should go to the surviving nephews and nieces; the plantation to go to her nephew Samuel Wragg, but without any words of inheritance even in this last disposition to him.

It is true the devise to Mr. Joseph Smith is encumbered with a charge of £20,000, which of itself has been considered as giving fee simple to the devisee; and rightly. But this only shews in how many ways a fee is raised by implication, to give effect to the intent of the testator. But it is time to proceed to the consideration of the clauses of the will in question on their own intrinsic merits. They have been stated before, and I think it was plainly the intention of the testatrix to give her niece a fee. She gives an express estate for life to her brother, manifestly intending that to be the whole interest he should have in the property. On the expiration of that estate by his death, she

† Mr. J. S. Grimke.

gives her niece an estate, which is either a fee or a life estate. If the former be conceded, the question is at an end. If the latter, then this absurdity follows: she gives to the heir at law an express estate for life; then to her niece an estate for life; at the expiration of which the same estate is to devolve in fee on her heir at law, who must be dead before the event can occur. The law does not suppose such an absurdity, when a plain and rational construction gives a different result. The giving an express estate for life to her brother, and then an estate to her niece, with limitations over to her surviving nieces, on certain events which have not happened, raises an estate in fee by implication. If she had intended a mere life estate to her niece, she would have expressed it; for she did so as to her brother. If she had intended her surviving nieces to take the estate at all events, at the expiration of Mrs. Middleton's life, she could have done this in the plainest and simplest

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way. But she has *used such words that if Mrs. M. does not take a fee, her surviving nieces on the events which have happened take nothing; and the heir at law would by such construction take the fee, when it appears she had given him an express life estate in the same property, thereby manifesting her desire that he should have no more. In short, look at this question in any point of light, and there is a plain, necessary and almost inevitable implication of a fee simple estate given to Mrs. Middleton. It is really unnecessary to follow the ingenious course of reasoning by which the complainant's counsel demonstrated his point. It is enough to say, I am entirely satisfied that the testatrix intended to give a fee to her niece, Mrs. Middleton, and that intention is sufficiently manifested by a necessary implication; and there is no rule of law opposed to it. This question has been often decided. I will not go over the cases at full length. It is enough to refer to a few of the great leading cases.

Devise to A. and if he die under age, to the heirs of the devisor, A. has a fee. 3 Comyn's digest 424; 2 Saunder's 388. Devise to A. for life, remainder to B. and if B. dies under age to C. and his heirs. B. takes a fee. 3 Comyn's, 425, Moon and others; Wills' rep. 142; Frogmorton v. Halliday; 3 Burr. 1618; 1 Bla. rep. 535; 3 Burr. 1540; 3 Comyn's 430; Baddely v. Lippingwell, 3 Burr, 1533. The later reports are entirely in concurrence with the old decisions.

To conclude. I am clearly of opinion that Mrs. Middleton took a fee under the will in question: consequently that she had a right to dispose of the land. Having done so, her alience is entitled to be confirmed and quieted in his title. It is therefore ordered and decreed that the title from Ann Middleton to the said Morton Waring, his heirs and assigns, be confirmed; and that the said Morton Waring, his heirs and assigns, be quieted in the possession of the said property under the said title; that the costs of those defendants who disclaimed be paid by com-

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plainant; and that defendants who have *insisted on a title, do pay their own costs, and those of the complainant: reserving rights of minors as usual.

From this case there was an appeal on the following grounds:

1. Because from the whole tenor of the will, and the time when it was made, the male line throughout are and ought to be preferred, and there is no express exclusion of the heir.

2. Inasmuch as the devise to Ann Manigault is only, in a legal view, a life estate, and cannot by construction be converted into a fee simple. Thos. S. Grimke.

March 8, 1811.

These grounds were supported by the following reasoning.

Grounds of appeal.

1. From the time when testatrix died, viz. 1780, the rights of heirs at law are to be recognised as in England, and the will to be interpreted with a view to them.

2. Testatrix knew of these rights, and could easily have negatived them, but there are no introductory words, no residuary clause, not an expression hostile to the primogeniture rights, much less a positive exclusion of them.

3. Testatrix throughout prefers male to female relatives; gives no such superior benefit to any nephew over the rest, as to this niece over the others; places A. Manigault on a level with all the nephews and nieces as to a contingent right to a proportion of the proceeds of a plantation devised on condition subsequent to Jos. Smith; prefers an entire family of nieces all equally, except the wife of the late Gen. C. Gadsden, and yet gives more to the nephews of the same family, than to A. Middleton's brothers, if she takes a fee.

4. That a precedent devise even to the heirs is not conclusive.

5. That A. Middleton by the first part of

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the clause, *has only a life estate, and the latter part is consistent with such, inasmuch as the limitation over only points out what course, different from the legal one, the estate should take, within a short given period; but does not therefore exclude the heirs, on the termination of the said life estate at a more distant indefinite period.

Grimke, App'lts' Sol.

The appeal came to a hearing and was fully argued.

The Court, consisting of Chancellors James, Thompson, Desaussure and Gaillard,

affirmed the decree of the Circuit Court, being of opinion that Mrs. Middleton took a fee simple estate, by necessary implication.

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Case XLVI.

WILLIAM CUDWORTH, and Sarah, His Wife, and Her Two Children by Thomas Hall, v. MARY THOMPSON, Administratrix of Thomas Hall.

[Tried before Chancellor Desaussure, March, 1811.]

[*Perpetuities* ⟸4; *Wills* ⟸602.]

A bequest to two nephews & their heirs, but in case they should die without leaving issue, then over to other persons, the limitation over is not too remote. But both of the nephews dying, and one of them leaving issue, the estate is absolutely vested, and the subsequent limitation is void. The estate vested in the nephews, so as to be transmissible to the heirs of the one leaving issue, and his widow is entitled to one third of the property, and his children to the other two third parts. Trust estates construed as legal estates.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. § 30; Dec. Dig. ⟸4; Wills, Cent. Dig. § 1354; Dec. Dig. ⟸602.]

[*Parent and Child* ⟸3.]

Children to be maintained out of their own property, where the mother is unable.

[Ed. Note.—Cited in Rhode v. Tuten, 34 S. C. 502, 13 S. E. 676.

For other cases, see Parent and Child, Cent. Dig. §§ 33–62; Dec. Dig. ⟸3.]

The late Mrs. E. Player, made her last will and testament on the 9th of February, 1801, wherein amongst other things she bequeathed as follows: "With respect to the remainder of my negro slaves, I hereby give and bequeath them to my nephews, William and Thomas Hall, their heirs and assigns forever; but in case both my nephews shall die without leaving issue of their bodies, then I give and bequeath the said slaves, with the future issue and increase to Mr. Thomas Hamlin, their heirs and assigns forever. My will further is, that until the contingency aforesaid shall happen, the said slaves shall remain and be in the charge of and under the direction of Mr. Thomas Hamlin and Dr. A. V. Toomer, whom I hereby nominate and appoint executors of this my last will, who are hereby directed annually to pay over the profits arising from the labor of the said slaves to the said William

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and Thomas Hall, equally, for their *exclusive use and benefit." Soon after the death of the testatrix, leaving her said last will in full force, one of her nephews, William Hall, died, without leaving any issue, and the surviving nephew, Thomas, in the year 1803, married Sarah Howard, by whom he had two children, Thomas and Elizabeth; and in October, 1808, he died intestate, leaving alive his wife and his two children. The widow, Sarah Hall, obtained letters of administration on the estate of her deceased husband, Thomas Hall, and took possession of the negroes which had been bequeathed by Mrs. Elizabeth Player. In February, 1810, she intermarried with Mr. William Cudworth, the complainant; and upon some reports of Mr. Cudworth's intending to sell the said negroes, or some of them, the securities to Mrs. Cudworth's administration bond applied to the ordinary of the district to be released from their bonds; and Mr. Cudworth and his wife not being able to find securities, the ordinary revoked the administration, and granted the same to Mrs. Mary Thompson, the present defendant, who is related to the family. She has since possessed herself of the negroes in question and receives the profits of their labor. The complainants allege that the negroes bequeathed by Mrs. Player belong to the widow and children of Thomas Hall; and they demand a re-delivery of them, and an account of the rents and profits of their labor, from the administratrix of Thomas Hall, who is charged with having possessed herself unjustly of them. The defendant insists that the said negroes belong exclusively to the two children of Thomas Hall, and declares her readiness to account for the rents and profits, and to apply the same as she may be directed to the maintenance and education of his two infant children.

The first question which was made on the argument of this cause, was, whether the limitation over to Mr. and Mrs. Hamlin was too remote, and therefore void, or within the rules prescribed by law, and therefore good? Perhaps it was not necessary to have labored this point, for the two legatees, the Halls, are

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both dead, and the *survivor of them left issue alive; and thenceforth the contingency on which the limitation over to Mr. and Mrs. Hamlin might possibly have taken effect, is at an end, and with it an end of the claim of the Hamlins. If it were material to decide on the question first mentioned, I should incline to say that the limitation over was not in its creation too remote; for it is a rule of this Court to lay hold of any words in a will, in executory devises of personal estate, to tie up the generality of the expression, dying without issue, and to confine it to dying without issue living at the time of the person's decease. Thus the words, dying without leaving issue, have been construed to mean, without leaving any issue living at the time of the death of the person so spoken of. See Fearn on Ex. Devis. 4th ed. 186, 191; 3 P. Wms. 258; 1 P. Wms. 663; 2 Atk. 642; 3 Atk. 396.

These are the very words of Mrs. Player's will, and therefore the limitation over to the Hamlins' was not in its creation too remote on that account. But this contingency

is at an end by the death of the Halls, one of them leaving issue alive, as above remarked. And besides it has been fully settled, that though there may be several limitations after the first executory devise of the whole interest, and that any one of them may be good in event, if no one of the preceding executory limitations which would carry the whole interest happens to vest, yet when once any such preceding executory limitation happens to take place, all the subsequent limitations become void, and the whole interest is then vested. See Fearn on Devises, 415, 416, &c. So that if there had been any contingency in this case at all, yet on one of the Halls (the legatees) having issue, and leaving that issue alive, there was an end of the limitation over to the Hamlins: I incline however to the opinion, that the estate vested immediately in the Halls. This brings us to the consideration of the principal question, what estate did the two legatees, the two Halls take, under the will of the testatrix? The words of the will, material to this point, may

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be remembered to be "to my nephews, *William and Thomas Hall, their heirs and assigns forever; but in case both my nephews shall die without leaving issue of their bodies, then I give and bequeath the said slaves, &c. over to Mr. and Mrs. Hamlin." The rule of law seems to be that where there are words in the will which would have given an estate tail in real property, to the devisee, the legatee of personal property shall take an absolute interest. 2 Bla. Com. 174; 2 Fonbl. 79, and the cases quoted. Note.

Now if we apply this rule to the words of the will, it is obvious that the legatees took an absolute estate in the negroes, with cross remainders by implication. See Cowper, 780, 800; 4 Term Rep. 710; 5 Term Reports, 431, 521.

It is true that if from any expression in the will, the testator should appear to have intended that the legatee should take a mere life estate, and the heirs or issue to take by purchase, they shall do so, in order to give effect to that intent. See 2 Fonbl. 79, 80, with the note (t.) where the whole doctrine is clearly stated, and the authorities examined and reconciled. See particularly 1 P. Wms. 132, Webb and Webb; 2 Vesey, 660, Garth and Baldwin.

But on examining the will in this case there is nothing to warrant the idea, of any intent of the testatrix to restrain the estates bequeathed to mere life estates. The words used are general; not directly restricting the estates to the lives of the first takers, nor raising any necessary implication. There is nothing to warrant the supposition of any intent of the testatrix to provide specially for the children of the two nephews, the first legatees, by restrictive words on their parents. This is not the case of a marriage settlement, where there is always valuable consideration, and it is a main object to provide for children and make them secure in succeeding to the property given to their parents for life.

It was however urged, that there is a subsequent clause in the will which varies this case from others, to wit, the direction that

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until the contingency should hap*pen, (the dying of the two legatees, the Halls, without leaving issue) the slaves bequeathed "should remain and be in charge of and under the direction of Mr. Thomas Hamlin and Doctor A. V. Toomer, whom I hereby nominate and appoint executors of this my last will, who are hereby directed annually to pay over the profits arising from the labor of the said slaves, to the said William and Thomas Hall, equally for their exclusive use and behoof." And it was argued that this clause furnishes a presumption of the testator's intent to restrain the estate of the first legatees to a mere life estate, so as to let in the children as purchasers, and entitle them to the whole estate; or at any rate to create a trust which was governed by different rules than legal estates.

Upon mature consideration it does not appear to me that the clause of the will, in question, does indicate with sufficient clearness such an intention in the testatrix to restrain the estate of the first legatees to a mere life estate, and to let in the children as purchasers. It may have been, and probably was, a provision made by the testatrix merely to protect the estate from abuse, from the contentions of the two legatees; or to insure better management of the property, by persons in whose judgment the testatrix had more confidence than in that of her two nephews and legatees; for though the objects of her bounty, she does not make them executors. It does not strike me that the testatrix meant by this clause to vary the rights of the parties under the express devises in the preceding part of her will. I cannot imply such intention in order to violate a rule of law; especially when it was easy for the testatrix to have expressed such intent if she wished it, so clearly, as to have left no doubt.

I come now to consider the other argument, that this clause raised a trust, and that this will produce a different decision on the rights of the parties under the will, inasmuch as trusts are governed by different rules than legal estates. Although the words, trust and trustee, are not mentioned in the clause in

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question, I agree that *it did by necessary implication raise up a trust in the executors to perform the duty there prescribed. But I do by no means agree, that the moment a trust estate is raised, a different rule of construction is necessarily to take place from that which would have governed the legal estate. On the contrary, it has often been decided

that the limitations of the trusts of a term, (or other personal property) and executory devises, are governed by the same rules. See 2 Fearn. 354, 380. And these last, relative to personal estates, are decided according to the doctrines applicable to real estates. See 2 Bla. Com. 174, in note; 1 Fearn. 103, 105, 203, 123. And Lord Hardwicke, in the case of Garth and Baldwin, 2 Vesey, 660, laid it down as a rule, that in limitations of a trust, either of real or personal estate, to be determined in equity, the construction ought to be made according to the construction of limitations of the legal estate unless the intent of the testator plainly appears to the contrary, by express declaration, or necessary implication. The case of Bagshaw and Spencer, 2 Atk. 583, seems to be contrary to this; but when examined, it will be found that Lord Hardwicke professed to decide on the intent of the testator. And Lord Keeper Henly, in Wright v. Pearson, 2 Ves. 657-8, and Lord Thurlow, in Jones v. Morgan, 1 Brown, 206, both strike at the authority of Bagshaw and Spencer, though cautiously and respectfully, from deference to Lord Hardwicke's great name.

In several of these cases there were devises of both real and personal property to trustees, with power to receive the rents and profits and apply the same to the use of the cestui que trust, for life, and upon his death to his issue. Yet the first taker was decreed to take an absolute estate, and the children did not take as purchasers. See the cases collected in 2 Fonbl. 79, and see 1 P. Wms. 132, Webb and Webb; 2 Ves. 660.

Upon the whole, the result of this laborious examination of the difficult doctrines and cases abovementioned, is, that after the best reflection I have been able to give, I am of opinion that in the case before the Court the

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two *legatees, the Halls, took absolute estates in the negroes bequeathed, with cross remainders by implication; and that the children of the survivor come in and take, not as purchasers, but under the limitations of the will. As a consequence, Mrs. Cudworth, the complainant, widow of Thomas Hall, deceased, is entitled to one third of the negroes and their issue; and the two children of Mr. Hall are entitled to the other two third parts of the negroes.

It is therefore ordered and decreed, that one third part of the said negro slaves and their issue be allotted to the said William and Sarah Cudworth, under writ of partition to be issued out of this Court.

It is further ordered and decreed, that the defendant do account before the master for the rents and profits arising from the hire and labor of the said slaves, from the time of her being in possession thereof, deducting all reasonable charges for clothing, feeding, medical attendance, and other proper demands; and that one third part of the nett balance be paid to complainants on their own account. And it appearing to the Court that Mr. Cudworth and his wife are in poor circumstances, and unable to maintain the said children, it is further ordered and decreed, that the rents and profits and income, derived from the labor of said slaves, now due, or which may hereafter be received, be paid to the said Sarah Cudworth for the maintenance and support of her two children, Thomas and Elizabeth Hall, the children of the said Thomas Hall, deceased; the costs to be paid out of the estate.

There was no appeal from this decree.

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3 Desaus. *263

*Case XLVII.

Executors of PETER BLAKE v. JOHN LOWE.

[Tried before Chancellor Desaussure, March, 1811.]

[*Gifts* ⟸77.]

Complainants to recover from the defendant the amount of the debt which their testator advanced for defendant with interest. All the jewelry in the shop passed under the donatio causæ mortis. The notes and other choses in action which fell into defendants hands on the death of testator to be delivered to executor.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 114; Dec. Dig. ⟸77.]

[*Evidence* ⟸78.]

[Where a party had improperly got possession of books, and mutilated them by cutting out leaves, he was not allowed to take advantage of any entries in such books.]

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 98; Dec. Dig. ⟸78.]

[*Fraudulent Conveyances* ⟸177.]

[After the death of the payee of a note, a third person will not be allowed to claim the note on the ground that it was given for property of such third person, which had been put into the hands of such payee to screen it from creditors, without the most irrefragable proof.]

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 543; Dec. Dig. ⟸177.]

The bill in this case is filed by the executors of Peter Blake against John Lowe to obtain an account and a settlement. The principal facts in the case are as follows Peter X. Lafar had instituted a suit against John Lowe for malicious prosecution, and had obtained a verdict for 700 dollars. He entered up judgment and issued execution, under which John Lowe was committed to gaol. Lowe, before he was committed to gaol, had made out a schedule of his effects, which Lafar had examined and approved. Some time previous to this a levy had been made on the shop and jewelry, and a negro boy, of John Lowe, under another execution; and at the sale, Peter Blake, who was an intimate friend of Lowe, had bought them in at a very low rate. The goods were continued in the shop which Lowe had kept in

Church street; and though Blake was not a jeweller, the shop and its business went on in his name. To relieve John Lowe from gaol, Peter Blake gave his four several notes, each for $175, amounting to $700, endorsed by J. Darby to Lafar, who has since put them in suit and recovered the money, with costs, against Blake's executors. Blake becoming sick, two deeds were prepared and executed on the 5th December, 1807. One was an assignment by John Lowe to Peter Blake and John Darby of all the effects which had been comprised in the schedule abovementioned, in order to secure Blake against the effect of the notes he had given for the payment of Lowe's debt on the judgment of Lafar; the overplus to be returned to him. No delivery took place of any thing mentioned in the assignment. The other deed was executed by Peter Blake. It was a donatio causa mortis, drawn with uncommon skill, of all the jewelry, shop furniture and the negro boy, which Blake had purchased at the sheriff's sale as

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above men*tioned, or rather of so much of the jewelry as remained unsold. Both these papers were executed in presence of respectable witnesses. The donatio causa mortis referred to a possession actually previously given by Blake to Lowe of the effects contained in the deed. P. Blake also made a will, and left complainants executors, and died on the 7th Dec. 1807. Immediately on his decease Lowe took possession of every thing in the shop, and carried them off, with some notes, papers and books of the deceased. The first point in dispute related to the notes given by Blake for Lowe's debt to Lafar. Upon this claim the Court cannot have the least doubt. It is a plain subsisting debt. Blake's executors have been compelled to pay the amount of the execution with costs, by an execution, under which the negroes of Blake's estate have been sold; and it is impossible to refuse the demand of the complainants for the reimbursement of that amount. Two objections were made however to this demand. First, that the assignment comprised many good debts, which might and ought to have been recovered by the assignees, and applied to the payment of this debt; and that the laches of the assignees exonerated Lowe, especially as one of the debts assigned was due by Lafar himself, which ought to have been set off as far as it went against the debt due on the notes. It is impossible however to support this objection; for the witnesses who saw the assignment executed, saw no delivery of the papers or effects, and no proof was furnished that they ever were delivered. Blake lay extremely ill at the time, and died in two days; and Darby, the other assignee, never acted under the assignment. There cannot therefore be any liability of the assignees for the articles assigned, which never came to their hands.

The other objection is, that Lafar would have compromised the judgment he held for $600, and that the executors had nearly cash enough in their hands of Blake to make this compromise, and ought to have done it. The plain answer to this objection is, that the

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exe*cutors were not under any obligation to make this compromise. The exigencies of the estate of Blake might have required a different application of the cash he left. They ask no more than the sum paid for Lowe, on a meritorious and friendly assumption by Blake, to relieve Lowe from gaol, and they are entitled to full reimbursement with interest.

The next question relates to certain notes, which were given by sundry persons to Blake, and which Lowe got into his hands at the time he took possession of the effects of Blake, immediately after his death. Against the claim of the executors for the re-delivery of these notes it was alleged, for the defendant, that though these notes, &c. were taken in the name of Blake, they were really Lowe's property. Some evidence was given tending to shew, that during Lowe's embarrassments Blake had acted as his friend, and endeavored to shelter his property and cover it with his name; and it was insisted that these notes grew out of some of those transactions. This was most strongly made out with respect to the note of W. Wright, given for some sugar, which he bought from Blake, and gave his note to him. Blake is proved to have said to Mr. Drummond, that the sugars he placed in his cellar were the property of Lowe, who was then in gaol. It is very possible, and even probable, that some of the transactions, for which the notes were given, were on Lowe's account; and the case of the note given for the sugar seems most probably to have been of that description. But it would be very dangerous to allow such evidence to be let in to alter the property, apparently of a deceased person. The debts are on the face of them due to Blake. Such claims founded on parol testimony, (though admissible evidence) would put in hazard the property of deceased persons, to the great injury of their heirs. And if Lowe suffers in these transactions it is by his own faulty conduct, in endeavoring to cover his property from his creditors. If a man, to suit his own purposes, will allow his property to remain in the name of another person until that per-

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son *dies, he must make out his claim by the clearest and most irrefragable testimony; and he must not rest on presumptions. Besides, Lowe behaved very ill in getting these notes illegally into his hands, and striking out Blake's name and inserting his own name.

The third ground of dispute is the claim of complainants to great part of the jewelry in the shop, of which Lowe possessed himself on the death of Blake. The executors do not

contest the donatio causa mortis, which they acknowledge to be too clearly drawn and too well executed to admit of dispute. But they allege that a much greater quantity of jewelry was in the shop than was comprised in the donatio causa mortis. The donatio causa mortis gives to John Lowe so much of the jewelry and silversmith's goods as remain unsold of the jewelry purchased by Blake at the sheriff's sale, and the shop furniture and other working tools as the same was sold, remaining in the shop formerly occupied by Lowe. The city sheriff proved that Blake had purchased the negro boy, jewelry, shop furniture, &c. at a nett sum of $212; but that the boy alone was worth $500. And Blake at the sale said he purchased for Lowe. Dorsey, the shopman, swore that the jewelry in the shop at the death of Blake was worth between two and three thousand dollars; as far as he could judge without an inventory, or particular examination; but from his daily knowledge of the goods. It was contended for the complainants, that the quantity and value of jewelry in the shop being much greater than that purchased at the sheriff's sale by Blake, which alone was given by the donatio causa mortis, such surplus did not pass to Lowe; that the shop was Blake's, and such surplus was his estate. That if there was any difficulty in discriminating, it arose solely from the unjustifiable and illegal act of Lowe in taking possession of the whole shop and all its contents; and in taking the books of the shop and in cutting out the leaves, and so destroying the evidence which would have thrown light on the case. That in odio spoliatoris omnia presumuntur; and that Lowe

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*should be made liable to the utmost extent that the Court could do it.

There is no doubt that the conduct of Lowe was highly unjustifiable; and considerable indignation is excited by his conduct in this respect, as well as in his taking the books and cutting out some of the leaves. But we must not permit our resentment against the acts of the spoiler to lead us to do injustice even to him.

There must be some ground to act upon in our presumptions. It is not certain that there was more jewelry than Blake had purchased at the sheriff's sale, and comprised in the donatio causa mortis. The shop originally was Lowe's. All his jewelry was not sold under the execution. The part sold was at a very low rate, and paid the debt, and left a balance in the sheriff's hands. What Blake bought was carried back to the shop. Blake was not a jeweller; there is no proof that he ever bought any other jewelry, or ever dealt in that way. It appears that the system of covering the property of Lowe was carried on in the shop. What was bought in was at so very low a rate, that there is no forming any judgment of the real value of it. The value put upon the goods in the shop at Blake's death, by the shopman, was a mere guess. He had no inventory; no prices; his eye alone guided him. He might be greatly mistaken.

I do not think there is any strong ground to believe there was any more jewelry in the shop than Blake had bought at the sale, except that part of the stock of Lowe which was not sold. If I had any reasonable doubts on this subject, I should have great difficulties how to discriminate. In that case I should presume much against him, if that presumption would lead to any fair and certain conclusion. But I confess I have not much doubt. I cannot therefore, because a man has behaved very ill in getting possession irregularly of the goods, make him liable beyond what I really believe him to be, as a punishment of his injustice.

There is one thing, however, I must re-

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mark. The *case of the defendant was attempted to be strengthened, with respect to the funds said to be furnished by Lowe to Blake, by shewing some entries in one of the mutilated books. But I enter my solemn protest against any use being made, in favor of Lowe, of books which he got possession of surreptitiously and illegally, and which are found mutilated in his hands. It would be monstrous to allow him to derive the smallest aid from such books.

It is therefore ordered and decreed, that the defendant, John Lowe, do pay and satisfy unto the complainants the sum of nine hundred and twenty-six dollars, 40 cents, being the amount of the principal and interest of the notes drawn by Peter Blake and endorsed by John Darby to Peter Xavier Lafar, and of the costs and charges paid to the sheriff at Charleston district from the proceeds of the sales of the negroes of the estate of the said Peter Blake, sold on the execution at the suit of the said Peter X. Lafar against the executors of the said Peter Blake. Also, the interest arising on the said sum of $926.-40 cents, from the 1st September, 1806, the time when the said sum was received by the sheriff. Also, the sum of forty-six dollars, 31 cents, which was paid, as per receipt, by the said Peter Blake to the gaoler of Charleston district, for the said John Lowe on his liberation from gaol, with interest thereon from the 6th November, 1808, the date of the said receipt. Also, that John Lowe, the defendant, or the attorney or attornies in whose hands the promissory notes, or other choses in action, may be, which were payable to Peter Blake and upon his death fell into the hands of the said John Lowe, do deliver the same or such of them as are unpaid unto the said executors, as belonging to the estate of the said John Blake, that is to say, John Strobb's note for $58; Thomas Wright's note for $259.60 cents; Daniel Ward's order in favor of Peter Blake, and by him accepted, for $106.96 cents; William Muir's due-bill for

$32; and in case any monies be received on account of them, or any of them, by the said John Lowe, or the attorney or attornies, they

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do account with and *pay over the same unto the said executors; and that the defendant do pay the costs of suit.

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Case XLVIII.

JOHN LOWE ads. Executors of PETER BLAKE.

[Tried before Chancellor Desaussure at Chambers' and before Chancellor Waties. February, 1812.]

[*Contempt* ⇐82.]

A debtor in gaol under an attachment issuing out of this Court, to enforce a decree, takes the benefit of the insolvent debtor's act in another Court, on a suit pending there. He moves to be discharged from the attachment – the creditor shews fraud in the debtor's obtaining his discharge. This Court will not discharge him from the attachment.

[Ed. Note.—Cited in Ex parte Dawson, McMul. Eq. 407.

For other cases, see Contempt, Cent. Dig. § 277; Dec. Dig. ⇐82.]

[This case is also cited in Ex parte Thurmond, 1 Bailey, 607, State v. Nathans, 49 S. C. 205, 27 S. E. 52, as to the nature of an attachment, whether civil or criminal process.]

In this case the Court had made a decree against the defendant Lowe, and an attachment had been issued against him to compel the payment of the sum of money decreed against him. He was in the sheriff's custody, in gaol under the attachment. A motion was made at Chambers before Chancellor Desaussure, to discharge John Lowe from the attachment, and the imprisonment under its authority, on the ground that he had been admitted to the benefit of the insolvent debtor's act, in the Inferior City Court, since the decree of the Court of Equity.

This motion was opposed by the complainants on the ground that he had made a false schedule, and a fraudulent concealment of his effects, and there being produced several affidavits to support the charge, he was remanded to gaol.

The Chancellor on that occasion delivered the following opinion:

That the attachment in this case not being for an actual contempt of the Court, but for the non-payment of money under the decree, which is analogous to an execution, the discharge under the insolvent debtor's act, if properly obtained, would discharge such attachment.

That the discharge of an insolvent debtor by any Court of competent jurisdiction within the State, was a discharge against all suing creditors in all the Courts of the State, according to the decision in the Court of Common Pleas in the case of Hunt and Simons, reported 2 vol. of Mr. Justice Bay's reports, p. 104, which decision has been acquiesced in ever since, in all cases clear

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*of fraud. See also the cases of Reiley and Lamar, in the 2d vol. of Cranch, 344, [2 L. Ed. 300], and Simms and Wise v. Slacum, 3 Cranch, 300, [2 L. Ed. 446.]

But that in case there was any fraud or concealment in obtaining the discharge, this Court is not bound to give effect to the discharge obtained in any other Court. That it is essential to the jurisdiction of this Court to detect fraud and prevent it having its intended effect, and even formal judgments at law cannot resist its all searching power, and when the frauds on which they have been obtained are exposed, such judgments are decreed to be nullities. That the insolvent debtor's act itself provides "that in case it shall, at any time after the discharge of the prisoner, appear that any such debtor did conceal any part of his estate, and not make a full surrender and delivery thereof, such debtor shall not be entitled to the benefit of the act." This privation of benefit in the case stated, is universal, not in one Court, but in all the Courts. Now this Court cannot give effect to such provision, unless it have the right of examining. The applicant requires of this Court to be discharged from the attachment issued by it, because he has taken the benefit of the insolvent debtor's law in the Inferior City Court.

The creditor answers that if he commits a fraud, he is not entitled to the benefit of the insolvent debtor's law, and he alledges that the debtor has committed a fraud, and offers to give proof of it. The debtor insists that this Court has no right to examine into the fraud. The Judge was clearly of opinion that the Court had a right, and was bound to go into the enquiry; and if the discharge was obtained by fraud or concealment, it was a mere nullity, like any other judgment or sentence of a Court obtained by fraud or surreptitiously.

On examining the evidence furnished to prove the fraud, by concealment of property, it did appear clearly that Lowe had concealed his property, and thereby committed a deliberate fraud on his creditors, and obtained his discharge under the insolvent debt-

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or's act, notwith*standing these frauds: therefore he was not entitled to the benefit of the insolvent debtor's law, and of course he is not entitled to the discharge he asks from the attachment issuing out of this Court to enforce the decree of the Court.

Afterwards, on the 23d September, 1811, Mr. Griggs, on the part of Lowe, moved, before Chancellor Desaussure, at Chambers, (in order to have another opportunity to have this charge of fraud tried by a jury, to which it was said he was entitled,) that the

Judge should suspend the attachment, by authority of which he was imprisoned, on his giving bond to complainants, with good security, conditioned for his appearance on the first day of the next sitting of the Circuit Court at Charleston, and for the surrender of himself; or on failure thereof to make payment of the penalty of the bond.

This motion was argued, and the Judge stated his opinion as follows:

The Chancellor said he had enquired if ever there had been a single instance of a debtor, who was in confinement and seeking to be released under the insolvent debtor's law, who had been released on bonds until he could obtain a final discharge from the Court or Jury; but no such instance could be found. That the absence of all precedent was a presumption against the application.

Besides this defendant does not stand on the vantage ground of presumed innocence. This Court has already refused his application for a discharge, on a full examination of the evidence of the fraudulent concealment of his effects. It would therefore be injustice to the creditors to release this debtor even temporarily, and thereby remove the only stimulus which may remain to induce him to do justice to his creditors.

Besides there are difficulties about the nature of the bond proposed to be given. No law prescribes one under such circumstances;

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nor can the whole extent and *effect of the measure be foreseen. It might be construed to be a release.

The motion therefore was rejected. But the Chancellor said that this decision would not prevent the party from applying for a trial of his case by a Jury, according to the act, if he desired to do so.

Afterwards, and at the regular sitting of the Circuit Court of Equity, in Charleston, in February, 1812, held by Chancellor Waties, Mr. Griggs moved for the discharge of Peter Lowe from gaol, where he was confined, as above stated, under an attachment or execution to enforce the payment of a sum of money decreed against him by the Court of Equity—on the ground that he had been admitted to the benefit of the insolvent debtors' act, by the Judge of the Inferior Court, at which time the complainants were suing creditors in Equity.

The motion was dismissed by Chancellor Waties. No copy of any formal decree has been furnished by the officer of the Court.

From this decision an appeal was made, by Mr. Griggs, upon the ground that the defendant had been admitted to the benefit of the act of the General Assembly of this state, made for the relief of insolvent debtors, by the Judge of the Inferior City Court of Charleston, in a suit issuing from that Court, and that therefore he was entitled to his discharge, the complainants being at the time suing creditors.

On the 23d March, 1812, the appeal came on to be heard by the Court of Appeals. Present, Chancellors Desaussure, Gaillard, and James. The following is the entry of the order made by that Court:

This cause having been argued the last Court on the appeal of John Lowe from the decision of the Circuit Court, whereby the motion made to discharge him from gaol was refused, the arguments of counsel and grounds of appeal being now considered, the Court are of opinion, unanimously, in ordering the said appeal to be dismissed.

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3 Desaus. *273

*Case XLIX.

T. BUNCH, Administrator of Sarah Bunch, v. CHAS. HURST, Administrator of Robert Hurst.

[Tried before Chancellor Desaussure, June, 1811—Decree, 27th August, 1811.]

[*Wills* ⊂⊃634.]

A man devises his estate to wife for life and after her death to several nephews and nieces. One of the nieces marries, and dies after the testator, but before the wife of the testator.—This was a vested interest, and survived to her husband and other heirs, under the statute of 1791.

[Ed. Note.—Cited in Davis v. Rhame, 1 McCord, Eq. 194; Durant v. Salley, 3 Strob. Eq. 160.

For other cases, see Wills, Cent. Dig. § 1488; Dec. Dig. ⊂⊃634.]

[*Deeds* ⊂⊃70.]

A deed, executed by a weak man, not alleged to be lost, but in the hands of an agent, and not produced, but the contents proved, is looked at with a jealous eye. Such a deed, executed by a weak man, in very necessitous circumstances, by which he transferred his rights, for a most inadequate price, will be set aside.

[Ed. Note.—Cited in Butler v. Haskell, 4 Desaus. 697; Banker v. Hendricks, 24 S. C. 13.

For other cases, see Deeds, Cent. Dig. § 175; Dec. Dig. ⊂⊃70.]

[*Evidence* ⊂⊃177.]

[Though the primary evidence is out of the jurisdiction, secondary is inadmissible.]

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 577; Dec. Dig. ⊂⊃177.]

[*Wills* ⊂⊃627.]

[A devise to several persons, "all of them to share and share alike," creates a tenancy in common.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1454; Dec. Dig. ⊂⊃627.]

[This case is also cited in Shaw v. Monefeldt, 6 Rich. Eq. 243, without specific application, and in Floyd v. Mintsey, 5 Rich. 373, regarding proof of contracts of lost deeds.]

The bill sets forth that Robert Hurst being in his lifetime seized and possessed of a tract of land, some negroes, horses, cattle and other stock, furniture, &c. made and duly

executed his last will and testament on the 26th January, 1793; and after bequeathing certain specific legacies, "he did give, devise, and bequeath all the rest and residue of his estate, both real and personal, to his wife, Jane Hurst, during her life; and after her death, [all the estate, both real and personal, he did give, devise, and bequeath] unto and amongst his nephews, Joseph and Charles Hurst, and his nieces, Sarah Dubon (afterwards Sarah Bunch) and Ann Viers, and to his niece Margaret Pringle, (who was absent from this state;) to them, their heirs, executors, administrators, and assigns, forever; all of them to share and share alike;" and he appointed his said wife to be executrix.

Shortly after Robert Hurst died, and his widow and executrix proved the will and qualified thereon, and made an inventory of the personal estate.

The widow afterwards intermarried with Archibald M'Kewn, and she hath since died; and Charles Hurst, one of the residuary legatees, took out letters of administration with the will annexed on the 4th November, 1808, and he made an inventory of the personal estate.

It is alleged that Margaret Pringle, one of the legatees, died in the lifetime of the testator, whereby the legacy to her became lapsed. Sarah Dubon, another of the legatees, married Maurice Viers, and on his death she married Timothy Bunch, the complainant. She hath since departed this life, to wit, on the ——— day of ——— and her husband, on the 2d Dec. 1808, took out letters of administration on her estate and effects.

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*Charles Hurst, the administrator with the will annexed, possessed himself of the personal estate of the testator, and held it till the 27th July, 1810; when, to make a division among the legatees, the negroes were sold for ten per cent. cash, remainder payable in one year. Complainant has applied to the defendant for an account and settlement of his late wife's share of the estate, but Mr. Hurst has declined any settlement.

To the complainant's bill, praying for an account and settlement, the defendant pleaded, in bar,

1st. That Sarah Bunch, one of the legatees, and late wife of the complainant, died in the lifetime of the testator's wife, which was previous to the period when the bequest to Sarah was to take effect. Consequently that the bequest never vested in Sarah, under whom complainant claims.

2d. That even if the bequest had vested in Sarah, the legatee, (under whom complainant claims) her surviving husband, Timothy Bunch, has divested himself of all claim to any part of the estate of the testator, by transferring to John Filbin all his right, title, interest, and claim, by marriage or otherwise, in said estate of R. Hurst. And the defendant averred that he was ready to prove the contents of the deed from Bunch to Filbin, the original having been lost or mislaid.

The defendant, for answer to the complainant's bill, stated that he did not know of what estate the testator was seized at his death, but admits the will as stated, and that upon his death his widow made the inventory stated, and married Archibald M'Kewn, in whose hands he believes some of the personal property still remains. Admits that on the death of Mrs. M'Kewn he administered on the estate and made the inventory mentioned. The defendant admits that Margaret Pringle is dead, but not prior to the death of testator; believes she survived him. He admits that Sarah, one of the legatees, married Mr. Viers, and on his death Timothy Bunch, the complainant, and then died; and that complainant has administered on her

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estate and effects. Defendant *admits that he took possession of the estate of the testator, but denies he used it for his own purposes; and refers to his exhibit D. to shew the contrary. Defendant states that he was not able to get possession of the negroes of the estate until November last, 1809, and two in the month of March, 1810, and the remainder in July. Defendant hired them as well as he could, and on the 27th July, 1810, sold the negroes on a credit of one year, deducting ten per cent. cash, and took bond and mortgage from the purchasers. Defendant denies that complainant is entitled to any right in said estate, he having transferred the same to another person. Defendant says he could not now settle with complainant if he had any right, as the property was sold on a credit by order of the ordinary, and by consent of the complainant.

When this cause came on it was agreed by the parties to go into the whole case under the pleas in bar and the answer at the same time. Although this was not perfectly regular I assented to it, to save delay to the parties. On the trial the following facts came out in evidence:

Zachariah Brown deposed, That on or about the 6th or 7th July, four years before, (1806,) he was present at John Filbin's, when Timothy Bunch and Aly Lochalear came there—several other persons were present. There was some conversation about the sale of the claim or interest which Bunch had in Robert Hurst's estate, and Bunch offered it for ten dollars. Bunch said that the reason why he would sell it so low was, that it could not be had until Mrs. M'Kewn's death, and she looked so hearty she would outlive him. That Filbin had two small creatures, and said he would let Bunch have one of them, at 25 dollars, if he would give him up his right to this property and his note for 15 dollars. The bargain was struck, and Bunch gave his note for 15 dollars, and a mortgage

of the mare. He also signed a paper, which the witness and three others also signed as witnesses. Bunch took the mare and carried

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her off. He *was quite sober. He had once before offered these rights to Mackay for ten dollars. Bunch, when at the ten mile house, said he had got a good bargain, and rather bragged of it.

When cross-examined, this witness said, the creature sold to Bunch was a small mare, 12½ hands high, worth about 25 dollars.

John Webber drew the paper which Bunch signed, and read it to Bunch. Witness does not remember the contents, but it was to assign Bunch's rights. He cannot remember whether any mention was made of the property which was intended to be conveyed, or whether any valuation was made. There was no list or schedule of the property intended to be conveyed. There was nothing put down in the deed but the right and title of Bunch. Supposes that Bunch knew his rights; but there was no specification of the property, or list, or schedule. Bunch is a sober man generally; he cannot tell if Bunch can read or write. Thinks Bunch signed a X to the deed, but is not sure. On re-examination the witness said he thinks Bunch must have understood the deed.

John Filbin was offered as a witness. He was objected to as the person to whom it was alleged that Bunch had sold the property in question, and to have since conveyed his right to Charles Hurst, the defendant. The defendant offering to release him, the objection was withdrawn, and he was sworn. He testified that Bunch came to him and offered to sell him all his rights in Robert Hurst's estate for ten dollars. The witness offered him a mare for 25 dollars, deducting ten dollars for the property which Bunch claimed of Hurst's estate. Bunch accepted the offer and agreed to have writings, which were accordingly drawn. Bunch gave as a reason for being willing to sell, that he thought Mrs. M'Kewn would probably survive him.

The witness said he knew the property in question. The witness deposed that the paper executed by Bunch was placed in the

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hands of a Mr. Mackay, and he is *gone to Georgia. Witness attempted to get it back but never succeeded.

The witness has sold the rights he obtained from Bunch for a creature worth fifty dollars. He sold his rights about a year before he gave his testimony. This was after the death of Mrs. M'Kewn. He said he sold it because he thought the rights worthless. When Bunch came to his house it was in the morning, and he was perfectly sober; Bunch never passed for a man out of his senses. On his cross-examination Filbin said that the property which bunch was entitled to was some land, negroes, furniture, plate, &c. There were six negroes, and Bunch was entitled to a fourth part of them and the land. He said he sold the property to Hurst because he thought he had the best right.

Matthew Martin deposed that he met Bunch on the road. Supposes it was some time after the trade with Filbin. He seemed a little groggy. Had not much conversation with him. Having seen him on foot before, he asked him if he had been trading for a horse. Bunch answered that he had got the creature from Filbin for about 25 or 30 dollars. Has no recollection of what he said about the property. Thinks he saw Bunch about a month after the above conversation. He told him again he had got the creature from Filbin, but told him no particulars.

On the part of the complainant Mr. Pringle produced the inventory of Robert Hurst's estate in May, 1793. There were six negroes, valued at £215. The negroes, furniture, and all the personal estate, amounted to £498. The appraisement of the personal estate after the death of Mrs. M'Kewn, taken in June, 1809, was $1,802.

Mr. Archibald M'Kewn, after being examined on his voir dire, was sworn in chief. He deposed that he married the widow of Robert Hurst, and removed to town in 1795 on account of his wife's ill health. She remained several years, perhaps six and seven, under Doctor Ramsay's care. She was long ill, and indeed never well. She died in October, 1807.

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*Witness has known Bunch 15 or 16 years. He is weak and of shallow intellect, hardly capable of any business. He thinks him three parts a fool. He cannot read or write. He is very poor, and lives by his labor.

The land is a tract of about 700 acres; some of it good. He planted it two years in rice and cotton. It is worth about a dollar an acre. On being cross-examined he said that he could not state the particular situation of his wife's health in 1805, or any particular year; but she was weakly and an invalid, and had a cough from 1795 till her death.

Mrs. M'Kewn, being executrix of Robert Hurst, sold some of the property, under the permission of the ordinary, for payment of the debts. No negroes were then sold. Witness bought in for her sundry articles of stock, &c. to the amount of £44. They were put down to him, but he really bought for her, and had the entry changed and the articles put down to her; and he was never called on for payment. Three of the negroes of Robert Hurst's estate were seized and sold for rent due by him and his wife in witness's house, but he bought them in and returned them to the estate. He employed Bunch as an overseer, for eight or nine months, about five or six years ago. He gave him no more than his victuals and clothes and never depended on his judgment in his planting. He worked ten or eleven negroes. He supposes

if pains had been taken to explain carefully a deed to Bunch, conveying property, he might have understood it. He believes there are no debts due by Hurst's estate. Sarah, the wife of Bunch, died in the lifetime of Mrs. M'Kewn.

The evidence of Mr. Grey was withdrawn, as the affidavit he was to support was lost or mislaid.

Major Lining, witness. He knew T. Bunch. He is of very feeble mind; so much so as to be obliged to employ a friend to come with him and give instructions about his business. Does not believe he could understand any deed.

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*Mr. Wm. L. Smith, for defendant. He originally thought this was a vested estate, but upon full consideration thought differently. 1 Brown, 181, Barnes and Allen, which is in favor of the complainant, is a trust estate and has been overruled. There are a great variety of cases. The words of the will creates no estate in the remainder man till the death of the wife. Carter and Bletso. Prec. in Ch. 267. No vesting words in the will.

This is not an executory devise. See 3 Vesey, jun. 208, Perry v. Woods. Says Allen and Barnes is not correctly reported. 5 Vesey, 210, Harrison v. Forman.

Distinction between cases of debitum in præsenti solvendum in futuro, or cases where the legacy is given on future event. 3 Atk. 219, 221, Billingsley and al. v. Wills. Prec. in Ch. 290, Tourney and Tourney. Ambler. 167; 1 Brown. 123, Dawson v. Killet; 1 Eq. Cas. abr. 295. Legacy given by words de futuro, legatee must live to the time fixed. 1 Brown, 299, Monkhouse and Holmes; 3 Vesey, jun. 363, Batsford v. Kebble; 1 Atk. 502, Hall and Terry; 3 Atk. 504, Elton and Elton. The intent might control the rule. There are cases where the postponement of time of payment is in ease of the estate, the limitation may be a vested one. 5 Vesey, 509; 6 Vesey, 43, 49, 50, Godfrey and Davis. Mackay and Alston, decided here, is also applicable. The word "when" denotes the devise is to take effect; "at" and "after" are stronger than "when." Lord H. refined in favor of children. 6 Vesey, 242-6, Hanson and Graham.

Argued on the second point. It appears that Bunch thought the property in a bad way, wasted and contingent; therefore he sold his contingent rights at a mere trifle. This was the inducement to sell. He considered it a mere lottery ticket. He had offered this to other persons. He sought the buyer.

Timothy Bunch wanted a creature to ride; he was humiliated with walking, whilst his

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neighbors rode. *The gratification to the party in a bargain is a great object.

There is no concealment; no fraud; no misrepresentation. Bunch must have known of what the estate consisted; and therefore gave up what he knew. But he knew also that the property was in a way of being wasted.

In the case of Gregor and others, v. Duncan and others, it has been decided that gross inadequacy of price shall not set aside a contract. There was great inadequacy. Ignorance of rights; concealment or misrepresentation; fraud and inadequacy of price, under particular circumstances may set aside contract.

If Filbin had given $1000, and the Court had decreed that Mrs. Bunch had no vested interest; could Filbin have compelled him to reimburse the $1000? certainly not. It was then a speculation. With respect to Bunch's faculties, Major Lining proves that he wanted a person to conduct his law business; this is common, yet such men are able to contract. Wm. M'Kewn employed Mr. Bunch as his overseer.

For defendant, Mr. Grimke. The evidence with respect to Bunch's imbecility, is contradictory; why has not more testimony been given by complainant, as to Bunch's imbecility. It surely was susceptible of more testimony.

It was not a sudden desire in Bunch to sell his rights. He was desirous to sell them before to other persons.

The reasons given by Mr. Bunch, for selling so low, are such as a man of some knowledge and reason would give. They grew out of the circumstances of the case; and he appeared satisfied with his bargain.

As to the law on the inadequacy of the price, see 2 Fonbl. distinction between agreements executed, and executory. Too late when executed; 2 Atk. 251, Willis v. Jernigan, 1 Bro. ch. 29.

Mr. Pringle, for compl't. The bequest to the four nephews and nieces is of an estate in common: not a joint tenancy. Contends

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that 'tis a vested legacy. Is aware *of the distinction of the time of payment being attached to the legacy itself; or merely fixed to shew when to be paid. This is not a legacy which would lapse.

The repetition of the word devise can make no difference. The gift was positive, the enjoyment only postponed The words amount to an immediate gift; tho' not to take effect till a future day. No intent to postpone the vesting.

Substantially the testator gave estate to A. for life, remainder to B. 1 Vesey, 217. Jackson, v. Jackson, legacy of £200. at the death of the mother; still it is a vested legacy. 1 Brown, C. C. 181, Barnes v. Allen.

The interest of the first person taking in remainder vested at same time with the first legatee. 1 Brown, 298. Monkhouse v. Holm, is a case where the bequest is to the wife for life; and after her decease to I. M.

This is not a trust case, but if it were trust estates and legal estates are governed by the same rules.

As to the objection, that in Monkhouse's case, it was only the use, which was given to the wife for life. This distinction has been exploded. When the legacy is not to be raised till a particular time, that varies the question, and the decision on it. It is a known rule that money to be raised out of land for a legatee who dies before the time fixed, the legacy lapses. Ambler, 276, Dawson, v. Killet, 1 Vesey, jun. 207, Medlicott, v. Bowes. 3 Bro. 390, Scarsfield, v. Hawes. 3 Vesey, jun. 204, Perry, v. Wood. 4 Bro. 404, Roebuck, v. Deane, 2 Vesey, jun. 265. 2 Brown, 75, Benyon, v. Madison. 3 P. Wms. 363, Pinbury and Ellkin, 4 Bro. 395, (same case as Benyon.) 5 Vesey, jun. Harrison, v. Foreman, 7 Vesey, jun. 279. Brown, v. Biggs.

The distinction between legacies given at 21, and payable at 21, is a rule of the Ecc. court not favored here. 3 Vesey jun. 135, Pierce v. Loman. 2 Brown 431, Scott. The cases cited on the other side, relate chiefly to legacies to be raised out of lands, as por-

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tions. *2 Vesey, 263. If payable out of a mixed fund, it sinks as to the land; and for good reason, in that country, where the heir is favoured; and if the person for whom a portion is to be raised out of land dies it sinks for the benefit of the heirs. The case before the court is not of a portion to be raised, but it is of the whole estate. Another class of cases, is that of marriage. 1 Bridgman's dig. 576, 3 Atk. 102, Heath v. Perry, 2 Bridgman, 102. Another class of cases is where legacies are given to persons by a partr. description, they must answer it, or they cannot take. The case of 6 Vesey, jun. 43, 8, Godfry, v. Davis, comes under this class. As to the 2d. plea in bar, the transfer of Bunch's right to Filbin, the plea is not supported by proof; no deed is produced, no evidence what the deed was; what it contained, nor whether it contained matter of real transfer. The court must determine whether the deed spoken of is really a good and valid deed. The court judges; not a jury; yet the court is asked to decide on a deed, alleged to be lost, and no copy shewn; no proof but loose recollections of unlettered men. Thus supplying by matter in pais the defect of not producing the deed. But allow the party to go into evidence in pais; he has not given proof enough; for he ought to have proved the existence, then the loss, and then the contents of the deed. In proving the contents, there must be some particularity. None has been shewn in this case; no proof even that the witnesses heard the deed read. Can the court undertake to say from the evidence, that this deed was executory or executed? It is said nothing was put down in the deed, but the right, title, and claim of Bunch. Who can undertake to judge of the extent of this deed? A deed pleaded in bar must be set forth. The court would not have decreed specific execution of a contract, on such proof as this. Why was not Webber produced, (who was said to have drawn the deed.) Why not produce any one of the subscribing witnesses? He might have explained it. Mackay, who is said to have gone to Georgia, and carried off the deed, has

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not been *examined, nor even a commission sent. It would be dangerous in a high degree; it would put to hazard all property. Even Filbin's evidence is not positive, as to the loss of the deed. It must be hearsay. He says he tried to get the deed back. This shews he did not know it was lost.

But admit that the deed was properly proved. Still this was a most unconscionable bargain; an advantage taken of a weak man, incapable of judging of his rights. He was at least a weak if not insane person. M'Kewn proves him weak, and explains his employing him as overseer. It is said he acted in a complicated case.

If Bunch did make calculations, he was grossly wrong; wrong in his estimates; wrong in his conclusions; weak, foolish, though not an idiot. Every man would exclaim at the gross inadequacy. To diminish the right and its value, it is said Bunch's claim was a mere contingency, a lottery. If he really considered it so, it shews his ignorance of his rights. Value $2500, his fourth equal to 625; abate a third for the life estate in existence at the time of the sale alleged to have been made to Filbin by Bunch; still it is an important interest to a very poor man, and gross inadequacy. Admits inadequacy alone will not set aside a contract; but the Court will catch at any slight circumstance to avoid it. Bridgman's digest, 454.

The party must understand the business, and the value, and fairly enter into the deed. If this be so, and no fraud, (and the case is such that the Court would decree a specific execution of the agreement) then inadequacy alone would not annul the agreement. There is a distinction between cases executed and executory—more difficult to set aside agreement, than to refuse to aid in enforcing it. 2 Brown, 87; Heathcote and Pagnion; 2 Brown, 175, Garside; 1 Brown, 558; Chesterfield and Jaussen; 7 Bro. P. C. 70, Filmer v. ———.

Mr. Grimke, for defendant.

1st. question. As to the proofs of the ex-

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istence, loss *and contents of the deed. Every thing may be supplied by parol evidence. All that is necessary has been proved, i. e. the circumstances which led to the contract; the execution of the deed; the contents; the loss. No property could have been specified. It was a doubtful property. It was a divis-

ible property. Contingent. A general reference was made to the source of the party's rights, under Hurst's will. It refers to that, and undertakes to transfer all his rights. As to the loss the necessity of proving that strictly is diminished by the clear and full proof of the contents of it. Therefore no ground for ssupicion that the deed is kept back designedly, lest the exhibition of it should discover something unfavorable to the defendant.

As to nonproduction of a copy, it would have been suspicious, for it would have been asked, why produce a copy? Ambl. 247. Saltern v. Malkish, sufficient to give a reasonable account of the deed, and contents of it, and loss. 3 Term rep. 160, Read and Brookman Co. of law even favors the suppletory testimony in loss of deeds. Mr. M'Kown says he believes that Bunch could have understood a deed if properly explained to him. As to the inadequacy argued yesterday, it must be gross and such as all men would exclaim at. Now as to the construction of the will, contends that the words of this will do not create an executory devise, but a remainder, as to real estate. Fonbl. 96, where there is a vested particular estate, the limitation over will be a remainder, not an executory devise. As to the personal property it will follow the real estate, and receive same construction. 1 Fonblanque, 213, note f.

This is a remainder, contends it is a contingent remainder, not a vested remainder.

The language of the will shews a desire that the remainder should not vest, till the event occurs, on which the remainder should take effect. Distinct clauses in bequeathing to his wife, and to his nephews and nieces. Meant his nephews and nieces should

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take if they lived, *no benefit intended to their executors or children. 1 Atk. 502, Hall & Terry. Insists that the legacy to the nieces is distinct from that to wife, and must be considered as commencing on the day of the death of the wife. It is as if the testator had died on that day. The effect of the will is as to them, to begin on the day of the death of the tenant for life. 3 Atk. 504, Elton v. Elton, is a case of marriage to take effect, as a condition precedent. Insists that the case before the court, depends also on a condition precedent. Talbot. 193, Bradley, v. Powell. Ambler. 575, Manning, v. Herbert.

This is like a charge on lands, where portions are to be raised. Prec. Ch. 267, Carter, v. Blets. Digest, 259. Ibid, 290, Fourney v. Fourney. Where there is a description of persons, the legatees claiming to take, must answer the description. This will manifestly intended a description of persons to take under this will, and the husband of one of them (who is dead) does not answer the description. 3 Vesey, jun. 363, Badsford v. Cabell, Ibid. 367. 3 Atk. 319, Billingsby v. Willamb. 521, Bennet and Seymore, 1 Vern. 425, Cole v. Berish. 31. 1 Bro. 124, Dawson v. Killet, 6 Vesey, jun. 49, 50, Godfry v. Davis. 2 Swinburne, revives the cases. 8 Vesey, jun. 5, 46, Elwin and Elwin.

Decree.

The property in dispute in this case is of very small value in itself, but considerable to the parties: and the questions involved are important. The cause has been ably argued and every thing brought out which learning and ingenuity could devise.

Four questions are made.

1st. Whether under the will of Robert Hurst any and what rights vested in Sarah Bunch, the wife of complainant, she dying before the testator's wife?

2d. What interest her husband has in those rights, he having survived her and administered on her estate?

3d. Whether there has been sufficient

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proof of the *execution, contents and loss of the deed from Bunch to Fillbin, to establish that deed?

4th. Whether under the circumstances of the case, the Court ought to sanction a deed obtained in the manner and for the consideration stated?

The argument upon the first point was very full, and a great many cases were cited. I have examined all of them which are within my reach. But I presume it is not necessary to go into a full discussion of the distinctions in the numerous cases. Some of them were decided upon the apparent intent of the testator, controlling the particular words of the clause of the will on which the question arose; others upon other principles of a peculiar nature, not applicable to this case. But upon a careful review of the whole doctrine, it does appear to me to be settled, that if a legacy be given to one person for life, (called A. for example) and after the death of A. to B. the legacy to B. is vested on the death of the testator, and it does not lapse by the death of B. during the life of A. See 2 Fonbl. 366, 7, and the note K, and the cases there cited, particularly the following, to wit, Tunstall v. Brachen, Ambl. 167; Dawson v. Killet, 1 Bro. C. C. 119; Jeale v. Tichenor, Ambl. 703; Barnes v. Allen, 1 Bro. C. C. 181; Monkhouse v. Holme, Bro. C. C. 298; Jackson v. Jackson, 1 Vesey, 217; see also other cases not cited by Fonblanque. Perry v. Woods, 3 Ves. jr. 404. Some of those cited are directly in point; for the legacies are to A. for life, and after his decease then to B. and though B. died before A. they were held to be vested and transmissible legacies. This is precisely the case before the Court. The defendant's counsel insisted that the estate being given to the testator's wife, for her life, and after her death to the nephews and nieces of the testator by name, and Sarah Bunch, one of the devisees and legatees, dying in the lifetime

of the wife, her share of the legacy lapsed. But this objection has been repeatedly considered and overruled, as appears by the cases cited. And indeed it never did prevail

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in any case, standing singly *on that ground. And there do not in my opinion exist any peculiar circumstances in the case before the Court to differ it from the plain one so often decided. The repetition of the words "I give, devise and bequeath," in this will do not alter the case. They are always implied, and the expression of that which is implied cannot vary the law. The defendant's counsel attempted to shake the authority of the case of Barnes v. Allen, by stating that it was declared by the master of the rolls in the case of Perry v. Woods, (3 Ves. jun'r, 204,) that Barnes v. Allen was erroneously decided, and had been overruled; but upon examining the case of Perry v. Woods, that does not appear to be the case. In the case of Barnes & Allen there were two points: 1st. Whether the legacies to the two legatees dependent upon a life estate, lapsed by the death of one of the legatees during the life estate. 2d. Whether these legatees had a tenancy in common or as joint tenants with survivorship, one of them having actually died during the life estate. Upon the first point there was no doubt. It was agreed to be a vested and transmissible legacy and did not lapse. On the second point the Judge was of opinion, that the legacy was in joint tenancy, and that the survivor took the whole. The case of Perry and Woods was held by the master of the rolls a tenancy in common, and that the share of one of the legatees who died during the life of the tenant for life, was transmissible to his representatives. But the case of Barnes and Allen had been quoted in the argument to prove that under such circumstances the estate was a joint tenancy. It was then that the master of the rolls examined the case, and said that Barnes and Allen was not in the least like the one before him, (Perry and Woods) on that point; and quoted the words in the registers book to shew the difference, which is stated in the note.

On a full examination of both these cases, I am of opinion that they are authorities in point to establish the first question in the case before the court, to wit: that in a legacy to A. and after his death to B. if B. dies

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before *A. it is nevertheless a good vested and transmissible legacy. In the case before the court, there can be no doubt, that the legacy to Sarah the niece of the testator was a tenancy in common. The words share and share alike, used in the will, create a tenancy in common. If authority were necessary to establish this, the case of Perry and Wood's is also decisive on this point. For there those words were decreed to create a tenancy in common, tho' coupled with the word survivor. The case of the heirs of W. H. Drayton, v. the heirs of John Drayton, deceased, in our own court, '93, is one of those where the death of one of the legatees, after the death of testator, and before the death of the intermediate holder for life (or on a contingency) does not occasion a lapse, tho' words of survivorship were added. The general intent was chiefly regarded. The case of Mackay and Alston decided in this court was relied upon by defendant, but has no application to the question before the court. The devise there is to Harriet Makay and to her heirs, &c. when she attains the age of 21 years, or day of marriage, &c. But if she should die before the above mentioned period, then a devise over. The court in deciding that case said the words of the will were so strong to shew that the time the devise was to vest, was annexed to the substance of the gift, as to leave no room to doubt of the testators intention. The words when and if are not to be got over. And this is the true difference as to legacies of personal property, where the time is annexed to the legacy itself, and not to the payment of it, and the legatee dies before the time, the legacy is lapsed. Otherwise, if the time be annexed only to the payment of it. The defendant also cited and relied on the case of Hall and Jermin, 1 Atk. 302. This was where a precise time was fixed for raising a legacy, and legatee died before the time. So in Elten and Elten, 3 Atk. 504. The event on which legacy was to depend, never happened at all. So in Bradly and Powell, Talb. 193, it was a marriage settlement case, and the contingency never occur-

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red. The case of *Manning and Herbert in Ambler, 575, is against the defendant, for it was decreed that the legacy was vested, tho' the legatee died before the life estate was ended. In the case of Batsford and Keppell, 3 Vesey, jun. 363. The legacy depended on a contingency. Bennet and Seymore, Ambl. 521. The words of the will shewed the intent was that legacy should not vest till the death of the life tenant. The case of Cock and Barrish in 1 Vern. 425, is totally different, one of the legatees died in the life of testator; and survivorship was established. 1 Bro. 119, which is Dawson and Killet, is against defendant. Billingsby and Wills. 3 Atk. 219, was decided on the express words of the will. The result is, that I am decidedly of opinion, that the legacy to Sarah was a vested legacy, held as tenancy in common, and was transmissible to her representatives, notwithstanding her death before tenant for life, the widow of testator.

The second question for consideration, is, what interest the husband has in the rights of his deceased wife, to the property in question. It is unnecessary now to go at large into this question. The law has been settled by several recent decisions. The husband

would have been entitled as the law stood formerly to the whole of this legacy, tho' not reduced to possession during coverture. Its being vested in interest, though not in possession, was sufficient to entitle him as survivor. But our act of 1791 has been decided to have introduced a new rule, incompatible with the old: and to have established that where the marital rights have not completely attached, by the husband's reducing the personal estate of his wife to possession during the coverture, the husband is entitled to no more than a third part of the wife's estate not so reduced to possession, where there are children of the marriage, and a moiety where there are no children. This law applies to the question before us; and as there are no children, consequently the husband, the complainant is entitled to a moiety. 3d. The third question for consideration is, whether there has been sufficient proof of the execu-

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tion, *contents and loss of the deed, alleged to have been made by Bunch, conveying his right under the will of Robert Hurst to Filbin. I have reviewed the evidence with great care and minuteness. From it there cannot be any doubt that some sort of deed was executed by Bunch, to whom it was read; and that it was intended to be a conveyance of the rights of Bunch in Robert Hurst's estate. The existence of a deed then I must consider made out. But I do not consider the contents of the deed so clearly established. It is remarkable that though this deed was subscribed by four witnesses, only one of them has been examined. And he expressly states that he has no recollection of the contents of the deed. He knows that it contained no description of the property intended to be conveyed, no enumeration, no schedule; he says it was intended to convey all Bunch's rights in Robert Hurst estate. But did the deed convey them, and in what way? Absolutely, modifiedly, or for a limited time? He cannot answer. He says he does not recollect the contents of the deed, and so imperfect is his recollection that he does not know, if Bunch signed his name, or put his mark to the deed. Upon the whole I am not entirely satisfied as to the contents. But if what the witness has said as to the contents and execution of the deed, were more satisfactory in the last particular, I have a greater objection unsatisfied. The rule of evidence is, that where a deed is proved to have been lost, or casually destroyed, or in the hands of the adverse party, parol evidence may be allowed to prove the existence and the contents. None of the cases go beyond this; neither those produced by the defendants counsel, Ambler, 249. 3 Term Report, 160. Nor those which I have since examined upon this doctrine, go beyond the rule so laid down. See 1st Ves. sen. 234. Cooks v. Hellier. Ibid, 387, 9. Whitfield, v. Fausset, 96, 503, 4, 5. Cole, v. Gilson. 2 Vesey, sen. 38, 111. Glyn, v. Bank of England. How does this rule apply to the case before the court? It is not alleged that the

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deed *in question is either lost or mislaid or destroyed. On the contrary it is expressly stated that the defendant placed it in the hands of a Mr. Makay, and it is added that he is gone to Georgia, and that he carried the deed with him, and that some unsuccessful attempts have been made to procure the deed from him. But what was the nature of these attempts, has not been explained. Nor has any commission been sent to examine Makay about the deed, or what has become of it. Yet Makay was the defendants own agent and depository, and his suppression of the deed, is attributable to his principal.† To suffer parol evidence of the existence and contents of a deed to be given under such circumstances, where there is no pretence of loss, would be extending the rule far beyond any thing that has been heretofore done. And in my opinion it would be mischievous in a high degree to do so. It might open a door to frauds and impositions of great extent. I will not therefore enlarge the rule, which I think is already sufficiently extensive for all useful purposes, and least of all in a case where there is much ground for suspicion as well in this as in other respects.

From this view of the case then it will appear, that I do not think a case has been made out, on which I could decree for the defendant, even if I had been satisfied as to the manner and the substance of the contract between Bunch and Filbin. But the truth is when I examine all the facts disclosed, and which raise the 4th question in this cause, I am not prepared to give my sanction to such a contract. The testimony has been so fully stated before, that I will not recur to it again particularly. I will confine myself to a few remarks.

Four witnesses subscribed this deed, conveying this small property. I will not say that this is a badge of fraud, but I will say that this excessive caution marks a conviction, that the party had a suspicion that things were not perfectly right, not perfectly equal and fair. Therefore he endeavoured to

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make a great shew of *strength by multiplying witnesses. I will not deny my credit to the testimony, that the deed vague and indefinite as it was, was read to Bunch. But there is no evidence that it was carefully explained to him, which seems requisite to his understanding it: tho' a witness entitled to credit, Mr. Brown, rather thought he did understand the purport of the deed. Nor can it be doubted from the testimony that Bunch was sober at the time of signing the deed: nor that he expressed some satisfaction at his bargain soon afterwards. But I cannot shut my eyes to the facts fully proved, that

† Schoals and Lefroy, 209, 222.

this man was foolish to imbecility, tho' not to downright idiocy. That he was poor and in distress, and that there was a shocking and gross inadequacy of price in the transaction. If he knew the extent of his rights, then his folly in parting with them for nothing, more strongly marks his imbecility and his incapacity to take care of himself and his affairs. If he was kept ignorant of his rights, then he transferred without that full knowledge, which a man ought to have before he is stripped of his property by such bargains. I am aware of the decisions that mere inadequacy of price is not sufficient to set aside a contract fairly made by a man of good understanding, not deceived or imposed upon and conusant of his rights; and I subscribe to them. For as a man in the plenitude of his free will, may give away his property without any consideration, when not indebted, so he may dispose of it, for inadequate considerations. But even these cases say a shocking inadequacy amounts to evidence of fraud. But I consider the case to be totally different, when a man remarkable for his weakness and folly and poverty, is induced to part with all the property he is entitled to in the world to save him from starvation, by a sweeping deed, which he could not read, and which enumerated nothing particularly; for about a 60th or at most a 30th part of its value. I do think, gross inadequacy coupled with such circumstances ought to prevent any court of justice from sanctioning the

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deed. Certainly no court would *have dedecreed a specific execution of such an agreement; and though that is not conclusive on the question in this shape, it assists to form a right judgment. This court did refuse its aid to enforce a contract specifically, in a case by no means so strong as the present. I mean the case of Clitherall v. Ogilvie [1 Desaus. 250]. It was well observed by the counsel, that the court will catch at slight circumstances to prevent such injustice. I am sensible there is no direct proof of fraud or imposition in the case under consideration; except what grows out of the circumstances; and that Bunch is said to have first offered to make this sale, and had done so to others; and was satisfied for some time afterwards; and it is said even gave a reason for it; which however by M'Kewn's testimony appears, was not a correct one. But this only shews the extent of his weakness and incapacity. He was too feeble to require any efforts to catch him in the toils. He was so much like a child as to be fond of the toy for which he sold his inheritance, or his valuable rights. It would be as tedious as unnecessary to review all the cases upon this subject. And it is not to be denied, that whilst at times the courts have been induced to set aside such contracts and conveyances from their indignation at the imposition practised, or the injustice produced; at other times they have forborn to interfere, where there was no fraud, though gross inadequacy, from their reluctance to unsettle what was done willingly by a party conusant of his rights and competent to act for himself and manage his affairs. Of the latter class, are the cases of Wood, v. Fenwick. Prec. in Chan. 206, Williams and Jernegan, 2 Atk. 251. Nichols, v. Gold, 2 Vesey, 422. Moth, v. Atwood, 5 Vesey, jun. 845. Of the former class, are the cases of Twisleton and Griffith, 1 P. Wm's. 310. Clarkson and Hanway, 2 P. Wm's. 203. Barnadiston and Lingood, 2 Atk. 133. How and Weldin, 2 Vesey, 518. Evans, v. Lewellin, 2 Bro. C. C. 150. The substance of these last mentioned cases, is, that conveyances from weak men

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for small considerations, *much below the value, in necessitous circumstances, more especially if young heirs or seamen, and others selling contingent rights, not in possession; and especially if obtained from men not fully conusant of their rights, (as in 2 Bro. 150,) will be set aside. I think those cases apply to and ought to govern the case before the court. And the case of Clitherall and Ogilvie, decided in our own court is as strong as any of them. It was argued that there is a distinction between contracts executory and executed. That when they are executed, this court will not interfere, though it will in those which being executory, the party must come to this court to have it perfected. This distinction will not prevail against strong cases, with circumstances calling for the interposition of this court. But if it were admitted, what is the proof, that the deed, in this case was executed or executory? The witness says he cannot swear to the contents. It was to convey Bunch's rights. Now these were in remainder. He had nothing then, of which he could make a direct conveyance; for though it was a property vested in interest, it was not in possession. The proper agreement in such a case then was executory, towit: an agreement that the party would convey his property, when it came to his possession; and we should be at liberty to argue, that the parties pursued the course, which was adapted to the nature of the interest to be conveyed: for the testimony does not fix it. But without resorting to this refinement, I am of opinion, that as Bunch was a very weak man, of no judgment; utterly incompetent to act for himself in any matter of importance, and as he was a very needy man, and as it is not certain that he was fully consuant of the extent of his rights, and of the property to which he was entitled, which was in expectancy only; and as he has parted with those rights in the gross, without any enumeration which could put him on his guard; and as he could not read, and there is no proof of a full or fair explanation of the deed, though it was read to him; and as the conveyance is for a con-

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sideration so grossly in*adequate, that all good men would exclaim against it at the first blush, this court is bound to interpose and to prevent the effects of such a deed, though there is no direct evidence of plain fraud in the case.

It was attempted to elude the force of these considerations, by shewing that Filbin had not considered this property as of great value, as he had afterwards sold the same property after Mrs. M'Kewin's death to the defendant for a very small property, towit: a horse worth $50, as Filbin himself swore. To this several answers may be given. This act would not establish the fact of the small value of the property in question; for there is distinct evidence to prove the value, which though not great, is prodigiously above the consideration given. And I must say I doubt if we have obtained the whole truth of this transaction. For though the parol evidence said the consideration given by Hurst to Filbin was $50; the deeds afterwards produced, say $60; and what more was reserved, does not appear. And Filbin, upon being interrogated why he sold the property so low, gave very different reasons on his examination, and cross examination; for on the former, he said he had sold it so low, because of the worthlessness, or low value of the property; on the latter he said because he thought Hurst was best entitled to the property.

Upon the whole of this case, I do not think, that either of the defendant's pleas have been supported. They must therefore be overruled.

It is therefore ordered, and decreed, that the defendant do account with the complainant for the share of the real and personal estate of the late Robert Hurst, to which his wife was entitled, under the will of the said Robert; to be administered by him, according to law. Defendant to pay costs of suit.

From this decree an appeal was made on the following grounds:

Grounds of appeal.

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*1st. That the defendant is distributee of complainant; intestate is entitled to retain his proportion, and that a reference to the master to ascertain the same should have been directed in the decree.

2d. That the decree is further exceptionable, inasmuch as it directs an account generally though a part of the personal property was sold on a credit with complainant's consent and the ordinary's sanction.

3d. That the proof of the existence of the execution and contents of Bunch's deed to Filbin was amply sufficient to preclude any objections on those accounts.

4th. That the inequality of consideration under all the circumstances of the case, was not that gross inadequacy which equity requires for the recision of a contract. Nor was the evidence of Bunch's incapacity and weakness by any means such as to convert the above disproportionate agreement into an act of fraud or undue advantage.

5th. That although the solicitors may have consented to be heard on the bill and answer, yet defendant should not be thereby precluded from offering testimony to establish Bunch's capacity, as he was taken unprepared and by surprise, not having had the most distant intimation that the deed was to have been impeached.

(Signed,) Smith & Bacot, appell'ts sol'rs.

The appeal was heard on the 20th March, 1812, by the Chancellors Thompson, Desaussure, Gaillard and Waties.

It was argued by Mr. Grimke and Mr. W. L. Smith for the appellants, and by Mr. Lining and Mr. Pringle for the respondent.

THE COURT after deliberation made the following order:

The decree in this case is affirmed for the reasons therein assigned.

Signed by WADDY THOMPSON, HENRY W. DESAUSSURE, THEODORE GAILLARD, THOMAS WATIES.

The first ground of appeal is founded in error. The general order of reference in the decree submits all the accounts to the master, who

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*reports on the accounts and the portions due to each of the heirs. The last ground of appeal was also founded in mistake. The defendant was not precluded from offering testimony. Both parties went to trial voluntarily, and after the complainant had gone through his evidence, the defendant's counsel expressed a wish to postpone the case, on the ground of surprise on the question of Bunch's weakness of understanding; but they made no motion, and offered no affidavit. The Court thought it would be dangerous to permit one party to hear the whole of the evidence of the other party, and then postpone the case in order to give him time to counteract it.

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*Case L.

ALWYN v. PERKINS and KELLY.

[Tried before Chancellor Desaussure, February term, 1811, and continued by adjournment to June, 1811.]

[*Arbitration and Award* ⟸63, 82.]

An award made by arbitrators acting under an order of court is conclusive on the party, as to the questions submitted to them, unless liable to objection for partiality, corruption, gross misconduct or palpable mistake of the law.

[Ed. Note.—Cited in Radcliffe's Ex'rs v. Wightman, 1 McCord, Eq. 417; Shinnie v. Coil, Id., 482; County of Greenville v. County of Spartanburg, 62 S. C. 125, 40 S. E. 147.

For other cases, see Arbitration and Award, Cent. Dig. §§ 313, 314, 316, 441; Dec. Dig. ⟸ 63, 82.]

[*Contracts* ⟸103.]

An American citizen covering British property as American, tho' to avoid the operation

of a British law will not be assisted by this Court, in obtaining covering commissions.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 468; Dec. Dig. ⟸103.]

[*Arbitration and Award* ⟸12.]

[The master, upon a reference to him, reported a certain sum as due from the defendant; but the court, upon argument by the defendant, gave him the option to go to a hearing, or submit the case to arbitration. *Held*, that the defendant could not avoid the operation of the award, as having been compulsory upon him.]

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 34; Dec. Dig. ⟸12.]

The complainant, who is a British subject, filed a bill in this Court for an account and settlement of the proceeds of a vessel and cargo entrusted to the care of the defendant Perkins, who is an American citizen. The bill charged that the complainant had directed the defendant, Perkins, to purchase a vessel on his account, but to take the bill of sale in the name of the defendant, Perkins, "for reasons of trade not forbidden by the laws of the United States." And that he instructed the defendant to proceed with the vessel and cargo, after accomplishing a prescribed voyage, to the Port of Charleston, and there to be subject to the control and orders of John S. Adams, the agent of complainant. That the defendant, Perkins, was to receive for all his services a certain fixed remuneration, as appears by a written agreement signed by him, a copy of which was filed with the bill. That Perkins accordingly purchased a vessel, which he paid for by a draught on complainant, which he has taken up; and he proceeded on the voyage directed, and arrived safe in America, with a large cargo, the property of the complainant; but disregarding his instructions, he refused to subject himself or the cargo to the orders of

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the said J. S. Adams, and *substituted an agent of his own choosing, Kelly, the other defendant. That they have sold the cargo, and have never accounted for the proceeds to complainant or his agent, Adams, and have never paid any part of the proceeds of the sales, except a small sum. The bill prays for an account, and an injunction, and a ne exeat. The defendant, Perkins, put in an answer admitting that he was employed by complainant, as stated in the bill, and that he purchased the vessel and took the bill of sale in his own name, and prosecuted the voyage directed by complainant. The defendant admitted that he subscribed the contract as exhibited with the bill; but he avers that the said agreement does not contain all the subjects for which defendant was entitled to remuneration. The defendant denied that he was to proceed to Charleston, or that he was to follow the orders of J. S. Adams, as in bill stated; but that he was to proceed to the best port he thought proper, for the purposes stated in complainant's letters to defendant. That the defendant arrived at Savannah with the vessel and cargo of complainant, and knowing J. S. Adams to be the correspondent of complainant, he consulted with him as to the best plan to adopt for the benefit of complainant; but he advising an impracticable plan, the defendant refused to follow it, and he placed part of the cargo in the hands of Michael Kelly for sale, and he himself sold part of the remainder of the cargo. That defendant having afterwards received letters from complainant, desiring him to account and settle with J. S. Adams, he has settled with him for part of the cargo, and is ready and willing to account for the whole, and to pay what may be justly due him, after deducting what is due defendant, under the agreement and understanding between the parties. On the coming in of the answer, a reference had been made to the master, who made a report (on 5 March, 1810,) stating that there has been frequent discussions before him, and he had examined a number of witnesses and documents; that the defendant had declared his inability to

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proceed on certain important *points, until he could obtain the examination of certain witnesses abroad. But the defendant in the accounts which he had exhibited, admitted an undisputed balance of $13000 and upwards, due by him to the complainant; and the master submitted to the court whether he ought not to be directed to pay over the same to the complainant. Upon this report, an argument was had in March, 1810, before the judge, who then presided, and he ordered that the report should be confirmed, and that the defendant should pay over to the complainant the sum therein mentioned, unless he should by his consent in writing, on or before the 10th day of May, then next ensuing, agree to submit all the matters in controversy between the parties in the suit, to the final award and determination of three persons therein named, or a majority of them, who should return their award, or before the 1st day of the next term.

In November 1810, the order of reference was extended to the first day of the then next term. At the ensuing term, February 1811, an award was returned, and upon argument, it was ordered by the Court, that the award should stand; but that the defendant should nevertheless have leave to exhibit proof to the referees to diminish the amount proved to be due to the complainant, provided he furnished the referees his proofs in time to enable them to make this final award on or before the 19th June then next ensuing; and that the award of the arbitrators should be final and conclusive on the parties.

The arbitrators accordingly reported in June 1811, that they had examined the matters in dispute between the parties, and

awarded the sum of $22397.77, to be due by the defendant, Perkins, to the complainant Aylwyn, as would appear by reference to an account current between the parties made out by the arbitrators and annexed to the report.

The complainants counsel moved to confirm the award, which was opposed by the defendants counsel.

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*Mr. Simons, for defendant, read the agreement between Aylwin and Perkins, dated 28th June, 1806, by which it appears that certain duties were to be performed by Mr. Perkins, for certain stipulated rewards. The object of all arbitrations is to put an end to litigations. The award should settle all matters in dispute, that no future suit might be brought on any parts of the matter which had been in dispute; but this award is not definitive. Perkins, as an agent, was not liable for debts out standing and not recovered. The sum of $1553.02, ought to be allowed him, as most of it is for money to attornies in Georgia for collecting debts. The charge of $177.77, for passage to Europe ought to be allowed; for Perkins was not merely a captain, but a confidential agent of complainant. As to the note of hand left for collection, $888.88, the arbitrators have left it undecided. Their award ought to be final, and to be so should cover all the points in dispute.

The next sum relates to what are called Perkins's overcharges in port, $999.20. This relates to the subsistence of Perkins. His demand is cut down not because the charges are extravagant or improper; but because the charges are not usual for a captain. But he charges them as agent. The arbitrators allowed only a dollar a day, and deduct $999.20, which was erroneous.

The next sums struck out by the arbitrators improperly, were for covering commissions, amounting to $3753.67. The arbitrators made these deductions upon the supposition that Perkins had bound himself by the agreement, which did not provide for such charges. But these charges in fact were neither the subject of the agreement, nor could they be; for the agreement provides only for ordinary charges, as master: not for extra services as agent, some of them secret and confidential. The agreement binds as far as it goes—no further. This claim steers clear of the objection, that parol evidence shall not be introduced to contradict a deed.

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*The agreement is admitted as far as it goes. Peake 117, King v. Inhabitants of London.

The objection to the covering commissions cannot be made by Aylwin, on the principle that the trade is unlawful. It is customary, and will be protected by the Court. The charge for covering commissions is collateral to the agreement and independent of it. The agreement specifies the precise grounds of the charge. The extra charges are of a different kind.

As to the power of the Court to disturb the award. Mr. Perkins did not choose the arbitrators as his domestic judges. He preferred to submit his cause to the Court; but it was imposed upon him to submit his case to arbitrators, or submit to a decree when he was unprepared. Surely the Court did not mean to deprive the party of the benefit of the law of the Court, contrary to his wish. Kyd, 350, 3d East, 18. Plain mistakes of arbitrators will be corrected by the Court, where they attempt to decide on a point of law. This is the case in regular ordinary voluntary arbitrations. Still more so in a reference made by order of the Court against the wishes of the party. 6th Ves. jun. 282. As to arbitrators deciding a point of law. If it is referred to them and they decide wrong, still it binds. But in 3 East, 18, this is questioned by the Judges.

The law of the country gives an appeal. If the reference made by order of the Court, and the award made, were conclusive, it would preclude the party from the benefit of his appeal. This will lead the Court to consider this reference as the usual one of leaving accounts to accountants, to assist the master, which are always examinable by the Court.

The Court can always get at the grounds of proceedings of the arbitrators. (See 3 East, p. 18.)

The award must be taken in reference to all the papers. The arbitrators had the bill, and answer, and papers. Perkins charged the covering commissions. It is disallowed by the award. Why? They are not prohibited by any statute. It is not fraudulent.

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Services *were required by the complainant Aylwin, and performed by Perkins, totally different from the services stipulated for in the agreement. The usage is clear. The aribitrators had no doubt; but supposed the agreement precluded them from allowing it. This was an error in the law, and the Court according to the case in 3d East, can correct the error.

Mr. Drayton, for complainant. The award is peculiarly binding on the defendant. The alternative was to obey a decree for paying a sum of money reported to be due, $13,000, or to go before arbitrators. He agreed voluntarily to the latter. It was for his benefit.

Referees made an award, which was sent back, because not sufficiently specific. They have now made a final award, as explicit as possible. This refers to an account attached to the award. The award, after all, makes defendant debtor for a sum infinitely below the first cost of the adventure.

To open this case again, would be terrible, after such a painful and laborious examination. No new matter; no new points; no new evidence could now be submitted to the

arbitrators. Every thing has been submitted to them. Nothing but some substantial ground of objection should prevail afterwards. 2 Atk. 501, Lingood v. Eade. No presumption shall be allowed to overturn an award. 3 Atk. 529, Titterson v. Peake. An award is final, unless collusion or gross misconduct in the arbitrators. 1 Vern. 157; 2d Ray'd. 1076, 12 mod. 585, Strange 903; 1 Atk. 77, 64. An award may be set aside if any circumstance had been concealed from the arbitrators, and if one of them had said it would, if known, have made a difference. 2 Ves. jr. 16, Morgan v. Maddar. An award cannot be impeached for error as to facts; but may as to law, or gross misconduct. 3d East, 18; 1 Ves. jr. 369. On general reference arbitrators may go further than the Court and relieve against a harsh right. 2 Ves. jr. 22, judgment of arbitrators on allowance of compound interest, is conclusive.

Allow that usually these commissions are

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admissible, *yet the arbitrators may judge under all the circumstances of this case that the party is not entitled. 2 Ves. jr. 23, Dick v. ———. The exception to the award must have reference to the transactions in the case, and to the papers in the cause. 6th Ves. jr. 282.

The agreement really does not allow the charge of this commission; but it was for the arbitrators to decide whether these commissions, under the circumstances, should be allowed or not. They have said not.

The commissions for covering is against conscience. It is a charge for swearing that property is American, when it is British. But take it as stated by the counsel for defendant. He at all events, seduces a customhouse officer to neglect his duty against his oath. Perhaps this conduct of covering enemy's property is the source of all these edicts and decrees which afflict our commerce and endanger our peace. 3 Cranch's rep. 248, ——— v. Ede.

As to the charge about the passage. It was a mere fact; and for the arbitrators; the Court has no ground to go on. It does not even know that the voyage was performed.

So as to the del. credere commissions not allowed; this was for the arbitrators. They allowed some commissions.

As to S. Guilly's bill $4580, the arbitrators have decided on it. It is a fact within their province, and the award is conclusive.

It is said the award is not conclusive, because a sum due on a note is not decided upon. But they have decided. If the Court should be of opinion that some of the items are wrong, let them be struck out; and complainant will take the balance rather than be delayed.

Mr. W. S. Smith, for defendant. Aylwin has no right to exclaim against the charges in this case. He engaged in the African slave trade, in violation of the law of his country. He tempted defendant to be his agent in this business. All his demands are founded on these transactions. Yet he pre-

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tends to raise an out*cry against defendant Perkins, for his charges, or for covering the property as American, when, in reality it was British to which he tempted him.

Perkins's submission to the award was compulsory. He would have been glad to have paid the $13000, and been totally discharged, but this offer was not made. The order of the last Court left open the whole subject by allowing the defendant to go into proof. It is said the award is final. It does profess to be so. But when executed it is found not to be so. It refers to an account, which shews it is not final.

The disallowance of several charges is contrary to law; and clear mistakes in law made by arbitrators can be corrected by the court.

As to the mistakes of the arbitrators, the bill admits the covering. And the commission follows of course. It is allowed in insurance offices; and by the court below. But our law forbids the covering, Br. Pro. as American; and the exception being taken potior est conditio defendentis.

It was impossible to put this covered trade and commissions into the agreement, as it would have been a violation both of English and American law. The charges agreed to be allowed by the instrument, are different from the covered commission, and the arbitrators should have allowed the covered commission. They did not, which was error. The case from 3 East has overruled the cases of L. Hardwicke.

The rejection of the claims is clear. This rejection was wrong; it was contrary to law. If it be asked what law? The answer is commercial law, usage, which makes law.

The error in law is examinable by the Court, and will be rectified by the Court.

The arbitrators looked, only to the agreement, (where no provision could be made for covering commission,) whereas they should have looked to the usage.

Defendant is entitled to his passage money to return.

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*The question of the note is not disposed of by the award.

The Chancellor delivered his decree, and after stating the case as above, he said,

I have considered the circumstances of the case, (as far as the imperfect lights and proofs furnished, enabled me) the points made, and the agreements of counsel, very maturely. The complainant's counsel insisted that the award made by arbitrators, upon whose conduct there was no imputation, was final and conclusive. The defendant's counsel insisted, that this was not a vol-

untary submission to arbitration, but imposed on him by the court; and that, therefore, the award ought not to be considered binding; unless upon a full examination of all the facts of the case, and a plenary hearing, the Court should be entirely satisfied therewith.

I confess I do not see the force of this argument. A report was made by the master, stating that in all events, the defendant was indebted to complainant, to the amount of $13,000, as his own accounts admitted that sum. And the Court ordered the payment of that sum. But upon the argument of defendant's counsel, the Court was induced to give the defendant an alternative, to pay the money according to that order, or to refer the whole case to arbitration. This was for the defendant's benefit, and he made his option; and I consider him as much bound by the award, as if he had himself originally solicited the reference. Of what utility was the appointment of arbitrators, if the Court is to go into the whole case and into the examination of all the accounts? It would have been a mere waste of time, and a source of delay to the complainant. I am of opinion therefore, that the award is binding on the defendant, unless he can shew corruption, partiality or gross misconduct on the part of the arbitrators; or unless the arbitrators were mistaken in a plain point of law, which materially affected the inter-

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ests of the parties; or unless *there were such gross and palpable mistakes in calculation as produced manifest injustice.

With respect to the first of these grounds of objection, no pretence has been set up, nor any allegation made of corruption, partiality or misconduct on the part of the arbitrators.

With respect to the second ground, it was argued, that there were plain mistakes in point of law; which it was insisted, furnished good ground to set aside the award: viz, that the arbitrators had refused to allow the defendant his charges of commissions, for covering the property of the complainant who is a British subject, and passing it as American, upon the ground that the agreement between the complainant and defendant, had stipulated all the charges which were to be made for all the services to be performed; and that they, the arbitrators were bound by the agreement, and could not travel out of it, or allow any other or greater charges or commissions than were comprised in the agreement; which the defendant's counsel insisted was an error in law of the arbitrators.

Secondly. That the arbitrators had refused to allow the defendant the said covering commissions, on a mistaken ground that they were not legal charges.

It might perhaps be sufficient to say, that I have no data upon which to form an opinion on what principles the arbitrators proceeded in rejecting these charges for covering commissions. It does not appear that the arbitrators refused to allow them upon either of the grounds alleged. For any thing that appears to the contrary, they may have rejected these charges upon a full consideration of all the circumstances apart from the agreement, and from a conviction that the defendant was not entitled under these circumstances to those commissions. And upon that ground I should be of opinion that the award ought to be conclusive upon the parties; but admit that it did appear that the arbitrators had decided on one or other of the alleged grounds. I cannot set aside the

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award: for I am not prepared to say *that their construction of the agreement may not be the right one; or to presume with the defendant that there was an omission in the agreement, of any charges intended to be allowed for any services to be performed.

If, however, every other difficulty was overcome, there remains one which with me is invincible. I cannot sanction the covering British property as American. It was contended for the defendant that however irregular such transactions might be, however done in fraudem legis, (and the very terms of the claim imply this) yet that usage had sanctioned the claim: and that the usage made it obligatory on the arbitrators to allow the covering commission. That their refusal to do so, was a violation of the mercantile usage now grown into law, which ought to induce the Court to set aside the award. I will not trust my feelings in the expression of invectives against this usage: I will only remark that so far from bad usages ripening into law, it is a maxim of justice as well as of law, that malus usus abolendus est. That the usage in question is malus in a high degree is obvious from its necessarily involving the parties concerned in it, in deception, fraud, corruption and sometimes perjury; and all this to compass a violation of a law of the country. How an usage productive of such effects, and directly in contravention of the laws of the country, can ever acquire a legitimate character and be entitled to claim the support of courts of justice is incomprehensible. The parties engaged in such transactions may give effect to such a principle; they may make such a law for themselves, and be obedient to it; and instances may pass sub silentio in courts of justice; but if the objection be taken, and brought to the view of the court, it must prevail. The law will not be made instrumental to destroy the law. In the case of Hannay v. Eve, 3d Cranch, 247, [2 L. Ed. 427,] quoted by Mr. Drayton, Chief Justice Marshall declares the opinion of the Court to be that though the agreement was not in itself an immoral act, yet as it was a fraud on the act of congress, no principle can be more clear than this, that

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the courts of the *United States can furnish no aid in giving efficacy to it.

It was further argued on the part of the defendant, that an award ought to be final and settle all the points in controversy between the parties, and referred to the arbitrators; or it should be set aside; and it was alleged that the award in this case did not decide finally on a sum of $888.88, which was the amount of a note of hand due to defendant, and left with complainant for collection. This objection, I apprehend, is founded in mistake. The award does decide that the defendant is not entitled to make the complainant accountable for this money. If they had stopped there, no controversy could have arisen; but from tenderness for the defendant and for his benefit, they go on to say, in a memorandum at the foot of the account, that they do not mean to confound this claim with the items totally and finally rejected; but that the note of hand left by defendant with complainant for collection, should be returned, or the money accounted for. This was speaking the language of the law itself: and was meant to furnish evidence to defendant, that though the claim was rejected in this settlement, he was entitled to the note itself. I have no doubt that the award is sufficiently complete and final to be sustained. But if a regard to the interests of the defendant on this point had betrayed the arbitrators into any little irregularity, not affecting the justice of the case, I should not, on that account set aside their award.

It is therefore ordered and decreed, That the award made and returned in this cause, be confirmed, and declared absolute and final: and that the defendant do pay to the complainant the sum of $22,397.77, which was awarded by the arbitrators.

From this decree there was an appeal.

An appeal is made from this decree on the following grounds:

1. That the written agreement between the complainant and defendant, did not, and was not intended to affect the claim for covering

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commissions, which was a *subject collateral to and independent of the agreement; depending on the known usage of the particular trade; and as the rejection of the claim by the referees proceeded from a misapprehension of the legal effect of that instrument, this error was subject to the revision and correction of the Court.

2. That if the contract for covering the property was a fraud on our laws, that circumstance would not bar the claim of the defendant, but rather would be an objection to the complainant recovering any thing from the defendant, as the complainant was a party to and a chief actor in the fraud; and the rule of law on this subject, is, Potior est conditio defendentis, the effect whereof would be to prevent the Court from making any decree against the defendant.

3. That the award is defective and wrong in not exempting the defendant from the consequences of any of the debts, which are the proceeds of the vessel and cargo, proving insolvent.

4. That the decree is in other respects contrary to equity. Signed, K. L. Simons, sol. for appell't.

The case was argued before the Court of Appeals: Present Chancellors Desaussure, Gaillard and Waties. The decree was unanimously affirmed for the reasons stated therein.

The ground on which the complainant Aylwin was understood to have employed Captain Perkins as his agent, to cover the vessel and cargo, as American, was that the British Parliament had passed an act prohibiting British subjects from supplying foreign ports or places with slaves. Whereas the act of Congress totally prohibiting the slave trade, was not to take effect till the 1st. of January, 1808. The vessel and cargo arrived in America in October 1807. The use therefore of the American name, on the voyage, was not to cover the property from the operation of the American laws, but of the British act of Parliament. The importation of slaves into this country was not then therefore such an unlawful act, by the American laws, as could be made a ground to resist the demand of the complainant for an account, on the maxim, that where both parties are in default, potior est conditio defendentis. Nor was it seriously insisted upon by the defendant, that he ought not to account to complainant. But the covering British property with the American name did appear to the Court, to be such an offense, as to deprive the American citizen of any right to claim the aid of the Court in recovering commissions for such an unlawful act.

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WINTHROP, TODD and WINTHROP **v.** Survivors of LANE, SON and FRASER.

[Tried before Chancellor Desaussure, February, 1811.]

[*Assignments* ⟹102; *Contracts* ⟹47.]

The complainants made contracts with Tracy, that they would ship 1700 barrels of rice to Lane, Son & Fraser, of London, for which Tracy was to furnish the funds. These contracts were transferred by endorsements to Lane, Son & Fraser, and accepted by complainant. Tracy did send some funds to complainant, but not sufficient. He also directed other shipments of rice to be made by complainant to France, for which he desired complainant to draw bills. This was done, but he caused the bills to be protested. So that he owes them a large sum of money. The complainants shipped 168 barrels of rice to L. S. and F. and then stopped shipments. The latter brought suits on the contracts, and recovered verdicts and judgments, at law. The complainants filed this bill, to obtain a perpetual injunction.

The Court was of opinion, that the complainants were liable on their acceptances to Lane, Son and Fraser, to the extent of the funds furnished by Tracy, but limited the liability to

that extent, and ordered a reference to the master to ascertain the amount. Tracy had no right to divert the funds to any other purpose. And complainants did wrong to obey him.

This acceptance by the complainants was not nudum pactum.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 178; Dec. Dig. ⟸102; Contracts, Cent. Dig. § 256; Dec. Dig. ⟸47.]

[*Judgment* ⟸446.]

[Cited in Kenner v. Caldwell, Bailey, Eq. 152, 21 Am. Dec. 538; Barnes v. Milne, Rich. Eq. Cas. 459, 24 Am. Dec. 422; Gist v. Davis, 2 Hill, Eq. 346, 29 Am. Dec. 89, to the point that equity will relieve against a judgment at law on the ground of evidence discovered subsequently to the trial.]

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 845; Dec. Dig. ⟸446.]

[*Judgment* ⟸446.]

[The fact that the defendant might have obtained evidence by bill of discovery or otherwise will not affect his right to relief if he had no reason to suspect the existence of such evidence.]

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 846; Dec. Dig. ⟸446.]

This is a bill to obtain a perpetual injunction against a judgment at law, or such relief as the complainant may be entitled to.

The bill stated that the complainants were merchants in trade at Boston, and had a branch of their house at Charleston, S. C. That Nathaniel Tracy, also a merchant, applied to the complainant, T. L. Winthrop, to engage his house at Charleston, to ship to Lane, Son and Fraser, of London, 1700 barrels of rice, on account and risk of said Tracy and his assigns, on the usual terms; he agreeing to furnish the funds in time to pay for the rice. That T. L. Winthrop agreed to the proposal, and on the 21st of October, 1785, signed two agreements to that effect. See exhibits A. and B. That at the same time Tracy signed two obligations, by which (after reciting that he had already advanced complainant nearly £2000 sterling,) he engaged to pay T. L. Winthrop £3000 sterling, or so much as might be due for the 1700 barrels of rice, to be paid in time to purchase the rice. See exhibits C. and D. That the advances so spoken (and erroneously stated as sterling,) were not in money, but in shipments of New-England rum, consigned by Tracy to complainants at Charleston, which they were obliged to sell on a credit, and could not collect the money in time to make the full

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ship*ments of rice, and was quite insufficient for that purpose. That afterwards the said Tracy requested T. L. Winthrop to sign acceptances of orders, on the backs of the said contracts, agreeing to deliver the rice to Lane, Son and Fraser, and the said T. L. W. not supposing such acceptances could vary the situation of the business, or make his house liable, but according to the contracts themselves, did sign an acceptance, under each of said contracts, whereby it was agreed that the rice should be delivered to Lane, Son and Fraser. See exhibits A. and B. That the impossibility of collecting the money on the sales of the rum prevented the complainant's shipping the rice so soon, or to the extent agreed. But they did ship a part of the rice, with other articles, to Lane, Son and Fraser, for which complainants suppose Tracy has credit with them. That Tracy also consigned the brigantine Lucy to complainants at Charleston, with orders to load her with rice, to be addressed to Mr. Bonnetheare, merchant at L'Orient, with orders if complainants were not in cash, for articles previously consigned to them, to draw for the amount of the cargo on him, or on his friends Coxe and Donaldson, of Philadelphia. See Tracy's letter of 12th April, 1786; Exhibit E. That complainants shipped accordingly by the Lucy, 434 whole, and 109 half barrels of rice, and 21,131 staves, of the value of £3801. See exhibits F. and G. And to reimburse themselves they drew bills on Coxe and Donaldson, as directed by Tracy; but they, by his express direction, protested the bills, which with damages and interest amounted to £3185 sterling. See exhibits 1 to 7. Thus injured by Tracy's conduct, complainants were compelled to stop shipping the rice to Tracy's correspondents in London, and to retain in their hands the funds sent them by Tracy, on account of the prior contracts, to repay them in some measure for the losses sustained by the above protests and a debt of £1700 also due by Tracy to complainants. Tracy transferred the two original contracts for rice to Lane, Son and Fraser, or some agent

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of theirs, and af*terwards became bankrupt. Complainants did not expect that any demands would be made on them by Lane, Son and Fraser, whom they considered as the agents of Tracy. But they soon made a demand and instituted a suit on account of said contracts, in the Court of Common Pleas in this State, and though they had never paid a cent for said rice, and the papers were not negotiable, they recovered a verdict, in 1790, for the sum of £5477 8. That Tracy is dead, and several of the house of Lane, Son and Fraser. The complainants contend that Tracy had no right under the circumstances to transfer their obligations; and they charge that the papers remained in Tracy's hands till about the time of his failure. That Tracy was the real principal, and continued to direct and manage the business, and never intimated to complainants that they were responsible only to Lane, Son and Fraser, or complainants would never have made the shipment to France as directed by Tracy. See letters of 14th and 30th Sept. 1786; exhibits I. and K. That Lane, Son and Fraser were not privy to the original contract, nor did they pretend they were the real owners thereof till Tracy failed; nor did they debit complainants therefor; nor open any account

with complainants in their books, as they would have done if they looked to them for payment; nor did they give notice to complainants that they held the same in their own right till Tracy's failure; nor did they give Tracy valuable consideration for these obligations, but received them merely as a collateral security, being apprised of and liable to the equity of the complainants's claims against Tracy; and not as an absolute transfer, but a mere deposit for Tracy, and at his risk, as appears by the receipt given by G. Dickenson, their agent, to Tracy, dated November 5, 1785, by which he acknowledged that he received the obligations from Tracy, the shipments of rice were to be made on the account and risk of Tracy, and promises to carry the nett proceeds to Tracy's credit, in account with Lane, Son and Fraser, and by a memorandum dated 12th of October,

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1789, in *which striking a balance between Tracy and Lane, Son and Fraser; they give them no credit for the amount of the contracts, but merely note them as depending matter. See exhibits L. and M. The bill concludes by praying for perpetual injunction and full relief.

The answer of John Lane, the survivor of Lane, Son and Fraser, admitted the contracts as stated in the bill, and the endorsements and acceptance, as stated.

Defendant believes Tracy delivered the two promissory notes or contracts, to G. Dickinson, the agent of Lane, Son and Fraser, towards the discharge of the balance due by Tracy to them, then amounting to £17768. sterling.

Defendant admits that complainant did remit in part of that contract, 168 barrels of rice, the neat proceeds of which, being £805. were carried to the credit of Tracy, in account with Lane, Son and Fraser. Defendant has heard and believes that Tracy sent the brig Lucy to Charleston, with orders to Messrs. W. T. and W. to ship rice to France. But they are ignorant of all the transactions which took place, of the shipments, bills of exchange and protests. And they deny that the misconduct of Tracy justified complainant in neglecting to fulfil the contracts then fairly held by defendant. Defendant is ignorant if Tracy was then in arrear to complainants, or in desperate circumstances. But has heard and believes that Tracy about two years afterwards became embarrassed and avoided his creditors. Defendant insists complainants are bound to comply with their contracts for the 1700 barrels of rice, transferred fairly with the knowledge of T. L. Winthrop to the defendants; and defendant believes that Tracy did furnish funds sufficient to purchase said rice; though they may have advanced money for him, in the shipments to France; and though they may have suffered by his protesting their bills. Defendant submits that the agreements of Tracy with complainants were not contained in the contracts, which were endorsed and transferred to Lane, Son and Fraser, and they had no notice of such agree-

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*ments. And they had a right to recover on those agreements, those papers being transferrable and negotiable, and Tracy largely indebted to them; and they took them discharged of all the equity they might have been liable to in Tracy's hands. Defendant admits, that Lane, Son and Fraser brought suit as stated in the bill, and recovered judgment thereon to the amount of £5477. Defendant is advised that Tracy had a legal right to endorse and transfer the said contract, and believes said endorsement was made with the knowledge and consent of said T. L. Winthrop, and that no fraud was practised on him. Said contract was endorsed and delivered to Dickinson the agent of Lane, Son and Fraser at least as early as October, 1786, for defendant then saw them in his possession, having been prior to their execution, and received them in part payment of a debt of Tracy to defendant, and defendant believes that as soon as 168 barrels of rice were received in London, which were sent by complainant in part performance of the contract, they were sold and the proceeds credited to Tracy by Lane, Son & Fraser, & defendant does not know if Tracy pretended to be still interested in said contracts, and to manage the business, but admits he may have written the letters stated by complainant in September 1786. Defendant admits that Lane, Son and Fraser did not send any vessel for the rice, because by such contract it was to be shipped by complainants in vessels to be sent them by Tracy. Defendant admits that he did not give any notice of the transfer of the contract to Lane, Son and Fraser, nor was it necessary as T. L. Winthrop knew they were so delivered and transferred. Defendant denies as far as he knews that Tracy used the names of Lane, Son and Fraser in the transfer of said orders to protect his property from attachments. Defendant denies that Dickinson the agent knew or accepted the contracts subject to any equity existing between complainant and Tracy. Defendant admits that Dickinson gave such receipt to Tracy, as in bill mentioned, and that Lane, Son and Fraser

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in their ac*count of October, 1789, struck a balance without crediting him with the said contracts. Defendant insists that he ought not to be enjoined, &c.

Decree.

At the trial of the cause the complainants' counsel produced and read in evidence the exhibits marked A. and B. Exhibit A. is in these words: "For value received, Boston, 21st October, 1785, I promise in behalf of Winthrop, Todd & Winthrop, merchants of

Charleston, S. C. to ship on account and risk of Nathaniel Tracy, Esq. or his assigns, one thousand tierces of rice in all the month of December; or so soon as the new rice comes to market, in any vessel or vessels he or they may direct the same, to be addressed to Messrs. Lane, Son and Fraser, in London.

(Signed,) "Thos. L. Winthrop."

On the back of this paper were these words: "Deliver the within mentioned rice to Messrs. Lane, Son and Fraser, or order.

(Signed,) "Nath. Tracy."

Also, the following words: "Accepted to deliver the within as above in behalf of Winthrop, Todd and Winthrop.

(Signed,) "Thos. L. Winthrop."

Exhibit B. is of the same date, and exactly similar to the above, except that it is for 700 tierces of rice, to be shipped in all February, then next following, with similar endorsements. The exhibits C. and D. were also read. C. is in these words: "For value received, Boston, October 21, 1785, I promise to pay Thomas L. Winthrop, or order, in behalf of Winthrop, Todd and Winthrop, merchants of Charleston, S. C. £1000. sterling, or so much as may be due to them for the 1000 tierces of rice, they, by their obligation of this date, are to ship for my account in all the month of December next, the same to be paid them in time to purchase the said rice, having advanced them nearly £2000. sterling, towards the purchase of the said rice.

(Signed,) "Nath. Tracy."

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*On the back of the above is the following receipt: "Boston, February 4, 1786, received of N. Tracy £1069. 5s. L. M. being the amount of 100 hogheads of N. E. rum, shipped in the brigantine Swallow, Sam. Boweyer, master, for account of Messrs. Winthrop, Todd and Winthrop, payable three months after date in part of the within obligation.

Signed for W. T. and W.
Thos. L. Winthrop."

£1069. 5s. L. M."

Exhibit D. is of the same date, to wit: "21st October, 1785, and exactly similar to the exhibit C. only that it is for £2400. or so much as the amount of 700 tierces of rice may be, which they are to ship in all February, then next following; the said sum to be paid in time to purchase the said rice, and security to be given to the said Winthrop, whenever he may require the same."

Signed by Nath. Tracy."

On the back of this paper is the following receipt: "Boston, December 29, 1785, received 1080*l.* 6s. of L. money, in part of the within note, being the amount of rum shipped on the brig Mary, Captain S. Pierson.

(Signed,) W. T. & W.
"By Thos. L. Winthrop."

"£1080. 6s. 8d."

"N. B. The above mentioned rum was payable in three months from the above date.

(Signed,) "Thos. L. Winthrop."

Exhibit E. Mr. Tracy's letter to W. T. and Winthrop of 12th April, 1786, authorising them to draw on Donaldson and Coxe, of Philadelphia, to pay for certain shipments ordered by him to be made to France by the Lucy.

Exhibit E. E. Letter dated October 7, 1786, from Donaldson and Coxe, stating that they were obliged to refuse their bills, by orders of N. Tracy, except one of about $600.

F. is the invoice of the brig Lucy, of 15th

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September, *1786, of shipments made by W. T. and W. to France, by order of N. Tracy, and on his account.

G. bill of lading, of cargo shipped on board the Lucy, 15th September, 1786.

H. is an account current shewing N. Tracy to be indebted to W. T. and W. in £1700.

Account begins 1st January, 1786, and closes 19th of October, 1786.

I. is a letter of N. Tracy to Thomas L. Winthrop, dated September 14, 1786. Answer 20 Sept. 1786.

Another letter from N. Tracy to W. T. and W. 1st December, 1785, by brig Mary, states the shipment of 100 hogsheads of N. E. rum, shipped on their account and risk. Directs shipments of rice to Lane, Son and Fraser.

K. Letter. Tracy to Thomas L. W. Sept. 30, 1786, expresses surprise that the rice was not shipped on his account.

L. Account current between Lane, Son and Fraser, and N. Tracy. Newberry, October, 1789. 1st. item, 30 April, 1787; last item, 30 October, 1789. Brings forward balance of old account, £53,149. Balance due by Tracy to Lane, Son and Fraser, £15,369 18s. 7d. This is the document alleged to have been discovered since the trial at law. It is at the foot of this account that a special note is made relative to the contract of Winthrop, T. & W. for 1700 barrels of rice, and states it as depending, and gives no credit for it.

M. is the receipt of Mr. Dickinson, agent for Lane, Son and Fraser, for two obligations, signed by W. T. and Winthrop to Tracy for 1700 barrels of rice. The following is the copy: "Boston, Nov. 5, 1785—This day received of Nath. Tracy, two obligations signed Thomas L. Winthrop in behalf of W. T. and W. one for the shipment of 1000 barrels of rice in December next; the other for 700 barrels in February next, both of which said Tracy has assigned to Lane, Son and Fraser. He is to send vessels to receive the same, and though it will be shipped by the

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above mentioned gen*tlemen on account and risk of Lane, Son and Fraser, it is notwithstanding to be on the proper account and risk of Mr. Tracy: I do therefore engage that the proceeds shall be passed to his credit, in account with Lane, Son and Fraser.

(Signed,) "Geo. Dickinson."

This also was part of the evidence discovered since the trial at law.

It ought to be noticed that the answer generally denies any knowledge or acquiescence in any of the facts which the complainants charge and rely on for discovery and relief; except that it admits that Mr. Geo. Dickinson was the agent of Lane, Son and Fraser, and that the shipments were made by W. T. and W. on the account and at the risk of Nath. Tracy, though addressed to them, and that they did not give Tracy credit for the amount of the 1700 barrels of rice, nor did they debit W. T. and W. with them, but credited Tracy with the nett amount of the shipments actually made by W. T. and W. to them.

This cause was argued with great ingenuity and ability on both sides, and the Court is greatly indebted to the counsel for the light thrown upon the cause. The principal arguments used, will be adverted to in the course of the opinion which the Court is about to give.

The first ground taken by the defendant, was, that the judgment at law was conclusive, and that this Court not being a Court of Appeals, cannot reverse that decision. It certainly is true that the Court is not a Court of Appeals, and it would never entertain a suit, which claimed its interposition merely on the ground that on a trial at law, where the merits were fully disclosed, justice had not been done.

The complainants, however, insist that this is not the ground of their application. They contend that the whole truth did not come out, and that facts have been discovered since the trial at law, not then within the knowledge or power of the complainant, and fully

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with*in the knowledge of the present defendants, (then pl'tiffs) which if known would have materially altered the case, and obtained a different decision.

This makes it necessary to examine the case which was made at law, and the decision thereon, and to compare it with the case now made. The case is reported by Mr. Justice Bay in the 1st vol. of his reports, p. 116 [1 Am. Dec. 599]. It is there stated that the suit was brought upon the acceptance of Thomas L. Winthrop on behalf of W. T. and Winthrop, which was endorsed on the back of the two obligations of W. T. and W. to ship rice on account of Tracy to Lane, Son and Fraser.

The obligations, the endorsements by Tracy, and the acceptances by Thomas L. W. for W. T. and W. are stated to have been given in evidence. No other evidence is mentioned in the cause.

It was insisted for the defendants on the trial that the assignee or person in whose favor the endorsements and acceptances were made, could not maintain the action; because the obligations were not negotiable, and because there was no value expressed to induce the endorsement and acceptances; therefore it was nudum pactum.

Only one of the counsel glanced at the principal ground now taken, to wit, that the plaintiffs, Lane, Son and Fraser, were the agents of Tracy. And this he urged not upon any facts disclosed in the cause, beyond the endorsements and acceptances; but on the ground, that as no consideration was expressed, (which would have been the case if a new contract had been intended,) it was nudum pactum. Therefore the obligations still remained the property of Tracy, and Lane, Son and Fraser were only his agents. That the obligations not being negotiable, Tracy could assign no more than his interest; subject to all the equity of the other party; which equity they were, however, attempted to be precluded from by the form of action.

On the other side it was contended that there can be no nudum pactum, where the

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contract is in writing. *That the suit was not on any implied assumpsit or any assignment, but on the express undertaking of the defendants by their acceptances on the back of the obligations after the assignment made; not on the supposed negotiability of the paper, but on the express assumpsit made by the defendants themselves, which formed a new contract.

The able judge who presided was of opinion, that this was a new contract which the parties had a right to make on the back of the old contract; and this suit being brought on the new contract, which created an original right, no equity between the original parties could be set up.

It was urged that from this statement of the cause tried at law, it appears that the evidence now brought to the view of the court and the grounds founded thereon, were not before the court below, and being discovered since the trial, entitles the party to relief in this court.

1. This involves the necessity of enquiring what the new evidence is; and when it was discovered and if there are any objections to its reception?

2. If the new evidence varies this cause from that tried at law, so as to warrant the interposition of this court?

3. Whether the case now made entitles the complainants to any and what relief?

The evidence now disclosed, which does not appear to have been before the Court below, is various. It consists of several letters between Tracy and W. T. and Winthrop, and from the latter to Lane, Son and Fraser, shewing that subsequent to the endorsements and acceptances, Tracy still continues to order, direct and treat the contract as his own; and that W. T. and W. still considered him as the real owner, even in their correspondence with Lane, Son and Fraser. And that Lane, Son and Fraser did not interfere, or

appear to claim as owners, until after Tracy's failure.

If this had been the whole of the new tes-

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timony pro*duced, and if it had been more conclusive to the point, to establish which it was introduced, it would still be liable to the strong objection made by the counsel for the present defendants, that the party against whom the judgment was rendered at law, could not come into this Court for relief upon evidence, which he possessed and might have produced on the trial at law. For most if not all of these letters were within the power of the party at the time of the trial at law, and if he did not make use of them then, it was his own fault. Other testimony, however, is now produced, which it is contended by the complainants is material to the justice of this cause, and which they had no knowledge of, and could not then obtain, which entitles them to claim the interposition of this Court, and to relief.

The first testimony of this description is the receipt of George Dickinson, the agent of L. S. and F. to Tracy for the two obligations of W. T. and W. dated 5th November, 1785, a few weeks after the date of the obligations.

The second is the account between Lane, Son and Fraser and Tracy.

There is no evidence that this testimony was within the power of the defendant at law, at the time of the trial below. The transactions were between Tracy and Lane, Son and Fraser. They knew what had taken place between themselves on this subject; but W. T. and W. do not appear to have known or suspected the existence of these papers. The non production of them at the trial at law, where they might have been beneficially used in their defence, furnishes a strong presumption that they had them not in their power, and were even unacquainted with their existence. The bill charges that these have been discovered since the trial at law, and the plea admits this allegation. But it was insisted by the counsel for the defendants in this suit, that W. T. and W. might have obtained the knowledge of these papers, or of the facts disclosed by them, if they had used due diligence, by sending com-

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missioners to examine *Tracy or his clerks, and L. S. and F.'s clerks. And that if they neglected to do this, they are not now at liberty to use this testimony. Undoubtedly it is true, that if a party does not use reasonable diligence to obtain testimony material to his cause, it is a neglect for which he must suffer. And he shall not be allowed to renew the litigation, on pretence of the discovery of new evidence, which he ought to have obtained before the first trial. But this rule itself has reasonable limits. The testimony must have been within the knowledge of the party, or he must have had some clue to guide him in the search before he can be said to have neglected the proper steps to obtain it. There is no reason to believe that the party had knowledge of the existence of the particular documents in question. And there is no reason to suppose that they had any distinct idea of the true nature of the transactions between L. S. and F. and Tracy beyond the endorsements and the acceptances. And if they had any vague ideas on the subject, arising from the letters, and conduct of Tracy, of whom were they to seek this testimony? Lane, Son and Fraser were parties. Tracy was a party in interest, and would not be likely to disclose what he knew. The parties all lived in different parts of the world. In short I think the objection too broad. It would impose on parties who come to this Court for relief on the ground of the discovery of new and material testimony, the obligation to shew that they had sent abroad at a venture ambulatory commissions in search of testimony.

I am therefore of opinion that the new testimony produced in this cause is properly admissible, and upon which the complainant can come here for relief.

The next question is, whether the new testimony varies the case from that made at the trial at law, so as to warrant the interposition of this Court. I presume there is little difficulty in deciding that the case is importantly varied. The receipt signed by Mr. Dickinson to Mr. Tracy for the two obligations of W. T. and W. to ship the rice, states

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that notwithstanding the assign*ment of those obligations to Lane, Son and Fraser, the rice was in reality to be on the account and at the risk of Tracy; and that he should be credited with the nett proceeds when received.

The account current between L. S. and F. and Tracy, is dated 12th October, 1789, and shews that the former did not give credit to Tracy for the amount or value of the 1700 barrels of rice, contracted to be shipped by them, on account of Tracy, and addressed to Lane, Son and Fraser, and notes those contracts as depending and unfulfilled; and they by so noting it on the face of the account, shew that they still looked to him, and they opened no new account with W. T. and W.

This is certainly a very different case from that made on the trial at law; and it might have had a very different decision there, if all these facts had come out on the trial.

To this testimony may be added the discovery in the answer corroborating the preceding. But does the variation so made by the new testimony, warrant the interposition of this Court? It must be remembered that the great objection is that this Court is not a Court of Appeals, and cannot reverse a judgment at law, when the merits of a cause have been decided there. This is admitted; but it is said in answer that where the merits have not been fully tried, where new matter,

not then known or within the power of the party to produce is now obtained, which greatly varies the original case, this Court may and is bound to interpose, in order that complete justice may be done to the citizen.

Happily the Court is not left to grope its way in the dark, or to exercise a vague discretion on this subject.

The decisions of able Judges are at hand to assist our judgment.

The general powers of this Court are very great; and amongst others it is assistant to the Courts of law in counteracting fraudulent

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judgments; or where in *conscience and equity the plaintiff ought not to avail himself of a judgment at law.

In the case of the countess of Gainborough v. Gifford, reported in 2 P. Wms. 424, it is laid down that a Court of Equity will give relief in a matter where the defendant at law might have defended himself, as if plaintiff at law recover a debt at law, and the defendant afterwards discovers a receipt under the plaintiff's own hand for the money in question. There the plaintiff recovered at law against conscience, and though the receipt was in the defendant's custody, yet he not being then apprized of it, seems entitled to the benefit of equity. So if the plaintiff's own book appeared to be crossed, and the money paid before the action. So if other circumstances shewing injustice done by the verdict at law, by surprise or accident, or I may add ignorance, as in the very case reported.

The great abuse which might take place under this doctrine, by drawing within the jurisdiction of this Court, as by a side wind, almost all causes decided at law, has made the chancellors extremely cautious and even reserved in the use of it. Well knowing that the high powers with which they are entrusted, are to promote the purposes of justice, and do not give a wild, unsettled discretion; they are anxious these powers should not be abused to the vexation of the citizen and the unsettling solemn decisions of other courts, where full justice has been done. Thence we find the Chancellors extremely guarded in their expressions as to the exercise of this power.

Lord Redesdale (late Mr. Mitford) says Courts of equity will not interfere after verdicts at law, unless in cases of fraud, surprise, or extraordinary cases, where manifest injustice has been done. See new Reports by Schoales and Lefroy, 1 vol. 201.

Nor will they interfere after verdict at law, where the party might have defended himself at law, or where the party might have been competent to lay before the jury or courts on motion for new trial, the grounds

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on *which he applies to the Court of equity for relief. New Reports by Schoales and Lefroy.

Lord Hardwicke also says, the Court will not always relieve against a verdict, where the defendant submits to try it at law first, when he might by bill of discovery have come at the fact by the plaintiff's answer, upon oath, before any trial at law was had. See Williams v. Lee, 3 Atk. 223 4. †

The doctrine seems to be comprised in these cases. Take the rule then with its modifications and reserves, and apply it to the case before us. Here is new testimony not within the knowledge or power of the complainant, which was well known to the plaintiffs at law, the present defendants, which has been discovered since the trial at law, and too late to lay before the Court on motion for new trial; and which alters the case materially and probably would have produced a different decision, if it had been known in time, and adduced at the trial.

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*It is an extraordinary case where the parties defendants at law, could not defend themselves on the trial, because they were ignorant of the existence of such testimony, which was out of their reach. And the defendant at law cannot be said to have submitted to a trial improperly, when they might have filed a bill in Equity, and have discovered the facts on the oath of the defendants; for he had no information which could lead him to an opinion, that notwithstanding the appearance of the transactions between L. S. and F. and Tracy, there was a secret understanding different from the ostensible case, and that in reality L. S. and

† One of the principal grounds of the equity jurisdiction, is the power of granting injunctions, and staying proceedings at law. Its origin is very ancient, ascending to a period anterior to the time of Sir Thos. Moore, who exercised this power frequently. In the year 1616, a dispute arose between the Courts of Law and Equity, whether the Court of Chancery could give relief against a judgment at law, which was decided in favor of the Court of Chancery, and it has been acquiesced in ever since. 3 Bla. Com. 54; 1 Woodeson's Cts. p. 186. There are numberless cases which may render it against conscience to prosecute an action at law. See 1 Vernon, 489, 490; 1 Ves. 396; 3 Woodeson, 409, 407; 1 P. Wms. 671; and proceedings may be stayed by injunction in another Court of Equity, if inferior; or in the admiralty, or ecclesiastical courts. 3 Woodes, 410; 1 Atk. 628; 3 Atk. 350, note, 2 Fonbl. 322; 1 Ves. 119, 284. But this power is exercised with caution, and on certain general principles. The Court of Chancery will not interfere after verdict and judgment at law, unless in cases of fraud, surprise or extraordinary cases, where manifest injustice has been done. Nor where the party might have defended himself fully at law, & neglected it. But it will give relief in all cases (not of a criminal nature) of fraud, surprise, or extraordinary cases where complete justice has not been done; and in many cases on principles of general policy. See 2 Atk. 190, 319; 1 Atk. 268; 3 Atk. 223, 4; 2 P. Wms. 424; 3 P. Wms. 395; 2 Ves. jr. 135; 10 Ves. 422; 6 Bro. P. C. 470; 1 Schoals and Lefroy, 201, Bateman v. Willoe; 2 Hen. and Mum, 179.

F. were mere agents and had no solid interest in the contracts assigned.

Indeed if the objection were valid to the full extent that a party shall be precluded from redress in this Court if he submits to a trial at law, where he might have filed a bill of discovery, and obtained important facts from defendant's answer on oath, it would cut up this branch of remedial justice by the roots, or compel every defendant at law to file a bill of discovery in the first instance.

Upon the whole, I think the new testimony makes a fit case for the interposition of this Court, to give the complainants an opportunity to try what effect this testimony discovered since the trial, ought to have upon the cause.

We come now to the great point, whether the case made out upon the introduction of the whole of the testimony entitles the complainants in this cause to any and what relief?

The strength of the argument on the part of the complainants may be summed up as follows.

A contract to be obligatory must be mutual, and there must be consideration to make it valid; else it is a nudum pactum. That in this case, L. S. and F. gave no value to W. T. and W. None is expressed on the face of the assignment or acceptance. None is proved or pretended in the defendant's

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answer. That L. S. and *F. gave nothing to Tracy to induce the assignment, neither a new credit, or forbearance for old debts. They do not pretend it in their answer. And it appeared by the account current now produced in testimony, that though the assignment was made in November, 1785, L. S. and F. continued to urge and receive payments from Tracy in all manner of ways, by bonds, bills, lands, houses, wharves, ships, brigs and fishing schooners, through the whole of the year 1786, so that his debt was immensely diminished.

That the original contract between W. T. and W. and L. S. and F. expressly stipulated that the funds should be furnished by Tracy. It was the basis of the whole contract.

This was as all fair contracts should be, mutual. Do you agree to furnish the fund in time, and I will purchase and remit the rice.

That all the papers signed by the same parties, in relation to the same subject, form but one contract.

That in all probability Mr. Dickinson, the agent of Lane, Son and Fraser, knew the whole extent and terms of the contract; he was on the spot and knew all the parties. He knew that he furnished no funds, and must have understood that they were to be furnished by Tracy. As agent of L. S. and F. he was acquainted with Tracy's affairs, and knew he could not advance all the money at once. And that the acceptances were made conformably to, and dependent upon the contract with Tracy. That Tracy could only assign his interests in papers not negotiable, subject to all the equity W. T. and W. might have against him. The papers signed by Winthrop shewed but one side of the contract: he knew there must be another. That Tracy did not furnish the funds or very inadequately; and he directed an appropriation of great part of what he did furnish to a purpose different from the original destination, which direction W. T. and W. obeyed, under the impression that Tracy was

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really the person interested, and had a *right to give such orders. They had no temptation to have done so, unless they thought it right.

That W. T. and W. had large discounts against Tracy, to more indeed than the amount of his advances; and that the right to discount remains unimpeached. That there was in reality no new assumpsit to L. S. and F. The original agreement was to ship the rice to L. S. and F. and the acceptance was only a confirmation of the agreement. It was in substance a renewal of it, without any abandonment of the reciprocal engagement to furnish the funds. That the pretence of a new contract and assumpsit to L. S. and F. by which W. T. and W. are said to have become bound to them, at all events, even if no funds were furnished, is entirely unfounded. They had no inducement to do so; no consideration moving them to it. And the facts disclosed by the evidence shews that it was not so understood by the parties, for L. S. and F. gave no credit to Tracy for the amount. They made no debit to W. T. and W. As remittances were made, they gave credit not to W. T. and W. which they should have done, if they considered them as their debtors under a new contract; but to Tracy.

That this was further shewn by the proofs, and the confession of the answer, that the shipments were to be at the risk and on the account of Tracy. And if profits were made, Tracy was to have the benefit of them.

That this was still further evidenced by the conduct of all parties. Tracy continues to controul and direct, and even claims damages of W. T. and W. (in one of his letters) for not shipping the rice in time. And L. S. and F. gave no orders; received the remittances as made on the account of Tracy, and make no objection to the letters of W. T. and W. accompanying the remittances, and stating them to be on their contract with Tracy, on his account and risk.

Long after they speak of their business as of an affair depending, and give no credit to Tracy for the amount of rice contracted for by W. T. and W. That till the discovery

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of the evidence, part of which was many

years after the verdict at law, complainants had no ground to come into this Court. And since that, if there has been delay, it has been mutual; and no more blame attaches to one party than the other.

That even admitting the decision at law to have been right, on the facts disclosed at the trial, the new evidence not in the power of complainants, but discovered since the trial, makes an entire new case, which entitles complainants to relief.

On the other hand, the strength of the argument on the part of the defendants, may be summed up as follows. That a voluntary engagement imposes a moral obligation, which courts of justice will enforce, and such engagements cannot be said to be nudum pactum. That in this case, W. T. and W. voluntarily accepted the assignments made to L. S. and F. and promised to deliver the rice to L. S. and F. or order. That this was a new contract with L. S. and F. Else why the formality of an acceptance, if it were not so intended, for the first contract was sufficient for all Tracy's purposes. Their acceptances were to bind them to L. S. and F. That if the original contracts were mutual and dependent, W. T. and W. had a right to make a new contract, and to wave their right to insist on Tracy's furnishing the fund as a preliminary. And that in fact their acceptance is a waiver and formed a new contract, not subject to the original equity, which W. T. and W. had against Tracy. But that the agent of the defendants did not know of the counter engagement of Tracy to furnish the funds, the same not being apparent on the face of the contract, and no proof that he had any knowledge.

That the conduct of L. S. and F. in not controlling the proceedings, and in not giving credit to Tracy to the amount of the 1700 barrels of rice, and in not debiting W. T. and W. was not at all inconsistent with the idea of a new contract, and a new engagement by W. T. and W. with L. S. F. for it

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is common for cred*itors to take assignments of paper from their debtors as collateral security and without releasing them.

That as the shipments were to be on account and at the risk of Tracy, this entitled him to have the profits if any, and to sustain any losses on the shipments.

That even if the obligation on Tracy to furnish the funds, as a preliminary to the shipment of the rice, is to have any influence in the cause; he did in fact furnish funds adequate or nearly so, to that purpose. And that W. T. and W. ought not after their acceptances to ship the rice to L. S. and F. to have obeyed the orders of Tracy, to appropriate the funds to any other purpose. And having done so, they have made themselves liable. Finally that this very question was examined and decided by the court of law, which was competent to the case, and that judgment ought to be conclusive; more especially as the new evidence did not essentially vary the justice of the cause. That the real time of the discovery of the new evidence is uncertain; but certainly has been of long standing. And the party might have obtained the same testimony by commissions properly issued and directed previous to the trial at law. And no person can be permitted to come into this Court to get the benefit of testimony which he might by due diligence have obtained and used at law.

I have weighed the evidence produced in this cause, and the arguments founded on it with anxious attention.

It is not my intention, nor is it necessary after the full statement I have made, to travel over all the grounds taken by the counsel. It appears to me, that from what appeared to the Court on the trial at law, the decision was correct.

The action was brought on the acceptances of W. T. and W. and it certainly appeared to form a new contract, which obliged W. T. and W. to ship the rice (without any reserve as to funds) to L. S. and F. Nor was there any clear proof to shew that L. S. and F. or their agent knew of the existence of a coun-

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terpart to the *contract, by which Tracy bound himself to furnish funds in time to purchase the rice.

Nor were there any strong circumstances disclosed to shew that notwithstanding the appearances of a real and complete transfer to L. S. and F. they were in reality only agents of Tracy; and had only a collateral interest. But it does appear to me that the evidence now produced in this cause, which I have before stated fully, does make a new case, essentially different from the former entitling W. T. and W. to some relief from this court. That evidence was not in the power or possession of the complainant. It was in the knowledge of the defendants and has been discovered by complainants long since the trial. They or their agent knew, (and his knowledge is theirs) that the receipt he had given to Tracy for the obligations of W. T. and W. did expressly declare that though the shipments of rice, were, to be made in the name and apparently on account and risk of L. S. and F. they were nevertheless to be on the account and at the risk of Tracy.

So the account current in conformity to this receipt gave no credit to Tracy for the amount of the 1700 barrels of rice, but states it as depending, and gives Tracy credit for the actual amount of shipments. And above all, the answer acknowledges that no debit was ever made to W. T. and W. of the amount of the rice which it is contended they had entered into a new contract with L. S. and F. to ship to them; nor do they credit them with the remittances. It may be true as it has been contended that a creditor may take

collateral securities from his debtor, without giving the debtor credit for the amount of those sureties. But it certainly is extraordinary that the creditor should take a new obligation from the collateral surety, which he contends forms a new contract, and yet never debit him under that new contract. It furnishes at least a very strong presumption that the creditors L. S. and F. did not consider this as an original absolute engagement to them, and a total abandon-

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ment and waver by W. T. and W. *of the contract with Tracy, by which the funds were to be furnished in time to purchase the rice.

And all the other acts of the parties, Tracy, Dickinson, L. S. and F. and W. T. and W. tend to strengthen this presumption. I need not recapitulate these acts. They have been sufficiently dwelt upon before.

It is a fact indisputably established, that the shipments to be made by W. T. and W. were to be made (notwithstanding the acceptances) on the account and risk of Tracy. This is usually made the test of ownership. It is so in many transactions. In a case in 4th Dallas, p. 155, it is decided that where a creditor refuses to take and remit a bill of exchange in absolute payment, and on his own account and risk, though his debtor endorsed and delivered it to him, the ownership remains with the debtor, and he shall be entitled to the damages on the return of the bill protested. The endorsement and delivery of the bill to the creditors gave the transaction the appearance of a complete transfer. But the proofs in the cause shewed that though the bill was endorsed, it was not received as an absolute transfer, but remained at the risk and on the account of the debtor. And this decided the cause, and entitled him to the amount of the bill and the damages.

In the case under our consideration, the acceptances gave at first sight the appearance of an absolute transfer at the risk and on the account of L. S. and F. But the new proofs in the cause shewn that this was most sedulously avoided, and that the receipt of Mr. Dickinson for the obligations of W. T. and W. most explicitly declares the shipments were to be on the account and at the risk of Tracy. And the subsequent conduct of the parties corresponds with this.

Viewing the case in this light, and strongly impressed with the idea that the abstract justice of this case is with the complainants, inasmuch as they received no consideration upon the acceptances, and as L. S. and F. the defendants, paid no price, and gave no forbearance even to Tracy for these acceptances, I am very strongly

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*disposed to pronounce that these acceptances as explained by the new testimony, were not so absolute as to make W. T. and W. liable beyond the funds furnished according to the contract between them and Tracy. I think the justice of the case clear to that extent. But I have great doubts on another point; that is, whether the complainants ought to be let in to diminish their liability below the extent of the fund actually furnished by Tracy, by shewing that he had changed the application of part of the fund to another purpose.

It was indeed insisted upon by the counsel for the complainant, that if the court should be of opinion that the acceptances were not absolute, but that the evidence limited the generality of the acceptances to the amount of the funds actually furnished by Tracy, then it followed of course that complainants could be let into all the demands they had against Tracy to set off against those funds. But it does not strike me that this is a necessary consequence. We are seeking the very justice of this case. Upon that principle I restrain the liability of complainants on the acceptances, to the amount of the fund furnished. Upon the same principle I think that as the complainants knew that L. S. and F. had an interest in the application of whatever funds were actually sent by Tracy to W. T. and W. for the purchase of the rice in question, under the contract, and they had agreed by their acceptances to such application for the benefit of L. S. and F. they were in the wrong to obey any directions of Tracy, which went to change the application of the funds.

I should be unwilling however to decide this point myself. I would rather direct that an issue should be made up for the trial of this point before a jury. ††

It is therefore ordered and directed, that if the parties desire it, an issue be made up to try the question abovementioned before a jury.

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*This cause was very fully argued at the last Court, and I gave a decree upon the principal points.

†† The Court does not feel itself bound to direct issues even in cases desired by one of the parties, (except in cases relating to the due execution of wills of real estate,) but it fre-

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quently directs them to satisfy its "conscience, on disputed facts. Lord Chancellor Eldon said, "there is no doubt that according to the Constitution of the Court of Chancery, it may take to itself the decision of every fact put in issue upon the record." In the case then under his consideration he directed an issue, saying, "it is enough for me that I cannot unravel the difficulty, so as to satisfy myself." O'Connor v. Cook, 6 Ves. 671, 3. See also, the Warden of S. Pauls v. Morris, 9 Ves. 155, 162, 8. See too the course clearly laid down in the case of Jervis v. White, 7 Ves. 413, 415. The Court of Chancery direct, or refuses new trials in its discretion. See Coker v. Farewell, 2 P. Wms. 563; and the object of issues out of Chancery being only to inform the conscience of the Court, the Chancellor is not tied down to the same strictness and regard for verdicts, as courts of common law. Richards v. Symes, 2

A doubt however remaining on my mind on one question, I wished to have directed an issue, and made an offer to the parties to do so; for I was very desirous to avoid deciding upon a question of this kind. This offer the parties declined, and though I greatly regretted this, I did not choose to direct the issue without their assent, because of the great length of time which has already elapsed since this cause was pending. I then directed a further argument upon the point whereon I doubted. That argument has taken place, and I have considered the question very maturely.

I had decided at first, that under all the circumstances of this case, I did not think the acceptances or engagements of Winthrop, Todd and Winthrop, at Tracy's instance, to Lane, Son and Fraser, were such as would render them accountable beyond the amount of the funds furnished by Tracy. But I was inclined to think that they were bound to the extent of those funds; and that they had done wrong to obey any directions of Tracy which went to change the application of the

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fund *and to make remittances to France, instead of shipping rice to Lane, Son and Fraser. I am now to give my opinion upon this point, on the second argument. Although the counsel took a much wider range in the argument, than the point reserved, and in some degree went over the questions already decided, I shall confine my remarks to that alone, on which I doubted.

It was insisted for the complainant that the assignee takes the assignment with all the equity which the obligor had against the obligee; and that in this case, Lane, Son and Fraser, could not be allowed to take any benefit, as assignee, whilst the obligors, W. T. and W. had any demands against Tracy, the assignor. And the case of Da Costa against Shrewsbury, reported by Mr. Justice Bay, in his first volume [1 Bay, 211], was said to have established that doctrine.

It is no doubt very true both at law and in equity, that the assignee does take the thing assigned subject to the equity which the obligor has against the obligee.

But the very cases which lay down that doctrine, say that many circumstances may vary it. And the later cases seem to put it

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on this ground, that the assignee *shall take subject to all the equity, which the obligor had at the time of the assignment, or at the time of notice of the assignment. And strong as the case of Da Costa v. Shrewsbury is in favor of the obligor and against the assignee, (and there cannot well be a stronger, for the obligor had been consulted by the purchaser, and had agreed that the holder of his bond should assign it; still the Court relieved him,) yet that case does not go beyond the limit above mentioned; for though the obligor was ignorant of the equity, which he had at the time he assented to the assignment; yet there existed an equity at the very time, to wit, the bad title to the land, for which he had given the bond in question. When that fact was discovered it had relation back to the origin of the contract, and he was let into that defence against the assignee, to whom he had consented that he might take the assignment. This is what has been done by the decree already given in this case; for the complainants have been let in to shew that though they made acceptances on the back of their contract with Tracy in favor of L. S. and F. they did so unquestionably, with a view to certain funds which Tracy by a corresponding and mutual contract agreed to furnish, and the opinion of the Court restrained their liability to the extent of the funds actually furnished by Tracy, though the parties, Winthrop, Todd and Winthrop, had been so unguarded as to make acceptances without an express reservation on that point. But equity made an implied reservation for them, under the peculiar circumstances of the case.

I am not by any means certain that the Court could have ventured to have gone even as far as it did, if there had been any proof that Lane, Son and Fraser had given any new credit to Tracy, or had even extended the time of payment of his debt to him; or had in any way done any act, or been endangered

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Atk. 319. Issues are not sent of course. The Court judges of the propriety in each case. In the great case of Fox v. Mackreth, Lord Chancellor Thurlow was pressed to grant issues, but refused. He said it would be sending to a jury, not matters of fact, but what ought to be the rules and principles of a Court of Equity. See 2 Bro. C. C. 400, &c. and Lord Chan. Redesdale thought he was right to refuse. See 2 Shoals and Lefroy, 669. Lord Chan. Cowper refused to direct an issue, in a case

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where if the fact to be proved were *established, it would operate as a forfeiture on one of the parties. See Vane v. Fletcher; 1 P. Wms. 353. See also, 5 Bro. P. C. 454, and 6 Bro. P. C. 197. By all which it is established that issues are not directed of course, or of right. The court of law, to which the issue is directed, adheres to legal evidence, unless otherwise directed by this Court. See the Warden of S. Pauls v. Morris, 9 Ves. 155, 162. The rule is laid down that in deciding between the evidence of a single witness, and the answer of the defendant contradicting him, circumstances are looked to, and if they turn the scales, the Court may decree or direct an issue to try the fact. Ld Chan. Eldon explains the grounds on which issues in such cases are sent. See East Ind. Comp. v. Donald, 9 Vesey, 275, 283, 45. See 2 Atk. 19, 140; 3 Atk. 177, 469, 407; 1 Ves. 66, 97, 125; 1 Bro. C. C. 52, and Evans v. Bicknell, 6 Ves. 174, 7, where the cases are collected. See the various cases in which the Court of Chancery will direct issues or refuse them, collected in the general index to Brown's P. C. at the end of the 7th vol. under title "Issue," and see 6 Bro. P. C. 501; but there are many other cases stated in the later reports.

by the acceptance of Winthrop, Todd and Winthrop. No such proof appeared, and the Court gladly protected the parties as far as it was in its power.

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*But the Court is now asked to go much further. It is asked to let in the complainant, to set up discounts, which arise from shipments made by Winthrop, Todd and Winthrop, to France, by the direction, and on account of Tracy, against the demand which Lane, Son and Fraser set up to have a performance of the contract with Tracy, assigned to them by the consent of Winthrop, Todd and Winthrop, themselves: which shipments to France were made long subsequent to the contract with Tracy, and to the assignment by him to Lane, Son and Fraser, and the acceptances of W. T. and W.

It was very properly observed by the counsel for the defendant that this was a very distinct question. That it was asking the court to let the complainant set up matters of discount, which were subsequent to the assignment and acceptances, and upon grounds entirely supervenient, to wit: the advances made by Messrs. Winthrop, Todd and Winthrop, to make remittances to France for Tracy; and surely this would be going too far. It was optional with Winthrop, Todd and Winthrop to have obeyed Tracy's injunctions, to remit to France or not. They were not bound to make such remittances by any contract or by any acceptances, to any French houses. Nor does Tracy appear to have substituted the one for the other; for there is no proof that he counter ordered any shipment to Lane, Son and Fraser, in order to make this shipment to France.

It would rather seem that he continued to urge the remittances to Lane, Son and Fraser, conformably to the engagements made. Now if Winthrop, Todd and Winthrop, had not received funds to perform both, they should have done that, which they had undertaken to do to third persons; and not what was optional with them to perform or not at their pleasure. Besides it would seem that Tracy held out to Winthrop, Todd and Winthrop, another fund to induce the shipments to France, to wit: the acceptance of bills of exchange to be drawn by Winthrop, Todd and Winthrop, on a house of credit at Philadelphia. And it appears that Winthrop, Todd

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*and Winthrop made the remittance to France on that ground. It is true that they were cruelly deceived and disappointed by Tracy, who afterwards forbade his friend at Philadelphia to pay the bills. And if Tracy alone were concerned there could be little doubt where the justice of the case would lie, and as little of the inclination of the Court to give relief adapted to the case.

Indeed it was insisted from the complainant that this was really the fact, that Tracy alone was concerned, and that Lane, Son and Fraser had no interest in this assignment, and in the shipments contracted to be made by Winthrop, Todd and Winthrop, with Tracy. That they were agents of Tracy. That the shipments being to be made at the risk, and on the account of Tracy, proved this; and that the conduct of Tracy in controling and regulating the shipments; and the conduct of Lane, Son & Fraser in acquiescing in his arrangements, supported that proof. Consequently the acceptance or agreement of Winthrop, Todd and Winthrop, with Lane, Son and Fraser, being for the benefit of Tracy alone, they were at liberty to set up every demand they had against Tracy.

It is true that the shipments were to be made on the account, and at the risk of Tracy to Lane, Son and Fraser. But when the remittances were received in safety, the proceeds of them were to be carried by Lane, Son and Fraser, to Tracy's credit, on a debt due by him. This is not uncommon among merchants. They are often willing to be paid by remittances made by third persons on account of their debtor; but not to release their debtor till the remittance be actually made. Every thing shall be at the risk of their debtor, till the remittance is effected. But they still have an interest in the remittance. Such an one as I presume, would have formed an insurable interest.

It cannot then be said, that Lane, Son and Fraser had no interest in these shipments. They certainly had, and were to give credit to Tracy, as soon as those remittances were

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made. The acceptances by Winthrop, *Todd and Winthrop, were a pledge to them that such remittances would be made to the extent of the funds to be furnished them.

With regard to Tracy's control, and his giving directions to Winthrop, Todd and Winthrop, respecting the remittances, and with respect to the silence and apparent acquiescence of Lane, Son and Fraser, in the acts of Tracy; the former resulted from the relative situation of the parties, and from the fact that the assignment of Winthrop, Todd and Winthrop's contract with Tracy, and even their acceptances in favor of Lane, Son and Fraser had not induced them to release Tracy entirely. He therefore was interested in the compliance of Winthrop, Todd and Winthrop with the contract. As he was to furnish the funds to purchase, and the ships to carry the 1700 barrels of rice, and was resident in America, he necessarily gave the directions. But his directions, as was properly urged by the defendant's counsel, were in affirmance not in violation of the arrangements made between the three parties. He orders the shipments to be made to Lane, Son and Fraser, as has been agreed. He never says, take the funds destined to enable you to remit to Lane, Son and Fraser, and make remittances to France. He never substituted one for the other; at least we have no proof of it. And if he relying upon the bills he authorized Winthrop, Todd and Winthrop

to draw, or upon their general confidence in him, gave directions to them to make some remittances to France; there was no inconsistency in this. And Winthrop, Todd and Winthrop adhering to the engagements they had actually made, would have been under no obligation to go into the shipments to France, unless they were satisfied as to the funds to be furnished by Tracy for this new purpose.

Nor indeed is there any proof that Winthrop, Todd and Winthrop, considered the direction to make a shipment to France as a substitution for the shipments to be made to Lane, Son and Fraser, for in such case we surely would have heard of some remon-

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strances, or of *some explanations. They seem unhappily to have had too much confidence in a man, who did not deserve it; and to have acted as he directed or desired, without sufficient precaution for their own security.

The claim of damages made by Tracy for the non compliance of Winthrop, Todd and Winthrop with their contract by making the stipulated shipments to Lane, Son and Fraser, certainly does not justify the conclusion drawn from it by complainants. It shews indeed that Tracy supposed that Lane, Son and Fraser had not accepted the assignment of Winthrop, Todd and Winthrop's contract in full discharge of the debt due by him to them; but that they took it at least as a collateral security, and were to credit the amount of remittances to Tracy when received from Winthrop, Todd and Winthrop, and that meanwhile it was at his risk, to which Winthrop, Todd and Winthrop assented.

And though Lane, Son and Fraser were entitled to the remittances actually made, Tracy might pretend that he was entitled to damages for non performance, on the principle of the case of the bill of exchange cited from [Keppele v. Carr] 4 Dallas, p. 155 [1 L. Ed. 780].

But the claim of Tracy to damages from Winthrop, Todd and Winthrop could not alter the rights of the parties, and could not take away the effect of the liability which Winthrop, Todd and Winthrop had voluntarily contracted with Lane, Son and Fraser, as far as that went, under the restrictions heretofore stated by the Court.

Reliance was placed on the acts of Lane, Son and Fraser, as if they had acquiesced in the conduct and acts of Tracy, asserting rights or powers of control over the application of the fund destined to support the remittances. I do not however perceive this. They have written no letters, made no declarations, nor have they done any acts, which would justify the idea that they meant to relinquish the interest they had in the assignment, or which could mislead Winthrop, Todd and Winthrop into a belief that they

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consented to a relin*quishment of the fund, or to the employment of it in any other way than in remittances to them.

It is said they were silent when Winthrop, Todd and Winthrop made them a remittance, and told them it was by the direction, and on account of Tracy. If this were so, then their silence was an acquiescence in an act, which was in part performance of the contract, and of the arrangements made. This was no waiver of their rights; and there is no evidence before me, that they ever did waive their rights to the proceeds of those funds, whatever they might be.

It was contended that the contract between Lane, Son and Fraser and Winthrop, Todd and Winthrop was without consideration, and was a mere nudum pactum, not binding on them. The doctrine of nudum pactum is of some difficulty. Different nations have different regulations on the subject. The civil law differs from our law. The subject is well discussed in the case of Pillans v. Van Mierop, 3 Burr, 1670, and in a note to the case of Rann and Hughes, 7 term rep. 850. And it seems to be now established that a consideration of some sort is necessary to support an agreement, though evidenced by writing, unless the writing be of the solemnity of a deed or bond, or unless it be negotiable, or unless third persons have become interested with the knowledge or approbation of the person engaging to do a particular thing, or to pay money.

There is a distinction between a mere voluntary promise, and one upon the faith of which another does some act, or enters into some engagement. See Crossby v. M'Dowall, 13 Vesey, jr. 147, 158, cited by defendant's counsel.

In the case under consideration, Tracy, who was indebted to Lane, Son and Fraser, (as appears by the accounts produced in evidence by the complainant, as newly discovered evidence,) proposes to make them remittances through Winthrop, Todd and Winthrop, who in consideration of Tracy's contracting to furnish them proper funds, en-

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gage to make the remittances. And *this engagement is assigned with their consent to Lane, Son and Fraser, who certainly must have counted on it; at least as an additional security to their debt, so far as Tracy had furnished, or should furnish funds.

And in fact he had actually furnished funds to a considerable amount at the time of the assignment and acceptance.

I really cannot under these circumstances consider this acceptance by Winthrop, Todd and Winthrop to Lane, Son and Fraser as a nudum pactum.

Nor do I think it necessary for Lane, Son and Fraser to prove actual indulgence or new credit given Tracy in consequence of this engagement of W. T. and W.

It was further insisted that to relieve the complainants from the whole extent now de-

manded, followed as a necessary consequence from the relief already given by the opinion of the Court restricting the liability of Winthrop, Todd and Winthrop to the funds actually furnished by Tracy. After mature consideration I cannot see it in that light. It appears to me there was strong equitable ground to restrain the liability to the amount of the fund. But that Winthrop, Todd and Winthrop were bound to apply the fund as far as they received it, undeviatingly to the object stipulated in their contract with Tracy, which was assigned to Lane, Son and Fraser, and acceptances made by them to Lane, Son and Fraser.

I cannot relieve them from the consequences of their employing part of that fund to any other purpose than that they engaged to do.

I cannot by any effort of mind, however strongly inclined, go with the complainants the length I am asked to do. But I may be in error, and I shall be glad that both the decrees made in this case should be carried up to the tribunal where the errors may be corrected. It would be grateful to me, if that tribunal could feel itself justified in giving greater relief to the complainants.

It is ordered and decreed that the injunction on the judgment at law be continued

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till the further order of *the complainants, and that the complainants do account with the defendants for the funds placed in their hands by Tracy, for the purpose of making remittances to Lane, Son and Fraser.

Let it be referred to the master to examine and report what funds were so placed in the hands of Winthrop, Todd and Winthrop, and what is now due by them on those funds, after deducting the remittances actually made by Winthrop, Todd and Winthrop to Lane, Son and Fraser.

HENRY WILLIAM DESAUSSURE.

October 15, 1811.

From this decree there was an appeal.

1. Because no new contract was made between complainant and defendant, and no consideration in law or equity existed whereon a new contract could be predicated.

2. Because the decree having admitted that defendants, the assignees of N. Tracy, took the assignment of the contract in question with all the equity which the obligor had against the obligee, nevertheless has declared complainants accountable to said assignee for the actual amount of the funds furnished by the assignor, although those funds were by the said assignor expressly diverted to other objects, without the interference of or any notice to the contrary by the assignees who by suffering the whole business of the contract to remain in the hands of the assignor thereby made him their agent and they are consequently bound by his acts.

3. Because it clearly appeared from all the documents produced at the hearing of the cause, that from the commencement of the operation of the contract until after the said alleged diversion of the funds, no privity of contract whatever subsisted between the obligor and the assignee, but continued throughout with the obligee and was so considered by the assignee.

4. Because from the very nature and circumstances of the case it was competent to

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the said N. Tracy the *obligee to make such diversion, and order such change as to the application of the said funds as to him should seem proper, and the defendants having trusted Tracy solely to manage the contract, ought to be held to look to him and to him alone for any damage or injury accruing to them therefrom, and because it was competent to and was the duty of complainants to pursue such orders as they should receive from Tracy relative to the said appropriation, the contract being with him alone.

5. Because nothing had intervened between the signing of the original contract with Tracy and the alleged diversion of said funds to create any new contract with Lane, Son and Fraser, and which could restrain complainants from pursuing the directions of Tracy, inasmuch as the acceptance by complainants only bound them to consign to defendants such rice as should be ordered by Tracy to be shipped to London with funds specially furnished and destined to that object by Tracy, and it appears from some of the documents aforesaid that this was the understanding of all the parties.

6. Because the funds applied to the purchase of the cargoes they sent to France were raised by and furnished out of the resources of complainant in the first instance on the faith of credit, being provided in Philadelphia by Tracy for bills to be drawn by complainants, who were led to regard that as one of the modes he had adopted to supply funds for the purchase of rice; and there was nothing in the original contract whereby any particular mode of supplying funds was designated, and therefore they had a right to charge those shipments to France to the general debit of shipments made, and the defendants can take no benefit from the assignment without allowing all disbursements on account of the contract the assignee taking the thing assigned subject to all the equity which the obligor has against the assignee, and is not in this case, and under its peculiar circumstances, confined to the equity which the obligor had at the time of notice of the assignment; the assignment not having changed or transferred the con-

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tract, but being a mere *modification of the original contract, as to the shipment.

7. Because it did not appear at the hearing that defendants had in consequence of the assignment, given any new credit to Tracy

or had extended to him the time of payment of his debt or had in any way done any act or been endangered by the acceptance of complainants; on the contrary, it clearly appeared that defendants continued to look to Tracy alone for the payment of his debt, and in every respect acted as if no assignment had been made or as if they considered the acceptance by complainants as nothing more than a mere promise to consign to them in preference such cargoes of rice as should be shipped to London.

8. Because the directions of Tracy, (who had alone with the acquiescence of defendants, the management of the contract,) to divert the funds, or create new ones for the shipment to France, were a virtual countermanding of the shipment to London, and the conduct of defendants substantially authorised Tracy to make such alteration in the shipments, and the advances were made by complainants by order of Tracy to further this shipment, and because it does not appear that it was known to defendants that these funds to be shipped to France were not ultimately destined for defendants, and that the said shipment was a more advantageous mode of making the remittance.

Smith & Bacot, compl'ts sols.

The appeal was heard, and the Court of Appeals, present Chancellors Thompson, Desaussure, Gaillard and Waties, made the following order, unanimously:

"The decree is affirmed, for the reasons therein assigned."

The cause was argued by Messrs. W. L. Smith, Parker and T. Ford, for the complainants.

And by Mr. Pringle, for the defendant.

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*Case LII.

The Executors of J. COGDELL v. the Widow, Heirs, Devisees and Legatees of Testator.

[Tried before Chan. Desaussure, Charleston, August, 1811, by consent.]

[*Wills* ⟸482, 774, 781.]

A person sells the greater part of his real and personal estate, and takes a mortgage of them. He then makes his will, and after bequeathing several legacies to be paid out of the sales of his estate, gives the rest and residue of his estate to three favorite nephews. Afterwards he rescinds the contract and takes back the property, and then dies. The property taken back is a new acquisition, and does not pass under the residuary clause in his will.

[Ed. Note.—Cited in McLemore v. Blocker, Harp. Eq. 274; Scaife v. Thomson, 15 S. C. 354.

For other cases, see Wills, Cent. Dig. §§ 1012, 1996, 2015; Dec. Dig. ⟸482, 774, 781.]

[*Wills* ⟸197.]

The words used by him in his last illness do not amount to a republication of his will, as to the real or personal estate. The widow and the legatees take their legacies and also distributive shares of the estate. Widow barred of dower by the express words of the will.

[Ed. Note.—Cited in Hall v. Hall, 2 McCord, Eq. 316.

For other cases, see Wills, Cent. Dig. § 495; Dec. Dig. ⟸197.]

[*Wills* ⟸506.]

A testator has a number of nephews & nieces, and a wife. He bequeaths to his wife certain legacies and if she dies without leaving issue, all that he bequeathed to her, is to be divided among his heirs, hereafter named. He gave small pecuniary legacies to several of his nephews and nieces, and leaves the residue of his estate, (which was the bulk of it) to three favorite nephews. He says his executors must sell the residue for the advantage of his heirs, and then bequeaths such residue to these three nephews. This selection of them as his heirs, will apply to the limitations over, on the death of his wife, without issue.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1090–1099; Dec. Dig. ⟸506.]

[*Wills* ⟸293.]

[The republication of a will of real estate cannot be proved by parol, but it may be as to personalty.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 678; Dec. Dig. ⟸293.]

[*Wills* ⟸194.]

[Cited in Haynesworth v. Cox, Harp. Eq. 118, to the point that a sale of land after a devise and before testator's death is a revocation.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 481–489; Dec. Dig. ⟸194.]

[*Wills* ⟸197.]

[Cited in Watson v. Child, 9 Rich. Eq. 132, to the point that the provision of act of 1791 regarding republication did not change the law regarding real property.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 495; Dec. Dig. ⟸197.]

Bill of Interpleader.

The bill states that the Testator made and duly executed his last will and testament on 16th May, 1805, by which he devised his house and lot, No. 91, and in which he resided, to his wife, for life; she keeping it in repair. He also bequeathed to his wife his pew in church, his carriage, horses, cows and seven negroes by name; also his household furniture and part of his kitchen furniture; also the sum of £800 "to be paid her in proportion as received of the sale of his estate." All which he gave his wife in bar of dower. And if she should depart this life without any lawful issue, in that case to be divided amongst his heirs hereafter named. If otherwise he gave it to her and her lawful issue forever. The testator then bequeaths to his sister Anna Cogdell during her life the house and lot No. 93, wherein she resided, and also £200 absolutely.

The testator then devises and bequeaths as follows. To his nephew John S. Cogdell (after the death of his wife) the house and lot No. 91, to him and his heirs forever. Also to Clement and Richard Cogdell his house and lot No. 93, (after the death of his sister) to them and their heirs forever.

He bequeathed to Wm. Egerton, 200*l.* to be paid him as above, to him and his heirs.

To the vestry 50*l.* for the use of the Episcopal church.

He then bequeathed to Hannah W. Shackleford, 300*l.* out of his estate as received; and some trifles besides to her and her heirs; but

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in case she should die before she *attained 21 years, without lawful issue, then to go to her brother, A. Potts, and if he dies under 21, then to return to the testator's estate.

He bequeathed to A. Barnap 300*l.* to be paid as above, to him and his heirs forever.

Also to Charles Egerton, 200*l.* to be paid as above to him and his heirs forever.

Also to his nephew Richard Cogdell, his silver watch and gold sleeve buttons.

No appraisement to be made of the household furniture or apparel.

He earnestly requests his executors to make sale of all the residue of his estate to the best advantage for his heirs.

The testator then proceeds to give and bequeath to his three nephews, John S., C. and R. Cogdell all the residue and remainder of his estate, to be paid them as above. This to be after his debts and funeral expences are paid; to be equally divided between them for their use and their heirs forever.

Lastly, the testator appointed J. Keith, J. Dick, B. Alston, sen'r. and J. S. Cogdell, executors of his will, and revoked all other wills before made by him.

The bill further states that the testator on the 12th May 1806, made and duly executed a codicil in the presence also of three witnesses, by which he expressly confirmed the said will; and also made several new, but small bequests, specifically to his nephews, John S. Cogdell, Clem. and Richard Cogdell. The testator died on the ——— day of November, 1807, leaving the said will and codicil in full force and virtue.

The bill of the complainants goes on to state that the said testator, before he made his last will and testament to wit: on or about the 1st of January, 1805, sold and conveyed his plantations on Winyaw bay and on Waccamaw, (as described in said bill of complaint,) and forty-four negroes named in said bill of complaint to Mr. Josiah Alston, for

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which he gave his bonds and mort*gages, of the property to the testator, to secure the purchase money.

That the only remainder and residue possessed by the Testator at the time of making his will (and to which he must have referred in his residuary clause) was the balance due on said bonds, after deducting therefrom the pecuniary legacies.

That afterwards, to wit, on the 24th February 1807, an agreement was entered into by the said John Cogdell and Josias Alston, for the purpose of rescinding the said contract, which was accordingly rescinded by certain deeds in writing; and the bonds and mortgages were given up, except one bond, which J. Alston gave to J. Cogdell for the interest accruing on the purchase.

That during the last illness of said John Cogdell, when questioned about his will and his business by his wife, he said he had already settled his business to his satisfaction, and left the management of it to fit persons; only some unsettled business gave him some uneasiness.

The testator died soon after, having made no alteration in his last will and testament, or codicil.

That the testator left the following relations.

Mrs. Ester Cogdell his widow, Mrs. Anne Cogdell and Barnup his sisters, J. S. Cogdell, Clement and Richard Cogdell his nephews, sons of his deceased brother George. W. & C. Eagerton his nephews, sons of a deceased sister. And A. Barnup, his nephew, son of his said sister of that name. There are one or two nephews not named at all.

The executors are desirous of complying with the will, but the contradictory claims of the parties interested prevent their doing so without risk to themselves; especially as the widow insists that the testator died intestate as to the property sold to Mr. Josias Alston, the contracts respecting which were rescinded, and the property returned to Mr. Cogdell after making said will and codicil, and that the same is divisible or distributable according to the act of 1791, abolishing the rights of primogeniture. Whilst on the other hand,

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the residuary *legatees, insist, that by the rescision of the contract, the testator stood in statu quo at the making the said will as if the said property had never been conveyed away; and therefore that the said property passed by his will. And that even admitting the contrary, the declaration made by Mr. Cogdell on his death bed, amounted to a republication of his will.

The executors state that this difficulty and another respecting the legacy of 800*l.* to the widow, and some other legacies which are contested; and sundry other questions which have sprung up among the legatees, have so embarrassed the executors, that they have filed this bill of interpleader, that the parties may set forth their claims, and that the court may instruct the executors how to act in the premises.

That in the mean time it would be for the advantage of all the parties, that the whole property should be sold for the benefit of all interested, by order of the Court; and that the funds arising therefrom should be subject to the orders of the Court.

The answer of Clement and Richard Cogdell admits all the allegations of the bill of complaint, and insists that the deeds executed by J. Alston did not vest in the testator any greater interest than he had therein

when he made his will. That deeds of reconveyance by way of mortgage were executed at the time of the sales and continued in force when the will and codicil were made; and so continued till the deed of quit claim was executed by J. Alston, and operated therewith to complete and perfect the testator's right; the said deed of quit claim merely confirming an estate already vested, and not conferring a new right.

That the declarations of the testator amounted to a republication of his will, at least as far as regards the personal estate.

That defendants and their brother were the peculiar objects of testator's bounty, and nothing had happened to alienate him from them.

Insists that the pecuniary legacies are

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adeemed. But *if not, yet the real estate should under the circumstances be decreed to be primarily liable.

The answer of Mrs. E. Cogdell, the widow admits the facts generally stated in the bill, but insists that there was other residuary property, besides that sold to Mr. Josias Alston, to wit: 6 negroes not sold, or mentioned in the will. Defendant admits the repurchase from Josias Alston. Defendant insists that the conversation held by the testator with the defendant in his last illness is not correctly stated in the bill, that it took place as follows. On the morning of the day the testator died, the defendant asked testator if he did not feel worse, and if she should send the boat and hands for his friends. He paused, and then replied he was not at all alarmed. That testator asked defendant if it was not in March? Defendant supposing he referred to the bond given by Mr. Jos. Alston, (on the rescission of the contract,) answered yes.

The testator after some recollection, said, it is the unsettled part puzzles me; but added, I have appointed people to settle or manage my business.

Defendant says that immediately after the repurchase made by testator from Mr. Josias Alston, he said to the defendant, he thought he had settled his business, but he would have it all to do over again. Which defendant supposes referred to his will.

Defendant submits that the property repurchased was a new acquisition and could not pass by the will, according to the 14th section of the law abolishing the rights of primogeniture. Defendant does not admit that the repurchase placed testator in the same situation as if he had never sold, or conveyed it; for testator had legally conveyed out of him the interest and title to said property, and could not resume it without the consent of J. Alston, the purchaser, by a deed of reconveyance or a formal rescision equivalent thereto.

Defendant denies that there was any republication of the will or codicil after such re-purchase.

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*Denies that the pecuniary legacy of 800*l.* to defendant is adeemed.

Defendant does not admit that it is advantageous for the parties to have the property sold, and prays it may not be sold till the rights of the parties are settled by a decree.

The testimony given in the cause was that of Mr. Keith, who swears that the will had been, as he understood, sealed up and deposited with Mr. Dick, and a copy of it was found in his trunk of papers. That he received the will from Mrs. Cogdell, as she had received it from Mr. Dick, (as she informed the deponent,) and he broke the seal in her presence. He afterwards received from her the trunk containing title deeds, accounts, receipts and other papers.

Mr. M'Dowall swore that he was several times at Mr. Cogdell's during his last illness, and was present a few hours before Mr. Cogdell's death with other persons, when Mrs. Cogdell enquired of him if there was any thing which he wished to have done, (alluding to his worldly affairs,) to which he answered, that all his papers were arranged; (and as witness thinks he said, in his desk at Georgetown,) and that he had left proper persons to manage his affairs. Then perfectly in his senses. Witness never heard any thing mentioned respecting a will, nor any conversation respecting his worldly affairs, except the above.

On the cross examination, Mr. M'Dowall said he had every reason to think, from the manner in which he, (Mr. Cogdell) expressed himself, as before stated, that he was perfectly easy and satisfied, as to the situation in which he left his affairs.

Dr. Blythe swore that he was well acquainted with the transactions between Mr. Cogdell and Mr. Josias Alston, and had repeated conversations with Mr. Cogdell on the subject of his taking back and releasing Mr. Alston from the purchase of the plantation and negroes, which the deponent was anxious to effect, as the purchase was ruinous to Mr. Alston.

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*After frequent solicitations Mr. Cogdell consented at last, and deponent attended by request, and was present when the deeds of conveyance were delivered up, and the bonds cancelled. Mr. Alston at the same time gave his bond for the interest due.

Mr. Croft, (dep. reg. of Georgetown,) swears that it does not appear that there is any conveyance from John Cogdell to Josias Alston recorded in the office.

The mortgage from Josias Alston to Mr. Cogdell is of land and not of negroes, and bears date January 1, 1805, and is given to secure the payment of a debt on bond, conditioned to pay 8000*l.* by instalments, with

interest. Mr. Archibald Taylor was security to the bond.

The exhibits A. and B. were copies of the reconveyances, or quit claim of Mr. Josias Alston to J. Cogdell of the lands and negroes.

That of the land is in the form of an indenture, bearing date February 24, 1807, and recites that Mr. J. Cogdell having by deed duly executed, conveyed to the said Jos. Alston, the lands in question, and that it having been agreed between them that the said contract should be rescinded, and the said land taken back, he the said Jos. Alston, in consideration of said agreement and of 5s. bargains, sells, remises and quits claim unto the said J. Cogdell and his heirs all the said land, &c.

The reconveyance of the negroes was by an endorsement on the bill of sale from J. Cogdell to Jos. Alston, and recites that J. Cogdell having conveyed the within mentioned negroes to him the said Jos. Alston, and it having been agreed that the said J. Cogdell should take back the said negroes, and that J. Alston should surrender the same, and all his interest therein, he the said J. Alston in consideration thereof remised, released and forever quit claim unto the said J. Cogdell, his executors, &c. all the said negroes conveyed to him by the said bill of sale, and all his estate, interest and claim therein.

In consequence of these transactions, Mr. Cogdell cancelled and gave up the bonds and

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mortgages of J. *Alston, and repossessed himself of the lands and negroes, and was in possession thereof at the time of his death.

Mr. Northrop, for the legatees, the Cogdells. The property taken back by the testator, Mr. John Cogdell, from Josias Alston, is merely the calling in a fund or debt, and does not affect the will. 3 Wils, 141. Precedents in the construction of wills, must apply wholly and closely, or they cannot govern. There is no distinction between real and personal estate in this country. The old cases made a distinction between calling in payments or receiving money on voluntary payments. 2 P. Wms. 165, 328.

The presumption is always in favor of the testators continuing of the same mind and will, till the proof of a change is fully made out, and revocations are presumed against even in England. A fortiori here, where there is no favor to an heir at law.

Calling in debts is not an ademption of the legacy. The Court goes into evidence quo animo, the debts are called in. 1 P. Wms. 464; Earl of Thomond v. Suffolk, 2d Ves. 625. Drinkwater v. Falconer.

The contract was rescinded by Mr. Cogdell, and the property stood in the place it did before the contract of sale. The rescission has reference back to the original transaction. Such relations to past time are adopted by the Court where no prejudice arises to third persons. 4 Johnson's N. Y. rep. 234; 1 Johnson, 81. Implied revocations are founded on presumptions; but the circumstances must be strong and clear. Property contracted for, will pass by the will, even though it be necessary to apply to the Court of Equity, to obtain a specific execution of the contract. So here the retaking the property must be taken to be in subordination to the will. The testator doubtless so considered it.

The will of testator was republished. Such is the effect of the testimony in the

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case; and it was suffi*cient to give full effect to the whole will. Roper on wills, 38. The act of 1791, cannot apply to this case.

Mr. K. L. Simons, for other legatees, contends that the property sold by Mr. Cogdell to Mr. Alston, and afterwards taken back, cannot pass under the will. If testator had died before the reconveyance, the debt secured by the mortgage of Mr. Alston would have passed by the will; but surely not the land and negroes. A devise of land is one of the species of conveyance; and to make it valid the land must belong to the testator at the time of making his will, as well as at the time of his death; and that no change should take place after making his will, till his death. The testator had sold his land and negroes before he made his will, which, therefore, could not operate on them. His taking back the property cannot give effect to the will upon that property: not upon the real estate, because by the old rule, land purchased after making a will cannot pass under it; not upon the personal, because by our statute a will cannot carry personal property acquired after making it. The rescission of the contract, and taking back the property, is substantially a new contract, a re-conveyance. He is in as a purchaser. If Alston had released the equity of redemption it would not have altered the case; the land would not have passed under a prior will. The mortgage is no more than a security for the debt. It is not such an estate in the land, as the will can operate on. A person mortgaging his land, his will devising it, will operate on the land. If so, then the mortgagee cannot also pass the land by his will, though he may the security.

Any the least alteration in the interest of the testator in the land, will prevent the operation of the will on the land. If a man has an estate in fee, and devises it, then makes a feofment in fee, and afterwards takes back precisely the same estate, it will defeat the devise in the will. Mr. Cogdell being put back again in this old estate, his will made before such revestment cannot pass the land. See 2 Ves. jr. 604, Williams

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v. Owens; 3 *Ves. jr. 650, Cave v. Holford. See Justice Rook's opinion, which was adopted by the Court. Chief Justice Eyre differed

from the Court on the peculiar circumstances, but he stood alone.

It is contended that there was a republication of the will. As to the land there is no pretext for it. Republication must be by some act, as solemn as the execution. 2 Ves. 606, Williams v. Owens. Parol evidence of republication can no more be received than parol evidence of the original execution of the will, as to real estate. As to the republication which it is alleged took place, being sufficient as to the personal estate, the testimony is at least dubious. There is no evidence of the animus republicandi. See Roper on wills, p. 39, and 2 Atk. 599, Abney v. Miller. Mrs. Cogdell's answer shews the reverse, and that he thought part of his affairs were unsettled. The effect of the testimony, if allowed to operate as a republication would be to alter the will, and make it dispose of much more property than it originally gave.

No republication by words can be admitted to alter a will. See 6th clause of the executor's act of 1788.

Mr. Pringle, counsel for the widow. There are three questions in this case:

1. Whether the property sold by Mr. Cogdell, before he made his will, and re-conveyed to him after he made his will, passed under the residuary devise in his will.

2. Whether there has been such a republication of the will as can pass the property.

3. Whether the legacy of £800 bequeathed to Mrs. Cogdell be adeemed.

By the provisions of our statute of February, 1791, for abolishing the rights of primogeniture, no property real or personal acquired after the execution of a will, can pass under it. This introduced no new rule as to real estate, only as to personal estate. The reason of the rule was, that the devise was the appointment of the person to take the specific estate. 3 Bla. 371, and 2 Ves. jr. 427. A devise is merely

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a species of convey*ance, and can act only on lands held at the time of the devise. Our statute put the personalty on the same footing. Then were the lands and negroes the property of Mr. Cogdell, when he made his will? They were not. He had sold them, and the title was in another. They were mortgaged indeed to him, but that was a mere security, and gave him no estate. The equity of redemption was in the mortgagor, and he could devise the estate, though subject to the mortgage; for he is considered the owner of the land; whereas the mortgage of the land is considered personal assets in the hands of the mortgagee. If a mortgagee devises all his real estate the land mortgaged to him, though in fee, will not pass, unless the equity of redemption be foreclosed. That makes it a new purchase. Call the deed of reconveyance from Alston to Cogdell, by what name you please, a release, or quit claim, it is a reconveyance, and cannot be stronger than a regular foreclosure by Mr. Cogdell. The quit claim, or release, cannot reach back, and put the party in his original situation. It is in spite of every evasion, a new purchase. See 1 Vern. 3, Winn v. Little; 2 Vern. 401, 625.

The land remains unaltered in the mortgagor. The mortgagee has only a personal estate in the mortgage. 2 Ves. jr. 428, Brydges v. Chandos.

The legal estate in the mortgaged premises does not pass by general residuary devise by mortgagee. 3 Ves. 348, Duke of Leeds v. Monday; Co. Litt. 3. The reasoning as to real estate is applicable to mortgages of slaves in this country. They are the viva vadia of the Civilians. The property remains in the mortgagor. The mortgagee has no estate in them. He has only the power to sell. Our act of 1791, regulating the foreclosure of mortgages, strengthens these ideas. It is express that the mortgagor shall be adeemed the owner of the property, and the mortgagee the holder of a mere security for money loaned.

Then the property was completely vested in Alston, and when Mr. Cogdell took back,

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by reconveyances, he *took as of a new estate, and that could not pass under his will made before such reconveyance.

As to the second question, respecting the republication, there was no such proof as would amount to it. Clearly not as to the real estate, and our statute has put the personal on the same footing with real, as to passing under wills; so that the evidence of republication should be as strong in one case as the other.

A republication as to lands must be by codicil, in writing, in presence of three witnesses. 4 term rep. 604, Doe v. Kett; 10 mod. 96, Comyns's rep. 381, Acherly v. Vernon; 3 Bro. P. C. 107; 1 Ves. 417, 437, Potter v. Potter. A republication must have reference to the will; it must shew that the testator had it in contemplation. 1 Ves. 489, Gibson v. Mountfort; Ambl. 487, Jackson v. Hurloch; 4 Bro. C. C. 2, Barnes v. Crow; 7 Ves. 98, Bigot v. Waller; Cowp. 130, 158; 7 term rep. 482.

As to what will amount to republication of wills of real estate, see 7 Bacon, title wills.

The republication alleged in the case before the Court, has not the least resemblance to that required by law as to real estate; and as to the personal estate, the effect of the statute of 1791, (which directs that after acquired personal estate shall not pass under a testament, without a formal republication,) must be to require more formality in republications than formerly. It should at least distinctly appear that the testator had a design to republish. There should be some direct reference to the will; not a casual speaking of his will or reference to it. The

evidence should be clear, precise and certain. See Lord Mansfield as to republications; Cowper 130.

The case before the Court has none of these characters. The conversation of the testator with Mrs. Cogdell, does not amount to a republication; but rather the contrary; for he seemed to think all was done that was necessary, and that no new act was necessary: therefore, he did nothing. He made no re-

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publication. At *all events his words are too vague and equivocal to be so construed.

So it would appear from Mr. Brown's testimony, that the testator did not think any new act necessary to regulate his affairs: therefore he did not republish.

The third question relates to the legacy of 800*l.* to Mrs. Cogdell, and its supposed ademption. It was to be paid to her in proportion, as received of the sale of his estate. The question then arises out of what fund this money is to be paid. The testator directs a sale of the residue of this estate. It is not a gift out of a particular debt, which if lost, or not recovered, the legacy would fail. It is not specific, but a legacy of quantity and number. The Court does not favour ademptions. They must appear to have been intended. The failure of the fund does not defeat a legacy, which is not specific. 2 Fonb. 362. 1 Atkin. 414, 416. Purse v. Snaplin. 1 P. Wms. 461, 540, 779. Saville v. Blacket, 2 P. Wms. 562, Amb. 57. Brunsden v. Winter. Ambl. 566. Att. Gen. v. Parkins. 2 Bro. C. C. 108. Ashberner v. Maguire. 2 Ves. jr. 639. Coleman v. Coleman. 4 Ves. 150. 555, 748.

Mr. Parker, for the residuary legatees. The nephews and residuary legatees were the favourite objects of the testator's bounty, and the construction most favourable to them would be most favourable to his intentions. The points to be considered are:

1. Whether the lands sold to Mr. Josiah Alston and taken back, can pass under the will of the testator, Mr. Cogdell?

2. Whether the slaves can pass under the republication?

3. Was there in fact a republication?

4. Whether there is an ademption of the legacy of 800*l.* to the widow?

5. Whether the widow can take the legacy, and also a distributive share under the statute?

6. Out of what fund the legacy is to be paid?

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*Mr. Parker said that the first question had been so fully argued he would not touch it.

With respect to the republication, as to the personal estate, that the term, republication applies to wills and not to testaments. A testament need not be published, if found in a man's desk, it is good. 2 Bla. 501. The executor's act of 1789 declares that a will disposing of real and personal estate, but not executed so as to pass real estate, shall be good as to personal. And the act of 1791, does not touch the case of testaments of personal estate. The 6th sect. of that act does not warrant the construction put on it by the counsel on the other side.

The testator could have passed the newly acquired property by a codicil or a republication. And a republication would carry the residue of the personal estate even that acquired by the new purchase from Alston (if so to be considered) to the favourite nephews.

The evidence has been sufficient to establish the republication of the testament, particularly M'Dowall's. And even the widow's conversation with the testator, as stated in her answer, must have related to his will.

It is of their wills that we speak, to dying persons. He tells his wife, that all his papers are arranged, and settled all his affairs to his satisfaction, and left his business in proper hands. This amounts to an avowal that he had made his will and that he was satisfied with it at the time of speaking, and that amounts to republication as to the personal estate. It would have been a sufficient original publication of a testament a fortiori of a republication. The testator, then, when dying recognizes his will as in existence, and this is a republication. See 2 Bro. C. C. 296. Coffin v. Farneham. The animus republicandi need not distinctly appear. For a codicil, though relative only to personal estate, but executed in the presence of three witnesses, and expressing no intention as to republication of the will, shall nevertheless amount to a republication of the will, and under a general residuary devise, after pur-

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chased lands will *pass. See 7 Vesey 98, Pigot v. Waller. See 1 Vesey jr. 497, Barnes v. Crow.

With respect to the next question, the ademption of the pecuniary legacies, Mr. Parker contended they were adeemed. These legacies were so far specific, that they were to be paid out of a particular fund, the sale of the estate. But the testator having taken back the estate, the fund failed, and the legacies failed also. The only grounds on which specific legacies fail, are some new expression of the intent of the testator, or the failure of the fund, by the destruction of the thing, or calling in the fund. Latterly this last ground has been relied on alone, without searching for an ambiguous intention, which creates all the embarrassment of the cases. And the cases shew clearly, that when the fund fails or is called in, the legacy fails. See 3 Bro. C. C. 431. Badirick v. Stevens. See also the strong and more decisive case of Ashburner and Maguire, in 2 Bro. C. C. 108. In Prior and Morris, 9 Vesey, 360, it is expressly decided that on a bequest of a debt, and testator himself re-

ceives the money, it is an ademption, though he kept the money separate. It is there said that the Court no longer depends on searching out an ambiguous intention; that is exploded, and it looks alone to the failure of the fund. See 2 Fonbl. 362, 9.

The legacies in the case under consideration were to be paid out of a particular fund; out of Alston's bond, and is so far specific, that on the failure of that fund, by the giving up that bond, the legacies failed, or were adeemed. This does not appear by the words of the will, but by a full view of the circumstances. The sale by the testator to Alston was in January, 1805. It was of the great bulk of his estate. He made his will in May 1805, and gave legacies to the amount of 2000*l.* to be paid out of the sale of his estate. He had no other estate of any value, than the bonds and mortgages of Alston, and 6 slaves unsold. The value of these slaves were not more than equal to his debts. The testator therefore when he said his legacies

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were to be paid out *of the sale of his estate, could refer only to the sales he himself had made to Mr. Alston, as the fund for the payment. And as the rescinding the contract destroyed that fund, the bonds of Alston, the legacies fail with the fund.

But if the legacy is not adeemed, the widow cannot take the legacy of £800. and the distributive share of the property, not passing under the will. The legacy was given in lieu of dower. She must take exactly conformable to the will, and give up her dower, or if she claims dower, she must give up every thing under the will. The 6th section of the act of 1791, directs that the distributive share given to the widow shall be in lieu of dower. In all cases of partial intestacy the widow shall be barred of dower in the land, if she accepts the provision made for her under the will. In fact distribution under the act is dower; and if the widow elects to take the several provisions made for her by will, in lieu of dower, and one of these provisions fails, she is not entitled (if she adheres to her election,) to reimbursement of the particular provision which fails.

As to the other legatees, where reference is made to a particular fund for payment, they stand on the same footing with the widow; and the fund failing, they cannot be paid out of the general estate.

But this case is a peculiar one, and stronger than the mere failure of the fund, by the destruction of the thing, or calling in of the fund by the testator and spending it. For the bonds or fund out of which the legacies were to be paid, are given up, and the lands and negroes taken back by the testator. Then the legatees claim their legacies; and also claim distributive shares (as relations) under the act of 1791, of that very property which was the fund out of which their legacies were to be paid, and the residue bequeathed to others. This would be doubling the benefit to them, against the intentions of the testator, and to the prejudice of those he meant to benefit. This is too monstrous a result to be tolerated by the Court. The

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Court will endeavor to counteract the ef*fect of the circumstances which have unhappily arisen to defeat the fair claims of the testator's most favored relations and his intentions, by giving the most liberal construction for them.

As to the last question, out of what funds the legacies are to be paid, all distinction seems to be done away by our statutes between real and personal estate, as to descents, distribution and payment of debts. The Court may, therefore, under peculiar circumstances, direct payment of the legacies out of the land; and as this would give more effect to the testator's intentions, already sufficiently defeated, the Court will readily do so.

Decree.

This cause was argued with all the zeal and ability, which the great importance of the property, and the difficulty of the questions which arose, required. And I am greatly obliged to the bar for the lights which have been furnished me in the case.

The first question made was whether the lands and negroes which had been conveyed by Mr. Cogdell to Mr. Alston, before Mr. Cogdell made his will, and taken back after he had made both will and codicil, will pass under the residuary clause to his three nephews, J. S. Cogdell, Mr. C. and Mr. R. Cogdell?

If not, secondly, whether there was such a republication of the will after the taking back the lands and negroes as would pass either the real or personal estate so taken back.

3. Whether the legacy of £800. to Mrs. Cogdell and some other legacies directed to be paid out of the sales of the estate, were or were not adeemed, or lost by the failure of the fund, on the cancelling the bonds and mortgages of J. Alston to Mr. Cogdell?

4. Whether the widow can take the legacy and distributive share under the law of 1791, in the lands and negroes? And also, her dower in the land?

5. Whether if the legacies be not adeemed, they ought not to be paid out of the real estate, under the circumstances of the case?

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*On examining the will of Mr. Cogdell, it is obvious that his three nephews, the residuary legatees, were the peculiar objects of his care and affection, and that he meant to provide for them more extensively than any other persons. It is the duty of the Court, therefore, to give as full effect to the testator's intentions as possible, consistent with the rules of law.

The strong probability is, that when Mr. Cogdell agreed to rescind the contract with Mr. Alston for the lands and negroes, and to take them back, he was ignorant of the effect which that act would produce upon his affairs, and the application of his will to them. It is almost certain that if he had been aware that the rescission of the contract, and taking a reconveyance of the property, would be considered as a new acquisition, which could not pass under his will, he would have republished his will, or in some way given his nephews the benefit of this property; for they had done nothing to forfeit the affection which had first prompted him to prefer them to other relations equally near to him.

This induces a strong inclination on the part of the Court to pass the lands and negroes under the residuary clause, if that be possible.

The old law before the act of 1791 was explicit that no real property acquired after making a will shall pass thereby, without republication; and the act of 1791 placed personal property on the same footing with real in that respect.

Now it is impossible to consider the property in question in any other light than as newly acquired. Mr. Cogdell had parted with all his title to it. It was firmly vested in Mr. J. Alston, and he could have conveyed it away to a third person, subject only to Mr. Cogdell's lien on it by mortgage. He could have mortgaged it to another creditor, subordinate to Mr. C's. mortgage. In making tax returns, Mr. Alston must have returned it as his property. Mr. Cogdell could not have returned it as his. It would have passed by Mr. A's. will. On the other hand

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Mr. Cogdell had *ceased to be owner. He could not have sold or mortgaged it. The will of Mr. Cogdell could not act upon it, only on the bonds given on the purchase. Then comes the rescission of the contract and the reconveyance of the property.

It was attempted to be shewn that Mr. Cogdell was in of his old estate, and that this would have relation back to the original contract, which preceded the making the will, and then that the will would operate on it. If it were permitted to a Judge to have private feelings on a question of a legal right; if it were possible for the Court to decide ex arbitrio, I should be glad to adopt this construction; as I do believe I should thereby give better effect to the testator's original intentions. But I cannot consider it in that light. The law knows but two methods of the acquisition of property: by descent, or by purchase. This was a repurchase by which the estate was divested out of Mr. Alston and vested in Mr. Cogdell.

The form of reconveyance may be called quit claim, or by any other name, but in substance, it is a conveyance of a right then subsisting in Mr. Alston to Mr. Cogdell, in whom it did not then subsist. It is in legal language a purchase, a new acquisition. It would change the tenure exparte materna, and descend exparte paterna; consequently it would not pass under the residuary clause of a will made before such reconveyance.

The weight of authorities is wholly with complainant upon this point. It is most clearly decided in the Duke of Leeds v. Munday, in 3 Vesey, jr. 348, that the legal estate in mortgaged premises, did not pass by a general residuary devise by the mortgagee. And this is the old law. See also 1 Atk. 605, Casborne v. Scarfe, & Co. Litt. 203, note 96, 1 Vernon, 3.; 2 Vernon, 401, 635. In the two great cases of Bridges v. the Duke of Chandos, 2 Vesey, jr. 417, 427, which was affirmed in the House of Lords, and in Cave v. Holford, 3 Vesey, jr. 650, this subject has been exhausted and settled.

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*The rules both at law and in equity are, that after purchased or acquired lands do not pass by a devise. That after a will has been made devising lands, if they are conveyed by the testator to other persons, or if testator makes a feoffment to the use of himself in fee or suffer a recovery, it is a revocation.

That even leases for years, or for life, and mortgages in fee, and conveyances to pay debts, are revocations pro tanto, 3 Vesey, jr. 685, Templer v. Duke of Chandos. The words of Judge Rooke, supported by the Court are very express. "If a man has parted with the legal fee, the law considers him according to my idea, as having another seizin. If therefore the testator conveys away the whole fee simple after making the will, though he becomes seized again to the old use, yet the conveyance renders the will ineffectual, not because he intended to revoke the will, but because by the rules of law, the will cannot operate, 3 Ves. jr. 651." Now the case is much stronger where testator first sells and conveys land in fee; then makes his will, and gives his residuary estate to particular devisees; then repurchases, or takes back the estate in the lands. It is impossible as the law stands that this land shall pass by the will. If it could, all the old decisions are wrong.

There was not such property in the lands and negroes, in the testator at the time of making his will, as would pass them. 1 Atk. 602, 4, Casborne v. Scarfe. When were the lands and the negroes vested in Mr. Cogdell? On the reconveyance to him. This was subsequent to the devise, and they could not pass by it; the land could not pass by the old settled law; the negroes could not by the express provisions of the act of Feb. 1791.

The next question is whether there has been such a republication of the will in this case, as will give it effect?

With respect to the real estate, there cannot be any doubt. The evidence of republication is altogether parol, and this cannot pre-

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vail as to real estate. The law *is too plain to admit of an argument. Parol evidence cannot even be received on the question, whether the testator meant to revoke or republish a will of lands. 2 Ves. j. 606; 4 term rep. 604; 3 Ves. j. 650, 410, 11; 7 Bac. abr.

It must be in writing and executed in the presence of three witnesses, &c.

As to the personal estate, that is a very different question. Formerly there was no doubt, that a republication of a testament of personal estate could be made by parol. And personal estate newly acquired would pass. But the decided cases are not very numerous on this point, for, as by the English law, after acquired personal property would pass under the general words of a testament, there was the less frequent occasion to advert to what would amount to a republication. Still cases occurred for the application of the doctrine, and certainly a less formal mode of republication was admitted as to personal, than as to real estate. But it was contended that the act of 1791, which declares, that no after acquired property, real or personal should pass under a last will and testament, without a republication, had placed real and personal property completely on the same footing; and that in future, a republication of a testament of personal chattels must be made in writing, with all the solemnities necessary to give effect to republications of wills of real estate. This however I do not conceive to have been the intention of the Legislature, or to have been enacted by it. The point intended to be fixed by the act was, that no personal property acquired after making the will should pass without a republication, as in cases of real estate.

But the act does not profess to regulate the mode of republication. It leaves the law as it found it on that point. And I should no more think of altering the old method of republishing testaments of personal estate (under that statute) and conforming it to the mode of republishing wills as to real estates, than I should think of requiring testament of personal estates to be signed in the presence of three witnesses, as wills of real

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estates *are required to be. But certainly in case of such alleged republication by parol declaration, there can be no doubt that the court will require clear proof of the animus republicandi. And slight circumstances will not induce the Court to be satisfied. A casual speaking of the will is not sufficient. There must be clearness as to the expressions, and certainly as to the intent. In one of the reported cases, the testator examining his papers with a person who was assisting him, and who took up a paper by mistake, said, that is my will; and this was held not to be a republication to pass a lease which he had renewed, after making his will. See 2 Atk. 599. Abney and Miller.

This decision shews that in such cases, a direct reference to the will and speaking of it as his will, does not amount to a republication, unless there be animus republicandi.

Undoubtedly there are cases where a written codicil amounting to a clear act of republication shall supersede the necessity of an enquiry as to the animus republicandi. See 1 Vesey, jr. 486, 497, Barnes v. Crow; 3 Vesey, jr. 98, Pigot v. Waller.

These are very strong cases, and indeed they (following up the case of Acherly v. Vernon, 1 P. Wms. 783,) have superseded the old cases, which examined into the intent of such codicils, whether as a republication of the will or not.

Still, however, the question of intent must necessarily recur, when the alleged republication is of a testament by parol.

The question then is, is there such a clear act of parol republication, or such an expression of the animus republicandi, as will give new effect to the will and pass the negroes reconveyed by Mr. Alston to Mr. Cogdell. The answer of Mrs. Cogdell, the widow, and her explanations of Mr. Cogdell's words on his death bed, expressly negative every idea of a republication. And the witness, Mr. M'Dowall, says that Mr. Cogdell, on being questioned by his wife, if there was

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any thing *he wished to have done (alluding to his worldly affairs,) answered that all his papers were arranged, and he gave Mr. M'Dowall the impression that he was easy and satisfied as to the situation in which he left his affairs.

There is nothing in this testimony which can give the impression of any latent design to republish his will, much less of the actual expression of such design. A slight allusion to some unsettled business, seemed to hover over his mind and to cloud it, but it was so uncertain in the object, and so obscure as to any purpose or intent, that no conclusion can be drawn from it. One can scarcely make up any opinion at all as to what he meant, and surely not an opinion, that he was acquainted with the effect of the reconveyance of the lands and negroes to him, and that he meant to republish his will and thereby dispose of them under the residuary clause of his will.

This expression of satisfaction in the arrangement of his affairs previously made, indicates directly the contrary. At all events it would be extremely hazardous to declare on such slight grounds that a testator has republished his will. It would lead to constant litigation and great uncertainty as to men's wills, and would open a wide door for the entrance of incalculable mischiefs.

It would be unsettling men's wills so extensively and injuriously, and placing their affairs in the disposition of others, that it could not be borne.

With a thorough persuasion then that if the testator had been aware of the effect, which the reconveyance of the property he had sold, would have had on his will, he would have taken such measures as would have ensured the disposition of the property to his nephews, conformably to his intentions in the residuary clause of his will; and with every inclination to give full effect and operation to such supposed intention; I dare not go the length of establishing by a solemn decree a republication of a will on such slight and more than dubious grounds.

The result then is, that as this after acquired property, the lands and negroes, could

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not pass under the will, *and there has been no republication, which can dispose of the property, it sinks into the testator's undisposed estate, and goes to the next of kin.

The third question is, whether the legacy of £800. to Mrs. Cogdell, and some other pecuniary legacies directed to be paid out of the sales of the estate, were not adeemed or lost by the failure of the fund on the cancelling the bonds and mortgages of Mr. Alston to Mr. Cogdell?

As the argument upon this question turns upon a supposed failure of the fund, out of which the legacies were to be paid, it is first necessary to examine whether these legacies are general pecuniary legacies, to be paid out of a particular fund, or specific legacies? The words of the will in the disposition of the legacy alluded to, have been accurately copied in the statement. That to the wife, is in these words: "Also the sum of £800. to be paid her in proportion as received, out of the sales of my estate."

These expressions are repeated nearly in the same words as to the legacy of £200. to Mr. Egerton; the words are, to be paid him as above.

As to the legacy of £300. to Hannah Shackleford, the words are, "£300. out of my estate."

As to the legacy of £300. to A. Barnup, the words are "to be paid him as above."

As to the legacy of £200. to Charles Egerton, the words are, "to be paid as above." And in the residuary clause to the three nephews, the words are, "to be paid them as above."

No words of similar import are used in the bequest to his sister, Anna Cogdell, of £200. Nor to the Vestry of £50.

It was insisted for the legatees that these were general pecuniary legacies, and that the reference made by the testator to the sale of his estate, meant to that sale, which he directed to be made by his executors. Consequently the calling in the bonds, or consenting to can*cel them, had no effect on these

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legacies, which must be paid out of the estate generally.

On the other hand it was argued that the testator had distinctly marked the fund, out of which the greater part of these legacies were to be paid, which made them specific. In fact that all of them except a legacy of £200. to his sister, Mrs. Anna Cogdell, and £50. to the Vestry, were directed to be paid in proportion as received out of the sales of his estate.

And that the sales thus alluded to by the testator were the sales of the great part of his estate, which he had made to Mr. Alston, a few months before he made his will; and that the contracts having been rescinded, the property reconveyed, and the bonds cancelled, the fund had failed and these legacies could not be raised.

To shew that the testator must have alluded to the sales which he himself had made, it was stated and not denied, that there was no residuary estate, which could be sold under the direction of the will, but about six negroes, and that the testator's debts amounted to upwards of £500. a sum not far short of the value of the six negroes. That the legacies unlocated on any particular fund amounted to £250. and located on the sales to £1800. amounting to £2050. That to suppose the testator (who necessarily took at such a time, a complete view of his affairs,) alluded to the insufficient fund of the sales of six negroes, at least three or four times short in value of the amount of the legacies to be paid, was to suppose him very absurd; and that he had made a gross mistake as to what property he had left for sale. But that such mistakes are not to be supposed, if any construction agreeable to reason can be found out. See 1 Atk. 415, Purse v. Snaplin.

It was argued further that the strong presumption was, that he alluded to the sales he had made himself, which being very large (£8000.) furnished a most abundant fund to pay all the legacies, and to have a large surplus to pass under his residuary devise.

Obliged, as the Court is frequently, to seek

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light from *every permissible quarter, to ascertain the intentions of the testator, I am glad that there is no impediment to my resorting to the light furnished by these facts, relative to the situation of the testator's affairs.

In the case of Lowndes v. the exors. of Lemprire, decided, in this Court, it was said by the Court, that it is permitted to a Judge to look at the circumstances of the testator's estate, and of course to receive evidence on that subject, to form a judgment of his intentions, out of what fund a legacy was to be drawn. Reason and authority concur in this doctrine. Parol evidence was admitted

to shew a trust from the mean circumstances of the pretended owner of the estate. Willis and Willis, 2 Atk. 71. And so it may be received in other cases. Hampshire v. Pierce, 2 Vesey, 216, 3 Ves. jr. 308, Silwood v. Mildmay. See particularly note a.

Upon looking at the circumstances and situation of the testator's estate in this case, I should be strongly inclined to think that the testator meant, that the legacies were to be paid out of the proceeds of the sale, he himself had made, rather than out of the sale which he ordered to be made by his executors of the small residue of the estate, if it were necessary to limit his intentions to the one sale or the other; because the one fund was, as he well knew, perfectly adequate to the payment of the legacies, and the other fund he must have known as well, was totally inadequate. But I doubt if the fixing upon either fund in the exclusion of the other, would be agreeable to the intentions of the testator, or at least to the words of his will.

He gives his wife £800. to be paid her "in proportion as received out of the sale of his estate," without saying out of what sale. In the several other legacies he says "to be paid as above."

The legacy to Mrs. Shackleford "is to be out of his estate." And the legacy to Mrs. Anna Cogdell, and to the Vestry are general, without saying how to be paid.

I do not, I confess, think that the testator can be said to have referred to either sale

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separately; or that he *meant the legacies to depend upon the one sale or the other; but that he looked to both, if necessary.

Nor does there seem to be any good reason to suppose that the testator meant any distinction or exclusive location in this case. Why should he? For he disposes of the residue, as well proceeding from the sale he had made himself, as that which he directed his executors to make, to the same persons, his three nephews. And the provision he made for these pecuniary legatees, is in most of them the sole, and in all of them nearly, the chief provision made for persons near to him in blood.

And it is remarkable that he uses the same words "to be paid them as above," in the residuary clause, disposing of all the rest and residue of his estate to his three nephews. Unquestionably he meant by this residuary clause to give them the proceeds of both sales —that already made and that directed to be made. Yet it is "to be paid as above." How as above? Why as he had directed the pecuniary legacies before mentioned to be paid, to wit, out of the proceeds of the sale of the estate. This would seem to cover all the legacies.

Upon the whole I am of opinion that the testator has not located these pecuniary legacies on either sale; but they are payable generally out of the proceeds of the sales of his estate, as far as they will go, and this will cover all his residuary estate. But the main question still arises: whether these legacies, being payable out of the sales of the estate, which the testator had made, and out of the residue of his estate directed to be sold by his executors; and the testator having cancelled the sale he made, and taken back the property, which does not, therefore, pass under the will, but is distributable, does this amount to such failure of that part of the fund which had been sold by the testator himself to Mr. Alston, as will defeat the pecuniary legacies, or be an ademption pro tanto; or shall they be payable out of the distributable estate.

I have considered this question with great attention, and I have examined all the au-

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thorities cited by the *counsel, as well as other cases which have occurred to me. It is certainly a difficult doctrine, and I do not think all the cases can be reconciled. The general leaning of the Court is against making specific legacies. There is a devise of certain sums to be paid out of the sales of the testator's estate. Prima facie, this is a pecuniary legacy, with reference only to a fund for the payment.

To be sure, however, a clear intent, distinctly expressed, or necessarily implied, may oblige us to consider it a specific legacy, or in other words a legacy given out of and depending solely on the existence of a particular fund. And if so, then the question would arise, whether the testator has adeemed that fund.

Is this then a pecuniary legacy, or a legacy made expressly to depend upon a particular fund, exclusively, and therefore specific; and has such a change been made by the testator in that fund, by his consenting to take back the lands and negroes, and cancelling the bonds, as destroys the legacy itself?

For the residuary legatees it is contended that it is such a specific legacy, and that the fund has been altered and the legacy adeemed.

These cases are relied on in 4 Bro. C. C. 431, Badrick et al. v. Stevens et al. In this case the testatrix bequeathed certain sums to certain legatees, to be severally paid to them within three months after her death, out of 200*l.* due to her from John Cooper, on bond. John Cooper paid the debt and took up the bond, in the lifetime of the testatrix. But whether voluntarily or on demand did not appear. This was held by the Court without much discussion, to be an ademption of the legacies. 2 Brown, C. C. 108, Ashburner v. Maguire.

The bequest was of the interest of a bond due to the testator, to his sister for life, and the principal of the said bond on the decease of his sister to her four daughters. The debtor became bankrupt, and testator received a small dividend in his lifetime. There

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*were other dividends paid to the creditors after the testator's death.

There was also in the case a bequest in these words, "I bequeath to Mr. Wm. Beauses, my capital stock of 1000*l.* in the India company's stock."

The testator had exactly £1000 stock at the time of making his will and no more, but sold out the whole of it before his death. No difficulty arose as to this legacy of stock. The Lord Chancellor said no case countenanced that claim. The legacy was gone. The bequest was considered to be specific of the stock; not pecuniary with reference to a fund. The difficulty arose as to the other legacy. Upon that Lord Thurlow said there were two questions.

1. Whether the bond was given as a specific legacy; which depends upon this, whether the manner in which the sum is mentioned turns it to a pecuniary legacy, or as the civilians call it, a demonstrative legacy, that is, a legacy in its nature, a general legacy, but where a particular fund is pointed out to satisfy it, or whether it be what is called legatum nominis, or a legatum debiti.

2. Whether the legacy, supposing it to be specific, is adeemed, so far as the testator has received dividends in respect of the debt, (or as the bankrupt's estate may be insufficient to pay the residue.) On the 1st point, the Lord Chancellor was clearly of opinion this was a specific legacy, for whenever a debt, or part of a debt is the subject bequeathed, it is legatum nominis, or legatum debiti. If in this case the fortune of the testator had failed, so as not to satisfy all the pecuniary legacies, this legacy would not have been bound to contribute.

When the testator made his will, £5300 was due him on the bond. He meant to relinquish that bond for the benefit of those legatees, whether it turned out well or ill; the bequest must be considered though the sum be mentioned, for he said he could not agree to Lord Camden's distinction in the Attorney General v. Parkin, Ambler, 566, who held that the bequest of a debt, was not adeemed by

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the payment of part of the debt to the *testator on the ground that the sum or amount was named in the bequest.

On the second point, whether the testator receiving a dividend, was an ademption of the whole legacy, the Lord Chancellor was clear that it was not; but only as far as the money was received. He said one maxim had prevailed, recognised by Lord Talbot and Lord Hardwicke, which is that where a debt is bequeathed, and afterwards extinguished by the act, or with the concurrence of the testator, as by demand, or suit, the legacy was adeemed. But if paid in without suit or demand, there is no intention to adeem, and many cases go upon this distinction.

But Lord Camden in the case of the attorney-general v. Parkins, Ambl. 566, held that there was no distinction between voluntary payment and payment on demand or suit, and that in both cases the legacy was extinguished, as far as paid in. And Lord Macclesfield in Thomond v. E. of Suffolk, 1 P. Wms. 461, disapproved of the distinction between a debt recovered by suit, or paid in voluntarily. And Lord Thurlow adopted the opinions of Lord Camden and Lord Macclesfield.

The Lord Chancellor after reviewing the cases, and shewing their palpable contradictions concluded that in the case before him, the testator intended that the legatees should have the debt due on the bond, and decreed that the bond should be delivered up to the legatees, that they might receive the dividends not received by the testator, and whatsoever might thereafter be payable out of the bankrupt's estate. In other words that it was a specific legacy; adeemed as far as the money had been received; but no farther.

The next case relied upon by the residuary legatees, is that of Frier v. Morris, 9 Ves. jr. 360.

This was a bequest of all sum and sums of money, as testatrix's executors may receive after her death, on the interest note of £400 given to her by Messrs. Cross & Co. who were then bankrupts.

The testatrix received the money due on

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the note *some weeks before her death, and she payed it to a banking house where she had no other money. She drew out 10*l.* and left the rest there at her death.

The master of the rolls decreed that this was a specific legacy, and was adeemed by her receiving the money. That as to the argument that it was a pecuniary legacy, as it is a bequest of money to be received, it had no weight, for that is the case of every bequest of a debt. In the case of Avelyn v. Ward, 1 Ves. sen. 420, 5, Lord Hardwicke decreed that the legacy of stock was specific on the intent of the testator and the circumstances, shewing that he meant to confine the legacy to the stock he then had. Lord Hardwicke in this case said, that in deciding Purse and Snapling, he did it on the plain apparent intent of the testator. But he did not mean to decide that every legacy of stock must be considered not as specific, but general and consisting of quantity only. The intent shall govern, if it should appear that the testator meant to confine the legacy to the stock he had. And this agrees with Ashton, and Ashton decided by Lord Talbot. In the case before him, (Avelyn v. Ward,) as he considered the bequest to be specific, he decided that the legatee should not abate with other legatees on deficiency of estate.

On the part of the widow and other legatees of certain sums to be paid out of the sale of the testator's estate. It was argued, that the sale spoken of by the testator, was the sale which he himself directed to be made of

the residue of his estate; or of that and the rest of his estate ordered to be sold.

That this residue is uncertain. That the legacy of 800*l.* (and the other legacies of particular sums to be paid as above) was not a gift out of a particular debt which if lost, or not recovered, would fail, was not a specific legacy, but a legacy of quantity and number, referring to a fund primarily, but not exclusively.

That the Court neither inclines to construe legacies specific, unless plain and clearly so by will, nor to favor ademptions unless in-

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tended to be so by the testator. *That the failure of a fund, to which a legacy not specific is first referrable for payment, does not defeat the legacy itself. And that the testator's cancelling the bonds given by Mr. Alston, was not an ademption. The following cases were cited; Purse v. Snapling, 1 Atk. 414, 416. In this case the testator bequeathed to his niece £5000 in the old So. Sea annuities, and to his nephew, £5000 So. Sea annuities. At the time of making his will and at the time of his death, the testator had only £5000 in the old So. Sea annuities stock. But the personal estate was more than sufficient to pay all his debts and legacies. Lord Hardwicke decreed, contrary to the decree of the master of the rolls, that these are to be considered as two distinct legacies, and the legatees are entitled to have them made good out of the testator's assets, and the exor. was directed to purchase an additional £5000 in the old So. Sea annuities for the legatees.

The Lord Chancellor examined all the objections. He said the testator had not designated this stock particularly.

He had not said "my stock" to determine the property he held, but generally bequeathed £5000 in the old So. Sea annuities, and would operate as a direction to the exors. to purchase stock to make up the legacies. To the objection that this was a specific legacy, and if not found in the testator's funds would fail, he said there were two kinds of gifts, which passed under the name of specific legacies.

1. Where a specific chattel is described and distinguished from all other things of the same kind.

2. Something of the same species, which the exors. may satisfy by delivering something of the same kind, as an horse, &c. The first kind may be called an individual legacy, and if not to be found, fails, and if disposed of by the testator, it fails.

But the second gift of £5000 is not confined to the £5000 old S. S. annuities, which the tes-

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tator had. and *therefore does not fall within the first rule, but the second, which is of a more liberal nature.

It is a legacy consisting of quantity and number, and not confined to the strictness of the first rule. It is like the case of Partridge and Partridge, in cases Temp. of Lord Talbot, p. 226, where testator bequeathed £1000 S. Sea stock to his wife. He had at the time of making the will £1800 of that stock. He sold out £1600 and then bought in enough to make up the sum given. Then came an act of Parliament altering So. Sea stock; then the testator died. It was decreed by Lord Talbot that neither the act of Parliament, nor the sale by the testator, was an ademption, for the devise of so much So. Sea stock, was descriptive of the nature and kind of the thing devised, not of the particular stock which testator had; no more than if he had had no stock at the time of the devise.

The next case cited was that of Hinton and Pinke, 1 P. Wms. 540. The point decided here was, that a legacy of £1500 to be laid out in land, shall be taken as land. But it is not specific, and must abate on a deficiency of assets. Lord Macclesfield said in this case that a legatee of a debt, which is lost by the insolvency of the debtor is specific, and shall not be entitled to contribution from other legatees.

In the case of Thomond v. the Earl of Suffolk, 1 P. Wms. 461, where the testatrix bequeathed a debt of £4000 to a grand child, due by J. S. and provided that if any part of the debt should be paid in before the testatrix's death, then so much should be made good to the grandchild out of the surplus of the personal estate. The testatrix released £2000 of the debt, without having received any of the money. It was decreed that this was not an ademption of the legacy pro tanto, but that the legatee was entitled to the whole £4000 as much as if paid in to the testatrix. This was evidently on the ground of intention.

In the case of Ashton v. Ashton, cases Temp. Talbot, 125, a bequest of £6000 S. Sea

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annuities was decided to *be specific, and not entitled to be made up out of the general estate, (less being left of that stock by testator.) But there the testator evidently meant the particular stock he had, for he orders it sold. The case of Sleech v. Thoringdon; 2 Ves. sen. 560, is of a legacy of £400 East India bonds. Only one bond was found at testatrix's death, short of the sum of £400.

This was decreed not to be a specific legacy, but of quantity and supplied out of the residue.

The case of the Attorney General v. Parkin; Ambler, 566.

The testator enumerates his mortgages, bonds and notes, and then gives an annuity out of the interest, and devises the principal sums, and the overplus interest to a college.

This was held not to be a specific legacy, but of money, and that the legacy to the college was not adeemed as to the money paid in, whether voluntary or not, upon the

ground that the sum was named in the bequest; which ground Lord Camden admitted to be slight, and Lord Thurlow afterwards said could have no weight: and the decree of Lord Camden was only supportable on other grounds in the case.

The case of Coleman and Coleman, 2 Ves. jr. 639, is as follows:

The testator by his will recited that he was possessed of a bill of exchange drawn in his favor, and accepted by the East-India Company, bearing an interest of 3 per cent. He bequeaths the interest to his wife for life, and directed that after his death, the bill should be sold and the money divided among his nephews and nieces. He gave his wife all his household goods, plate, linen, china, notes and ready money in the house at his death. The testator afterwards received the money due from the East-India Company, and lent it out on private security, which remained due at his death, and was paid to his widow and executors. The nephews and nieces filed the bill to establish their right to the £1500 subject to the life estate

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of the wife. She by her answer insist*ed that the legacy was adeemed. This fund formed the bulk of the estate. It was contended for the legatees that there could be no intention in the testator to adeem; for this bill was paid in the usual course in which the Company pay their bills in rotation. This cannot be considered a specific legacy, with reference to this security.

For the executrix it was insisted that this was a specific legacy and adeemed. That the distinction between voluntary and compulsory payments has been exploded since the cases of Ashburner and Maguire, 2 B. C. C. 108; Attorney-General v. Parkin, Ambl. 566. The Lord Chancellor said it was true it had been said that the distinction was exploded, and the application of it would frequently fail in particular cases. But the difference of a voluntary or compulsory payment would often furnish strong presumptions of intention on one side or the other.

He approved the decision of Lord Camden upon the whole case. He acted upon consideration of the whole will; the distinction will not decide in every case. The nature of the legacy and the particular will must be considered.

Upon the whole, (though the sum was not given, but the proceeds of the sales of the bill of exchange,) the Lord Chancellor decreed that this was not a specific legacy, adeemed by the receipt of the money by testator, but the legacy should be raised out of the estate, subject to the wife's life estate.

The next case is that of Roberts v. Pocock, 4 Ves. jr. 150, where it was decided that a legacy of £4000 divisible between the testator's two nieces, and a legacy of £500 to another girl, payable out of monies due to the testator by A. Davidson, should be considered general legacies upon the circumstances; and upon the failure of the fund by the insolvency of Davidson, the legacies were directed to be raised out of the residuary estate of the testator.

In this case the testator seemed to have

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been aware *of the law, that if he called in the fund, it would be an ademption, and he provided against that by declaring that if he should receive the money or alter the security, it should not be deemed a revocation. He did neither; but the fund failed by insolvency. It was decided to be no ademption.

The Lord Chancellor said the arguments as to intention balanced each other. That he must take the will as he finds it. These legacies he did not think specific. The testator has not given the bond in form or substance. The legacies are charged on the bond, and so far were specific that the Court would not have permitted the bond to have been applied to the prejudice of legatees, but for payment of debts. It would not have abated with other legacies. He therefore decreed that as the legacy was not specific, and the fund to which reference was made had failed, it should be paid out of the estate generally.

The next case is Chaworth v. Beech, 4 Ves. jr. 555. In this case a legacy of the money due upon a note was held to be specific. But this was upon the intention, notwithstanding the inclination of the Court is against specific legacies, and to hold it a general legacy with reference only to the security, as the fund first to be applied.

The master of the rolls said (565) that this was clearly a specific legacy as decreed in Ashburner v. Maguire, decided by Lord Thurlow.

That the bounds between specific and pecuniary legacies are sometimes very nice and too refined; yet we are now come to a clear understanding of the rule upon which the Court proceeds; that the will is to be read with an inclination to hold it a general or pecuniary legacy, with reference only to the particular fund, as that out of which it is to be first paid. And the Court is so desirous to construe it a general legacy, that if there be the least opening to imagine that the testator meant to give a sum of money, and referred to a particular fund only as that out

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of which in the first place, he meant it *to be paid, the legacy will have this advantage, that it shall be considered pecuniary, so as not to have the legacy defeated by the destruction of the security, if that should be destroyed.

But this could not apply to the case before the Court, where it is impossible not to say that the testator meant to give the note itself, with the interest due on it. Upon the will itself, and the authorities of Ashburn-

er & Maguire (which is the true rule upon the subject,) he said he must decide this to be, the legacy is that note and nothing else. Lord Thurlow took two years to consider the case of Ashburner and Maguire.

He was afraid of overturning the case of the Attorney-General v. Parkins, decided by Lord Camden. What he decided establishes this, that if the legacy is meant by the testator to consist of the security, it is specific, though the testator begins with giving the sums due on it.

The case of Innis v. Johnson, 4 Ves. jr. 568, was similar to the above, and decided at the same time.

The case of Kirby v. Potter, 4 Ves. jr. 748, is where a legacy of £1000. "out of my reduced bank annuities," was held to be pecuniary, and meant £1000. sterling, payable out of his reduced bank annuities, of which he had more than enough to raise the £1000.

The evidence being that the value of £1000. reduced bank annuities was no more than £470. Decree that the sum of £1000. sterling be raised out of the sale of the reduced bank annuities.

Examining this question fully, some cases came under my view, which had not been cited by the bar; one is Sibley v. Perry, 7 Ves. jr. 522, 536, where a direction to transfer £1000. stock in the public funds for the legatee, and that so much capital be kept in the public funds, is not sufficient to make the legacy specific.

The Lord Chancellor said (page 529,) there is no case deciding the legacy to be specific, without something marking the specific thing, the corpus, to be bequeathed.

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*Another is the case of Webster v. Hale, 8 Ves. jun. 410. where a legacy of £8000. stock in the 5 per cent. Irish fund, was decreed to be pecuniary and not specific, which last the Court leans against.

The last of the authorities I shall quote is that of Deane v. Test, 9 Ves. jr. 146, 151.

In this case it was decided that a legacy of £4000. stock in the 4 per cent. consolidated bank annuities which is directed to be transferred directly to the legatees, is a specific legacy. But that a further legacy to the same legatees of £2000. more to be paid out out of the 4 per cent. consolidated bank annuities, was held to be pecuniary, as the prima facie construction, which is to be controlled only by plain inference from the rest of the will upon solid and rational grounds. It is pecuniary with a direction, out of what fund to be primarily paid; but may come on the rest of the estate if that fails.

Thus have we made a long and laborious examination of the decided cases on this important and difficult question. It is full of perplexity and even contradiction. The neglect of testators to new model their wills to the new circumstances and changes of property which arise, produces infinite embarrassment. And there is a perpetual conflict in the minds of the Judges between their desire to give effect to the intention of the testator when it can be discerned, and the rules of law necessary to be observed as land marks of property. The infinite diversity of the cases arising from the great variety of expressions used in wills, and the great changes in circumstances, leaves much room for regret. It is the humiliation of the bench, perhaps of the human mind, to perceive Judges arrayed against Judges, opinions against opinions. Lord Macclefield, Lord Camden and Lord Thurlow, advocating one principle and decreeing solemnly under it; and Lord Talbot, Lord Hardwicke and a later Chancellor holding an opposite opinion, or decreeing differently on shades of difference in the cases.

See Brown's C. C. 110, Ashburner v. Ma-

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guire, where *this is displayed. It should, however, be added as the justification or excuse of the Court, that there are such intrinsic difficulties in the questions, and they are so varied by the words of wills and new modifications of property, that the keenest perception is sometimes bewildered in the vain attempt to seek and give effect to the intentions of the testator, and at the same time to conform strictly to the rules of law.

Amidst these difficulties, however, we may perhaps discern with sufficient clearness to guide our steps, that it has been settled, that wherever a sum of money is intended to be given, to be paid out of or with reference to a particular fund, merely as the primary source of payment, this should be deemed a pecuniary and not a specific legacy; and that the failure of the fund, or the calling it in, (whether voluntarily or involuntarily on the part of the testator, though that circumstance may sometimes furnish evidence of intent,) will not defeat the legacy. That the will is to be read with an inclination to hold it a general legacy, with reference to the particular fund, as that out of which it is to be first paid; but not confined to that fund, if it should fail.

On the other hand it seems equally clearly settled, that if a legacy is meant to consist of the security itself, it is specific; even though the testator begins by giving the sum due upon it. But to make it specific, there must be something marking the specific thing, the corpus, as the object of the gift. And that in such case, if the specific thing be destroyed, or the debt or stock specifically bequeathed be paid in, or called in voluntarily, or involuntarily it is an ademption wholly, or pro tanto as received.

Applying these conclusions to the case before the Court, it appears to me after the maturest and gravest consideration I can give the subject, that the legacies to Mrs. Cogdell, the widow and the other persons, to

whom particular sums are given, are pecuniary legacies with reference to the sale of the testator's estate, as the first fund for the pay-

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ment. I cannot say that this reference *is such a bequest of the security itself, or corpus, as constitutes a specific legacy. Indeed upon great reflection, it does not appear to me that this case is so strong as many of the cases of legacies to be paid out of the stock, which were decided notwithstanding to be pecuniary legacies, with reference to a particular fund in the first instance; but to be paid generally out of the estate, if the first fund failed.

The legacies so given in the case before the Court, were far short in amount (not being above one fourth) of the value of the estate of Mr. Cogdell, even if we suppose with the counsel for the defendants that the testator referred to the sale of the estate, which he himself had effected. How then can it be said that the legacy here was intended to consist of the security, the bonds proceeding from the sales of the estate?

The corpus was not given to the legatees, but to remain with the executors, out of which to pay the legacies, and the large balance was to go to the residuary legatees. These, therefore, in my judgment, were pecuniary legacies, and the calling in the bonds to which they had reference, (whether under the circumstances stated it should be held to have been done voluntarily or involuntarily) will not be permitted to defeat the legacies. They must be paid out of the assets of the estate generally.

I have come to this conclusion slowly and reluctantly, because I perceive that the testator's intentions will not be fulfilled, and that those who were intended to have these legacies and no more, or but little more, will not only receive them, but will take a large share of those parts of the estate, which by the testator's taking reconveyances, do not pass under his will, to the prejudice of the residuary legatees, whilst those who were the chief objects of the testator's providence and kindness, will be greatly defeated in their reasonable expectations, under the provisions of his will. But I am bound to pronounce what appears to me to be the law: I am only its voice, not its framer. And the

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disappointment aris*es from the testator's own neglect, in not altering his will to suit his new circumstances. As this however is a question of great difficulty, as well as importance, and as in the long investigation we have been obliged to pursue, the conclusions I have drawn from a great number of complicated and conflicting cases may be erroneous, I hope that my opinions and decree upon this point may be put under the revision of the Court of Appeals.

4. Another question was made, out of what fund the legacies should be paid. On decreeing the payment of these legacies I feel that I shall be at liberty to direct that they, as well as the debts, shall be paid out of the estate, to which the testator chiefly, if not wholly, had reference for their payment, and which not passing under the will, remains now an undisposed fund, applicable to these purposes, and the remainder subject to distribution under the act of 1791. This will leave that part of the residuary estate which did pass by the testator's will, to go undiminished to the residuary legatees. It will leave something for the will to work upon. And the testator's general intent will not be so totally defeated, as it otherwise would be.

I am the more satisfied with this arrangement, (or marshalling the assets, if you please so to call it,) because it is founded on a very equitable principle. It is also an equivalent for the advantage which the legatees in such cases are allowed to have, if there should be a deficiency of assets, for though deemed pecuniary legacies, and only having reference to a particular fund for payment in the first instance, they are so far deemed like specific legacies, that in case of a deficiency of assets such legacies shall not be bound to contribute out of the particular fund, which is its peculium; whilst on the other hand, if the particular fund fails, they may come upon the general assets for payment.

All the cases quoted lay down these doctrines. And the case of Hamblin v. Leyster, in Ambl. 401, goes farther, and decides that

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when a legacy is given out of a *mortgage (but not specifically) and the money is afterwards received by the testator, and laid out in new securities, this is not only not an ademption of the legacy; but the legatee has a right to follow the fund for the satisfaction of the legacies. And as the money due upon two of the new securities was readiest for the legatees satisfaction, that money was directed to be called in forthwith for that purpose. This case from Ambler is cited, approved and stated more largely and clearly by the Lord Chancellor in the case of Wood v. Penoyre, in 13 Ves. Rep. 335, 6, 7.

As therefore the legatee, who though pecuniary has by the will a reference to a particular fund for payment, shall have the advantage to be paid out of that fund without abatement, and may even follow the fund, if received and newly invested; so in my opinion he ought to be confined to that fund, as long as it is sufficient to pay him, if that be necessary to the doing justice to the other legatees, even residuary legatee; for though these last are not usually favored, the Court will do what it can for them, when it is manifest that the testator intended to provide chiefly for them, and by some unforeseen events his intentions are much frustrated.

The legatees in the case before the Court should have interest on their legacies from

the end of one year after the death of the testator, according to the case. 13 Ves. jr. 335, 7, and should be paid their principal sums when received out of the sales of that part of the estate which did not pass under the will, in consequence of the testator's taking reconveyances of the property.

We come now to the consideration of the last question. Can the legatees take their legacies and also distributive shares under the statute; and can the widow also claim her dower?

I presume that the argument on this point was founded upon those cases, (though none were cited) which lay it down, that by the equity of this Court, no person shall take by the will of the testator; and at the same time do any thing which shall destroy the

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will. 2 Atk. *629, Morris and wife v. Burroughs and others. And that a person enjoying a benefit under a will, must abide by it in toto; as well in taking a personal as a real estate under the will. 1 Ves. sen. 235, Cookes v. Hellier, whence it is argued that the legatees in the case before the Court cannot claim the legacies bequeathed them, and also take distributive shares in those parts of the estate, which do not pass under this will, by an alteration in the circumstances.

Upon examining these cases however the principle does not appear to go so far as the defendants would carry it.

They usually are where a testator has a right to dispose of some property and no right to dispose of some other property which is vested in others beyond his control; And the testator makes dispositions by his will of both. There those who are entitled to property, which the testator had no right to dispose of, shall not take any benefit under the will, unless they acquiesce in the dispositions made by the testator in relation to their property. This seems to be the general extent of the principle.

2 Ves. sen. 31, 33, East v. Cook, it is expressly said by the Court that there are exceptions to the rule of not claiming by one part of a will in contradiction to another, and that a legacy in lieu of things expressed is not to exclude from other benefit, though it may happen to be contrary to the will.

It appears to me that this is the case in this cause.

The testator gave certain legacies, meaning them to be all the benefit those legatees should have in his estate. The residue of his estate he bequeaths to certain residuary legatees. By a change in his residuary property it cannot pass by his will, and therefore is distributable among his next of kin. Some of these happen to be the pecuniary legatees first mentioned.

They do not claim distributive shares in contradiction to the will; but on a failure of the will to which they did not contribute

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by any act of theirs. And I *think they are entitled to claim their legacies and take their distributive shares. With respect to the wife's claim of dower, I presume there is no difficulty.

What is given her under the will is given in lieu and bar of dower. She gets all that and more too by the accidental failure of the residuary bequests of the testator, and she certainly has no claim to dower.

If there was any question of abatement for defect of assets, to be sure the Court would consider the wife's legacies given and taken in lieu of dower as a purchase, and would not oblige her to abate, as in the case of Mrs. Loocock v. Clarkson, [1 Desaus. 471,] decided in this Court. But no such question arises here.

It is therefore ordered and decreed, that the lands and negroes of the estate, which did not pass under the testator's will, shall after sale made thereof and the money collected thereon, be applied first to the payment of the debts of the testator and then to the payment of the pecuniary legacies under the testator's will, with interest from one year after his death, and the balance shall be distributed among the next of kin, conformably to the statute of February, 1791.

The lands and negroes shall be sold by the master, to wit: The negroes one fourth cash and the balance on a credit of one and two years, taking bonds with personal security and a mortgage of the property; also, the land, one fifth cash and the balance in one, two, three and four years, taking bonds with personal security and mortgage of the property. The sale to commence on the fourteenth day of January next, or the first fair day thereafter.

HENRY WILLIAM DESAUSSURE.

On Tuesday the 8th October, 1811, the

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counsel for *the several parties attended, and requested the Court to explain and enlarge the decree pronounced in the above case, by expressing its opinion more directly upon that part of the will of the late Mr. John Cogdell, which makes sundry devises and bequests to Mrs. Esther Cogdell, the widow of the testator.

The devises to Mrs. Cogdell in question are set forth fully in the body of the decree abovementioned. They are of a house in Georgetown for life; also, his pew in the church, his carriage, horses, cows and seven negroes by name; also, his household and kitchen furniture; also, the sum of £800 as received from the sales of his estate; all which (the testator says) he gives his wife in bar of dower; and if she should depart this life without any lawful issue, in that case to be divided amongst his heirs hereafter named. If otherwise he gave it to her and her lawful issue forever.

He afterwards devises the house above-mentioned to his nephew, J. S. Cogdell, and requests his executors to make sale of all the residue of his estate to the best advantage for his heirs; and then he bequeaths to his three nephews, John, Clement and Richard Cogdell, all the residue and remainder of his estate, to be paid them as above.

It is stated by agreement of all the parties that Mrs. Cogdell has no lawful issue living, and it is added that from her advanced age, there is no probability of her leaving issue.

The parties are desirous to know the opinion of the Court, upon their respective rights, in the event of Mrs. Cogdell's dying without issue.

Although it may perhaps be considered premature to express any opinion, before the event happens, on which the questions can arise, I have no objection at the desire of the parties, to state what I think upon the subject, to prevent, as it may do, future litigation.

Two questions would arise upon the event occurring, which is spoken of by the will, to wit, the death of Mrs. Cogdell without leaving lawful issue.

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*1. Whether all the devises and bequests made to her by the will, would pass from her and her representatives?

2. To whom they would pass under the expression "to be divided among the testator's heirs hereafter named?"

Upon the first question I have no doubt. The several bequests are all connected by the word also; and at the close the testator says, all this I give her, &c. and if she dies without any lawful issue, I give it in that case to be divided among my heirs. If she dies leaving lawful issue, then to her and her issue forever. The plain intent of the testator is, that the quantity of interest the wife is to take in all the bequests, is to depend upon her leaving lawful issue or not. If she did leave issue, they were to take the several bequests; if not, the property bequeathed was at the end of her life, to go to his heirs hereafter named.

This intent must prevail; and upon Mrs. Cogdell's death, if she should not leave lawful issue, the property so bequeathed must go over to the testator's heirs.

The next question is, to whom would the property comprised in the said bequests pass, upon this event happening, under the words "to be divided among my heirs above named."

The testator left several sisters, and the children of several deceased sisters, and of a deceased brother. According to our law, these sisters, and the children of the deceased sister and brother, are the testator's heirs, and would all take under the generality of that term, unless restrained by other words, or plain intent.

It appears pretty plainly throughout the will of the testator that he preferred his nephews, the sons of his deceased brother, and intended to constitute them his heirs, or to bestow on them the bulk of his fortune. This alone however would not be sufficient to establish them his heirs universally, to the exclusion of others equally near to testator. The intent must be plain, as applicable to

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each particular property, or there must *be some strong, broad expressions completely establishing them to be his heirs general.

In this case I think the intent is sufficiently plain to guide our judgment. The testator requests his executors, to make sale of all the residue of his estate to the best advantage for his heirs. And then immediately gives and bequeaths to his three nephews, John, Clement and Richard, all the residue and remainder of his estate.

This residuary clause which comprehends all the property then held and possessed by the testator, and not completely disposed of by his will, and the use of the word "heirs," in reference to these three nephews do, I think, establish their rights. I am of opinion, therefore, that in event of Mrs. Cogdell's dying without leaving any lawful issue, all the property comprised in the several bequests to Mrs. Esther Cogdell, will pass under the will to the three nephews above named; except the house and lot in Georgetown, No. 91, which will pass to Mr. John S. Cogdell, under the express provisions of the will.

HENRY WILLIAM DESAUSSURE.

October 15, 1811.

In the above case his honor the Circuit Judge having decided, amongst other things, that the slaves in bill mentioned, "who had been acquired by the testator subsequent to the making of his will, could not pass thereby, for want of a republication thereof, no evidence of such republication having been given," the defendants, Clement S. Cogdell and Richard W. Cogdell, do appeal from such decision, and as a ground for such their appeal do state, that there was sufficient evidence adduced at the hearing to establish such republication, whereby the said slaves could have passed, and therefore that the said decree of his honor was erroneous in this respect.

Thomas Parker, counsel for the defendants, C. S. & R. W. Cogdell.

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*Decree affirmed for the reasons therein assigned.

(Signed,) W. THOMPSON,
HENRY W. DESAUSSURE,
THEODORE GAILLARD,
THOMAS WATIES.

March 20, 1812.

This case was argued by Mr. Parker for the appellants.

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Case LIII.

ANN L. FRASER and Children, by Their Next Friend, v. JAMES M'PHERSON and M. FORD, Sheriff of Colleton District.

[Tried before Chancellor Desaussure, Charleston, February, 1811.]

[*Principal and Agent* ⟸100, 169.]

R. sells certain slaves to C. and takes his bond, and a mortgage of them. R. assigned the bond and mortgage to M. for valuable consideration. C. who had purchased the negroes as the agent of F. a married woman delivered them to her and her husband, who held them many years. The defendant not being paid, M. attempts to enforce the mortgage, whereupon this bill is filed to obtain an injunction, on the ground that C. had been employed to purchase slaves for F. and to pay for them with bonds, of her separate estate, and that he had no authority to give a mortgage of them. That she held the slaves not under his unauthorised purchase, but by possession, and would be protected by the statute of limitations; more especially as she alleged that her agent C. had not accounted with her for the bonds. This allegation however was not proved. The Circuit Court decided that the seller was entitled to take a mortgage on his sales, and was not bound by the secret instructions to her agent, and that when she received the slaves from C. she took them subject to the mortgage, especially as the trustee concurred, and she cannot protect herself under the stat. of limitation. Her possession being consistent with the deed, and not adverse. A majority of the Court of Appeals reversed the decree.

[Ed. Note.—Cited in Frazier's Trustees v. Center, 1 McCord, Eq. 276; Welsh v. Davis, 3 S. C. 116, 16 Am. Rep. 690.

For other cases, see Principal and Agent, Cent. Dig. §§ 265, 637; Dec. Dig. ⟸100, 169.]

The bill sets forth that the complainant, Ann L. Fraser, being entitled to considerable personal property under the will of her father, the same was settled by deed dated 6th November, 1782, on her intermarriage with Thomas Fraser, upon certain trusts for the benefit of herself and children.

That finding it would be more for their advantage that the bonds (part of the personal estate aforesaid) should be converted into more productive property, the trustees determined to purchase negroes with the

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mo*nies arising from sale of said bonds, and accordingly requested David Campbell, their friend and connection, to receive from the executors of the estate of the father of the complainant, Ann, all bonds and monies which should be paid over as said Ann's share of the said estate, and to purchase therewith negroes for the benefit and use of complainants. That said D. Campbell did accordingly make several purchases of negroes, which together with their issue, and a plantation on the Edisto river, constitute the sole estate and property of complainants; the same altogether arising from the bonds and monies paid by the executors of Thomas L. Smith, as complainant Ann's share of his estate. That in or about March, 1790, said D. Campbell, being in possession of a bond or bonds which he had received on account of said Ann's share of aforesaid estate, purchased sundry negroes from the estate of And. Williamson, on account of said Ann Fraser, and gave his own bond with Jas. Clitherall as security, payable in one and two years, together with a mortgage of said negroes, and took a bill of sale thereof from executors of said Williamson, on which bill of sale said Campbell made the following endorsement, viz: "Mem. The within negroes are purchased by me for Mrs. Fraser, and a bond of Mr. Inglis assigned to me for the payment of them. D. Campbell."

Complainants aver that said bond of said Inglis was part of their trust estate, and more was paid thereon into the hands of said David Campbell during the years 1791 and '92, (in which time the bond to executors of Williamson became payable,) than the amount of purchase money of said negroes, as appears by statement of said D. Campbell, ready to be produced.

Complainants further shew, that in February, 1795, complainant Ann, with those of her children then born, returned to this State, after a residence of five years in Virginia, when Thomas Fraser came to a settlement of accounts with said David Campbell, for his administration of the trust funds

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in his hands. That said David *Campbell accordingly delivered to Thomas Fraser an account, wherein the complainants were charged with full amount of principal and interest of said purchase of negroes of Williamson's estate, and of all others which he had purchased as aforesaid, and after payment thereof stated a balance due to the complainants of 536*l.* and delivered said negroes to complainants, together with aforesaid bill of sale and memorandum thereon, moreover stating at the same time that the negroes so purchased of executors of Williamson, were fully paid for, and freed of all incumbrances whatsoever.

The bill further states that the said negroes have remained in the quiet possession of complainants since March, 1790, about five years during their absence, and twelve since their return, nor had they any the remotest idea that any claim existed against said negroes, until sometime in the year 1807, when said David C. first communicated to them, that there remained a balance due for said negroes, on the bond he had given as aforesaid, and which was in the hands of Colonel James M'Pherson, and then also for first time, apprized them that said negroes had been mortgaged at the time of sale, for securing said bond of said David, which complainants aver was the first notice they ever received of said negroes being subject to any mortgage on account of said bond. And the

said David proposing at the same time that Thomas Fraser should write to Colonel M'Pherson, acknowledging the liability of the negroes, and to propose a mode for the payment of said bond; which the said Thomas refused, conceiving that the holders of the bond and mortgage had lost their lien on said negroes from their own laches in not pressing payment of said bond for fifteen years, and when David Campbell and his security were solvent, and possessed sufficient estates to pay the same, which complainants aver was the case from 1792, when the last instalment of said bond became payable, to 1800 or 1801. And complainants are ready to prove that D. Campbell in particular paid away large sums in the years 1802 and '3.

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*Complainants further shew that during the years '95 and '96, and until 1803, David Campbell, and Thomas Fraser had extensive money dealings on behalf of complainants in which said Thomas had frequent opportunities of retaining more than the amount of said bond, and on one occasion in 1803, Tho. Fraser paid Messrs. M'Wham and Nephew on account of complainant's trust estate 1000*l.* sterling, on behalf of said D. Campbell, a sufficient part of which sum he might have retained, had he known that complainant's negroes were mortgaged for a bond given by said David Campbell, but no such information having ever been given to Thomas Fraser, or any other person acting for complainants, the said Thomas Fraser and complainants lost the said opportunity as well as many other prior ones of retaining said money in their hands, or of reimbursing complainants, owing to subsequent insolvency of said David Campbell, who soon after assigned over all his property for the benefit of his creditors.

Complainants further show that the several holders of said bond and mortgage, although complainants have constantly resided in the State from 1795 to the present time, never made a demand on them, or apprized them of the existence of said bond and mortgage, until the year 1807, when defendant, Colonel M'Pherson, wrote a letter to Thomas Fraser, in consequence of his refusing to comply with David Campbell's proposals promising not to urge a foreclosure of the mortgage then, that being the first notice after seventeen years possession of the negroes, that said Thomas Fraser or any of complainants ever had of said bond or mortgage from any of the holders thereof. That the said bond and mortgage have passed through several hands, the several possessors always considering the debt as one of said David Campbell; have always until lately from motives of personal friendship, indulged him with delays, without any regard to said negroes, complainant's property, thereby wholly changing the nature of the original contract, and

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voluntarily relinquishing their lien *on said negroes, satisfied with said David, as their debtor, and said David having similar ideas on the subject, always considered said debt as his private debt, as appears by his contract, and a letter from him to Tho. Fraser, dated 21st of March, 1807, and ready to be produced, wherein he says he always considered this debt as his own.

Complainants charge that as the holders of said bond and mortgage have been indulging their sympathy for said D. Campbell at their expense, who had been paid seventeen years ago for said negroes out of their estates, and in 1795, could have a second time paid off said bond with the sum of only 242*l.* had it then been notified to them, they ought now in justice to suffer for their own laches and improper lenity to said David Campbell, and not to strip complainants of a valuable part of their patrimonial and trust property, by resorting to it as a security, which during the solvency of said D. Campbell had been abandoned and relinquished.

Bill charges that defendant, James M'Pherson, has caused a levy to be made of said negroes, and has placed said mortgage in the hands of the sheriff of Colleton, with orders to seize and sell for cash said negroes, and that said sheriff is about to proceed to such sale; prays that said defendants may be each enjoined perpetually from proceeding to sale of said negroes, or from further proceedings on said mortgage, and prays a writ of injunction.

The answer of Col. James M'Pherson states that he is ignorant of the things contained in bill, except as hereafter stated, and prays that complainants be compelled to strict proof of the same.

That he obtained the bond and mortgage in bill mentioned, by assignment from Thomas Radcliffe, deceased, as executor of And. Williamson, and which he holds as executor of Isaac M'Pherson, deceased. That since holding said bond he has always endeavored, without resort to law, to obtain payment thereof, and never granted or agreed to grant

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any indulgence to David Camp*bell, the obligor. That he has always forbore to resort to the mortgage, which he deemed his principal security, by his knowledge that said David Campbell was only the trustee of complainants, and that the distress of coercive measures would fall upon them. But said defendant observes that however obligatory said David Campbell's acts may be on complainants, as the acts of their trustee and agent, yet they cannot bind defendant, or those interested in the bond in question, and the mortgage securing the payment thereof, and denies all combination, &c.

After stating the circumstances of the case the Chancellor proceeded to deliver his opinion.

In arguing this case, the counsel for the complainant contended that complainant

Campbell purchased the negroes in question, either in his own right, or in the agent of Mrs. Fraser. If the former then be afterwards sold to her, and she holds by a distinct title, and her possession has been adverse, and has been so long that it will bar the mortgage under the authority of the cases quoted. That if he purchased as her agent, he did not comply with his instructions, by paying for them with Mr. Inglis's bonds, which were a part of her separate estate; but gave bond and mortgage, by which she is not bound, for a principal is not bound by the acts of an agent transcending his authority, more especially as she has suffered by it, for if she had known what he had done, she could have made herself whole from Campbell, by retaining as she had it in her power to do. That the seller looked to Campbell alone, and not to Mrs. Fraser. He was liable to a suit: she was not. That there was no express notice of this mortgage to Mrs. Fraser, and the mortgage was not sufficient constructive notice. That the forbearance of the mortgagee was to Campbell and not to Mrs. F. but to her prejudice, and entitles her to avail herself of her long and undisturbed possession to protect the negroes from the operation of the mortgage.

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*On the part of the defendant it was insisted that Capt. Campbell manifestly purchased as the agent of Mrs. Fraser, and that her possession under him could not be adverse to the mortgagee. That his violation of his instructions, (of which there was no proof,) was of no importance to the seller, who was totally ignorant of any such. That if he violated his instructions Mrs Fraser might have redress against him. But third persons were not to suffer; and least of all to be deprived of a security taken in the usual way and accessible to all the world. That if Mrs. Fraser had been dissatisfied she should have refused to accept the bargain; instead of which she has accepted and confirmed it. She did not, and holds under it; her possession cannot be adverse. That she trusted her agent and must be bound by his acts. Her trustee, Doctor Clitherall, concurred in the purchase, in the mode of payment and in the mortgage. And that the knowledge of her trustee is notice to her. That the mortgage being on record was notice to her of the mode of settlement, and of the lien on the negroes, of which she made no complaint. That the bill stated Campbell to have been Mrs. Fraser's agent or trustee, and trustees may encumber and even sell. And if any injury results, they who employed and trusted must suffer. That there is really no distinct or subsequent purchase of the negroes by Mrs. Fraser from Campbell, but she accepted the negroes as purchased in trust for her, and thereby confirmed the contract in all its parts; and she gave no new credit to Campbell.

On first examining this case some complexity in the circumstances, and the great ingenuity of counsel which took a wide range in argument, produced some degree of doubt. But on a careful attention to the facts and real merits of the case, the doubt has vanished. The first great question is, did Capt. Campbell purchase the negroes from the executors of Williamson, as the agent or trustee of Mrs. Fraser, and hold them for her

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and *transfer them to her in that character? Or did he purchase them on his own account, and afterwards sell them to Mrs. Fraser, so as to enable her to set up her long possession as adverse to the mortgage? The complainant herself has in a great measure decided this question. In her bill she charges that the trustees in her marriage settlement (which however has never been produced) determined to purchase negroes with the monies arising from the sale of her bonds, and accordingly requested her near friend and connection, Captain Campbell, to receive all the money and bonds due to her from her father's estate, and to purchase therewith negroes for the benefit of herself and children. And that Capt. Campbell did accordingly make several purchases of negroes on her account. And in 1790, he being then in possession of a bond or bonds due to her (being part of the trust estate) made a purchase of sundry negroes from the estate of A. Williamson, on account of Mrs. Fraser, and gave his own bond with J. Clitherall as security, payable in one and two years, together with a mortgage of said negroes, to the executors of Williamson, from whom he took a bill of sale in his own name; on which bill of sale Captain Campbell made a written endorsement, declaring that the negroes included therein were purchased by him for Mrs. Fraser, and a bond of Mr. Inglis was assigned to him for the *payment of them.

The bill further alleges that Captain Campbell afterwards accounted for the trust funds in his hands, and after charging all the purchases made by him, acknowledged himself a debtor to Mrs. Fraser in £536 and delivered the negroes and particularly those purchased from Williamson, with the bill of sale and memorandum of the trust endorsed to the complainants who have remained in possession of them ever since. This then is the complainant's own statement of the case, and this statement speaks of the purchase of the negroes in question, as made in trust for her, and so declared by Mr. Campbell, and so ac-

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cepted by her, and the ne*groes held by her under that purchase. There can be no question then but that the negroes were hers from the time of the purchase, and that Campbell held them merely as trustee; and there can be no question that had Captain Campbell instead of declaring the trust as he did, en-

deavored to convert the purchase into one for himself, he could and would have been compelled by this Court to acknowledge the trust; and Mrs. Fraser would have held them clear of his debts contracted on his own private account, whatever judgments and executions there may have been against him. See case of Denton and M'Kinsze, and Methodist Ch. v. Brazier. If the case rested here I presume there would be an end of the question of adverse possession. It would be obvious that the possession arose out of the purchase and was consistent with the mortgage. But it is alleged that Captain Campbell had instructions to make the purchases of negroes for Mrs. Fraser, with the bonds of the trust estate, and that he violated his instructions by giving his bond and a mortgage of the negroes to the seller. That this violation of duty has been mischievous to Mrs. Fraser, as Captain Campbell has received the money on Mr. Inglis's bond, without appropriating it to the payment of the purchase of the negroes; and now a considerable balance remains due, on which account the negroes have been seized under the mortgage; and that he being now insolvent, the loss ought to fall on the holder of the bond and mortgage given by Capt. Campbell, who looked to him alone, and not to Mrs. Fraser.

The counsel for the defendant very properly remarked on this part of the case, that it was necessary to distinguish between the allegata and the probata of the complainants, and they denied that there was any proof of any such instructions as to the mode of paying for the purchased negroes. And it is certainly true that there is no proof on that point, except what is contained in the accounts and papers of Captain Campbell, and these do not go so far as is alleged; for though the complainants have sworn to the

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bill containing the allegations, *it is well known that this is not received as evidence on the hearing. It was proper in order to enable the party to obtain an injunction, but no further. Stripped of this feature for want of evidence the case would stand thus: An agent is employed to purchase negroes for a principal and does so, and gives a bond and mortgage, and takes a bill of sale in his own name, but declares the trust on the bill of sale and afterwards to the seller. All are satisfied and no complaint is made of any violation of the instructions, till it is said many years afterwards that the agent has not applied the funds which were placed in his hands to the payment of the debt. Under such circumstances I cannot doubt that the original lien remains with the seller, and that the principal must look to the defaulting agent for an account of his funds. But let us look a little further into the circumstances of the case. The trustees are said to have instructed Captain Campbell to make the purchases, and placed the bonds in his hands to make them, without any view of his giving bond and mortgage. Now we see one of those trustees, the acting one Dr. Clitherall, concurring in this very purchase, and in the mode of settling for it by bond and mortgage. He joins in the bond as security and in the mortgage as a principal. He knows and approves of all that is done, and is satisfied with the declaration of trust, and on the return of Mrs. Fraser she accepts of the negroes under the purchase, as made in trust for her. It appears to me this is conclusive, for the trustee who planned these operations best knew if the execution of the plan conformed to his directions. He has said yes, by his conduct. I cannot say no. Besides if he had a right to give the original instructions, he had a right to vary them, and his conduct shews that he did so, or approved of the alteration, for the purchase was made wholly under his eye and he was a party. Another objection was made founded on an alleged misapplication of the funds by Capt. Campbell. The accounts of Mr. C. were offered by complainants in evidence, which

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after some opposition and some scru*ples I admitted. Let us see what it proves and how far it agrees with the allegation that Captain Campbell received all the funds placed in his hands, and particularly the money on Inglis's bond, and did not account for them, or apply them to the payment of the purchase of negroes. The first paper relates to Inglis's bond; it shews the payments made on them to Captain Campbell, & the application of them till the last sum of £541 18s. 4d. Then follow these words: "Then received in full, credited on purchase of negroes as is every other payment." There we have a decisive declaration of Mr. Campbell, introduced by the complainant herself, that he has received the whole of Inglis's bond and applied them to the payment of the purchases of the negroes. He does not say indeed on this particular purchase, but he had made several purchases as the bill alleges, and it is unimportant on which this money was credited. He says expressly, he has received all the trust funds and paid them away on the purchase of negroes for her use. The next paper signed by Captain Campbell, and introduced by complainant, is an account between Mrs. A. L. Fraser and Captain Campbell, in which the first item of debit to Mrs. Fraser being £176 9s. 9d. is the balance due by her to him on the different purchases of the negroes. On the back of this second paper are these remarkable words: "I must however acknowledge that the debit of £176 9s. 9d. in the within account was all that was due to me, after giving credit for the bonds I received from the exors. of the estate of Thomas L. Smith and debiting you with all the purchases of negroes on account of your family. This seems to me to be conclusive on the complainants in this cause; for though it might

not be so in any controversy between Mrs. A. Fraser and Captain Campbell; yet here the papers shewing this result are introduced and made evidence by herself and are uncontradicted by any evidence; and he expressly charges Mrs. Fraser with £176 9d. 9s. as a balance due to him after giving credit for the bonds he received from the executors of T.

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L. *Smith and debiting her with all the purchases of negroes made on account of her family. What can shake this? Can Mrs. Fraser be at liberty to shew that this her own evidence is erroneous, and that Captain Campbell had not applied as he stated, all the trust funds to the payment of the several purchases of negroes? I think she would not be at liberty to do so. But if she were has it been done? I think not. For the third account is with Major Fraser, and includes a great variety of other matters of account. Indeed there is nothing about the trust bonds in the third paper of account, and the supposed balance of £1166 18s. 4d. on January 1, 1801, stated in that paper is instantly diminished by counter charges, and the account is manifestly left open. So that it really does not appear that there was any or any ascertained balance due by Captain Campbell on January 1, 1801. But this is of no importance. The two former papers shewed that Captain Campbell had applied and accounted for the fund arising from Inglis's bond, partly to the purchase in this particular case, (£599 12s.) and wholly to other purchases of negroes as he expressly alleges on the face of the account. So that the trust estate has had the full benefit of all this fund. The subsequent charges in the accounts are for other things, for hire of the negroes and money matters of a joint concern between Mr. Campbell and Maj. Fraser. But let us take for granted for the sake of argument, that Captain Campbell had received all the trust funds, and had not applied them to the payment of the purchase of the negroes. The question would then arise who should be the sufferer? The friend who confided in him and employed him as an agent or the stranger who ignorant of the instructions said to have been given, had dealt with Captain Campbell, and sold him valuable property at a fair price, and took his bond and a mortgage of the property sold. Common sense and the rules of law and of equity all concur in saying that the former and not the latter ought to be the sufferer, if any suffer-

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ing must take place. It is insisted *however that as the seller looked to Captain Campbell alone, he ought to be obliged to resort to him. But surely this is not the state of the case. The very contract shews that the seller, though he did look to Capt. Campbell, did not look to him alone. He looked to the solid security of the property sold. He held fast the very corpus, the thing on which the contract was founded. He had a right to do so, and he does so now. It was immaterial to him in what right Captain Campbell bought, he held his mortgage. But he was informed he bought as agent for Mrs. Fraser.

A great deal of learning was introduced, unnecessarily I think, to shew what the law is on contracts, where the agent transcends his powers and attempts to bind his principal beyond his instructions. If the negroes mortgaged had died, and Captain Campbell had failed, and the executors of Williamson or their assignee had attempted to make Mrs. Fraser or rather her separate estate liable to pay this debt, then there might have been room for this question, whether the agent had exceeded or acted in pursuance of his powers. But no such attempt is made; no suit is brought against Mrs. Fraser, and I do not perceive how that question can arise, where the seller is enforcing his mortgage of the very property sold. It would be monstrous that a party selling to an agent should be liable to be stripped of the very property sold, by the pretence that the agent had power to purchase, but instructions not to mortgage the property, and those instructions secret at the time as to the seller. No man would be safe on such terms, and it cannot be the law of the land. Indeed the harshness of such a doctrine is too quickly felt to be insisted upon directly. It is attempted to be used indirectly, by putting it in this way: As Captain Campbell violated his instructions, this purchase cannot be considered as made on account of Mrs. Fraser but for himself. And he afterwards sold to Mrs. Fraser and she has held the property many years, adversely to the seller; and is now entitled to the benefit of the statute of

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limitations. *Every fact in the case, however, discloses a different state of things. The bill itself, it must be repeated, alleges that he bought the negroes as her agent. He states the fact on the back of the bill of sale. He holds them and takes receipt from the seller as her agent. He accounts to her as her agent for the product of their labor. She accepts the account, receives the negroes, not as a new purchase made from him, but as a part of her separate or trust estate, antecedently purchased for her. She then concurs in and approves of what her agent had done, as her trustee had previously approved and concurred, and she holds the negroes under that purchase, and subject to all its conditions. One of those subjected them to a mortgage to which they remain liable in her hands. Her possession then has never been adverse. But it is alleged that she was ignorant of the fact of the mortgage, and did not suppose them mortgaged, but believed them paid for. But there is really no proof of such ignorance, for her trustee knew the fact of the mortgage as well as the agent, and had joined in it, and the law will pre-

sume a communication to her. The knowledge of the agent or trustee is notice to the principal. Nor is this altered by the fact that the complainant has sworn to her bill, in which her ignorance is stated, for whatever respect the Court feels for the lady who is complainant, it is not at liberty to receive that statement as evidence on the hearing. A complainant as has been stated, is required to swear to the truth of a bill in order to entitle himself to an injunction. But that oath and the facts alleged under its sanction, are laid aside on the trial and other testimony must make out the cause. But suppose it were conceded that Mrs. Fraser was ignorant of the mortgage having been given, the mortgage was on record, which she could have learned by enquiry several years before any settlement made with Captain Campbell. It would not only have put her on the enquiry as to the true state of her interests, but would have answered the enquiry by shewing the lien on the negroes.

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It was said if Mrs. *Fraser had enquired and found the mortgage, it would have misled her, as it would have shewn that the seller looked to Mr. Campbell alone, and not to Mrs. Fraser. But this is not correct, for the mortgage would have shewn that the seller looked to the lien on the negroes, as the real security of the debt. Besides I must repeat that it does not appear that any notice was necessary to have enabled Mrs. Fraser to have saved herself by retaining from Captain Campbell. It appears by his express declaration in his accounts that he had settled and accounted for all the sums received by him on account of the trust estate. More could not have been done with the fullest notice; and any general balance of account independent of the particular fund is of no importance in this case. It ought not to be admitted that there was no proof that the seller ever had the least notice of any instructions as to the mode of purchasing and the restriction alleged to have been imposed upon the agent in the purchase. How that restriction if proved could affect the seller, without full and explicit notice, is inconceivable. It would place contracts on the most dangerous footing. A seller has a right to presume that the agent of the buyer has the ordinary powers necessary to complete the contract, and a mortgage is a usual concomitant. Another ground was taken and it was insisted that if a sale of the negroes had been made for valuable consideration to a third person and such person had held possession so long as Mrs. Fraser has had them, it would have been an adverse possession, which according to the decided cases of Cholett and Hart, [2 Bay, 156,] decided in Charleston, 1798, and Duncan M'Raa v. Isaac Smith, [2 Bay, 339,] decided at Columbia, 1801, would have protected the holder of the negroes, and that Mrs. Fraser stands in the situation of such a third person. I am not inclined to question the cases cited as far as they go, and they are both cases of judgments, not of mortgages. However I am disposed to admit that the same principle would govern in cases of mortgages. But an essential ingredient in those cases is,

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that the person setting up *the title by possession should have a hostile possession adverse to the title of the holder of the judgment or mortgage. But no debtor, no mortgagor can set up an adverse possession against his creditor or the mortgagee. It is impossible to consider Mrs. Fraser's possession as adverse. The purchase was made for her originally and she held under the title of the seller, and her possession however long and complete, was consistent with and not in opposition to the mortgage. It was further objected that the acts of an obligee to an obligor ought not to be permitted to injure a third person such as a surety or others. And it was insisted that the indulgence given in this case to Capt. Campbell was extreme and prejudicial to the complainant, as it has allowed the debt to increase in amount considerably, as well as put complainant off her guard, when she might perhaps have made herself whole against Mr. Campbell. I really think that this which is a correct principle has not the smallest application to the case before me. It is in evidence by the receipt given by Williamson's executors to Mr. Campbell, that the trust was made known to them as early as 1792, if it was not originally; with a knowledge then that the negroes were purchased by Mr. Campbell as agent for Mrs. Fraser, surely every indulgence given was and was intended to be to her; for the mortgage could have been enforced at any time. But it was foreborne in tenderness to her. I think therefore it would be a very hard case on the defendant and those under whom he claims to say you have indulged the person really interested in this property, and have foreborne to enforce your mortgage so long, that this very indulgence, instead of being considered a favor, by which the complainant might be enabled to work out the debt, shall be construed into demerit, and a plea of adverse possession founded on it, to exclude the operation of the mortgage and defeat the demand altogether. It would be altogether a surprise on him, as he knowing Campbell had purchased as agent for Mrs. Fraser, could never suppose her possession

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could be adverse. Some re*liance seemed to be placed by the counsel on the ground that the lapse of time in this case might raise a presumption of payment, or of a release of the debt or security. But the lapse of time which has occurred is not sufficient to raise such a presumption. This is a bond debt; the last payment upon it was in March, 1794.

and the bill was filed in June, 1809. Fifteen years have never been considered a sufficient lapse of time to raise such presumptions against a bond.

I have not introduced much of the law quoted and relied upon by the complainant, because it appeared to me that the cases turned on other points than those in question in this cause. They chiefly went to shew that an agent could not bind his principal beyond his powers or instructions, and to place the responsibility where the credit was given. I think it unnecessary to go into a detailed examination of them, because I do think the circumstances in this case essentially different from those cited, and particularly in this great feature, that there is no attempt to make Mrs. Fraser liable, but merely to hold that property subject to the mortgage, which was originally sold, and immediately pledged for the payment.

Upon the whole, after the best consideration I have been able to give this case, I am of opinion that the complainant is not entitled to the relief prayed. I can and do feel for the respectable lady and her children who are interested in this case; but I cannot relieve them. I hope indeed that they will not suffer, as it has been stated that Major Fraser acting upon the trust estate for the benefit of the family, is in fact indebted to Captain Campbell on the general balance of accounts. Let this however be as it may, I do not perceive that I can shake the legal lien, which the defendant has on the negroes in question. It is therefore ordered and decreed that the injunction be dissolved and the bill dismissed.

HENRY WILLIAM DESAUSSURE.

October 15, 1811.

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*The complainants appealed from the decree delivered in this case by His Honor Judge Desaussure on the following grounds:

1. That David Campbell purchased the negroes in question in his individual capacity, that they were transferred and sold by him to Mrs. Fraser, her title to them being derived immediately from him, and were held by her for the space of twelve years and upwards under the said title, as an innocent purchaser without notice.

2. That the seller looked to the said David Campbell alone as the principal in the transaction; he signed the bond as principal and mortgaged the negroes as his own property for the payment of the purchase money, and Mrs. Fraser was evidently unknown to the seller throughout the whole business.

3. That there was no express notice of this mortgage ever given to Mrs. Fraser, the mortgage being on record not being sufficient constructive notice, and so admitted by the counsel for the defendant, in opposing the issuing of the injunction.

4. That admitting David Campbell to have been the agent of Mrs. Fraser for the purchase of negroes, and to have purchased negroes in that capacity, yet he was a limited agent, and did not comply with his instructions by paying for them with Alexander Inglis's bonds furnished from a part of Mrs. Fraser's trust estate for that specific purpose. The bill of sale being produced in Court and admitted in evidence, it clearly appeared by a memorandum on the back thereof in the hand writing of Mr. Campbell, that a bond or bonds of Mr. Inglis was assigned to him for the payment of the said negroes; and it further appeared by a statement of the said bond in the same hand writing that a much larger sum was received on the bonds than was sufficient to pay for the said negroes. Mr. Campbell in making the purchase departed altogether from his instructions, and instead of applying the bonds of Inglis to the payment, he dealt with the seller as

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principal, gave his own bond, *purchased in his own name and mortgaged the negroes as his own.

5. That if Mr. Campbell was an agent at the time of the purchase, his agency ceased in 1795, when on the arrival of Mrs. Fraser and family from Virginia, he settled his accounts with her and delivered the negroes to her with a declaration that they were fully paid for and free from any incumbrance whatever; and that upon said settlement of accounts Mr. Campbell owed her a balance of £430 after fully paying for the negroes and every other purchase made on her account.

6. That the balance noticed by his honor the Judge in his decree as ultimately due to Mr. Campbell by Mrs. Fraser, was a transaction in the year 1803, long subsequent to the former settlement, when Thomas Fraser bought of him a tract of land, which threw the balance in Mr. Campbell's favor.

7. That the long indulgence and forbearance of the executors of Williamson, even admitting that Mrs. Fraser could be any way affected by the mortgage, was undoubtedly to her injury, it being evident that had she known of this incumbrance on the negroes, she had various opportunities of indemnifying herself from any loss arising therefrom, as from the subsequent pecuniary transactions between Mr. Campbell, herself and Major Fraser, a sufficient time might have been retained by them to meet this demand, and the not informing Mrs. Fraser of this mortgage must be deemed tantamount to a waiver and abandonment of any claim under the mortgage. From circumstances it may be presumed that nothing is due on a sleeping mortgage or that it is satisfied, more especially when the mortgagee sees the possession of the property transferred and no notice is given or application made to the transferee.

8. That great laches has been exhibited on

the part of the executors of Williamson to the great injury of the complainants by not resorting to Mr. Campbell and compelling payment from him; and that this Court does not favor those who by their negligence have

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in*jured innocent persons; that justice evidently required that Mr. Campbell who owed the debt should have been obliged by legal means to settle it. If the executors of Williamson had pressed their demand in the year 1792, when the last instalment on the bond became due, Mr. Campbell could have then easily paid it off, as he was then and long after perfectly solvent, being till the year 1800 or 1801, fully competent to discharge his debts; that such gross laches ought not to be allowed to operate to the disadvantage of an innocent and bona fide holder of these negroes; and that Mrs. Fraser as such is entitled to the benfit of the statute of limitations, having been from 1795 to 1807, in peaceable possession of the said negroes.

9. Because reliance is placed in the decree on the fact of Dr. Clitherall (said to be the trustee of the complainants,) having signed the bond and mortgage, whereas there was no evidence before the Court shewing that he was such trustee, and had such evidence been gone into, it would have been repelled by shewing that Dr. Clitherall was in the practice of endorsing for and signing as security of Mr. Campbell, and did not sign such bond as trustee, but merely as his friend and security, and because that point was not pressed in the argument of the counsel for defendant, and had it been it would have been repelled by shewing that Dr. Clitherall had no authority to bind the property of his cestui que trust by signing said bond and mortgage, and that the executors of Williamson, by conniving at a breach of duty in so doing forfeited all benefit therefrom. It was incumbent on the vendors to inquire whether the trustee had power to execute the mortgage; there was enough to put them on enquiry, and any deviation from the trust deed would impair the transaction. If Dr. Clitherall, therefore, had no authority under the trust deed to mortgage the negroes, his act is absolutely void, as relates to the cestui que trust.

10. That the receipt of Thomas Radcliffe, the executor of Williamson, in 1792, does not

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shew that the ven*dors knew of the time of sale in 1790, that David Campbell bought as the agent of the complainants, but it does shew that the said executor knew in 1792, that the negroes were the trust property of complainants, yet notwithstanding such knowledge that he always continued thence forward and until the assignment to defendant, M'Pherson, in 1805, to look altogether to David Campbell as the principal in the purchase.

11. That the complainants purchased these negroes not from the executors of Williamson, but from David Campbell, who had paid for them to the executors of Williamson in 1790, by his bond and security, and who in 1795, delivered them to complainants with an account current, wherein they were charged to complainants, and which constitute a sufficient sale. That in 1795, he did not deal with her as trustee, for the trust, if any, was fulfilled as soon as the negroes were purchased of the executors of Williamson in 1790, but as an individual. He did not purchase them as a trustee, for he paid for them with his own means and on his own responsibility which made him the owner. Purchasing them in his own individual capacity he had a right to sell them to the complainants, who are protected by the statute and the adjudged cases.

Smith & Bacot, compl'ts sol'rs.

The appeal came to a hearing in March 1812. The Judges delivered their opinions as follows:

The only question to be taken into consideration in this case is whether D. Campbell acted as agent for the trustees to the marriage settlement or not. If he acted as agent, he unquestionably transcended his powers, and his acts must devolve on himself, and cannot bind his principal. He had no general powers given him; he was to purchase negroes with the bonds due the trust estate, he was not authorised to depart from that arrangement, and involve the complainant in pecuniary embarrassments, which she never contemplated, and also to create a lien

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on the property purchased. For *although it be true that in general and unqualified agencies, the right to mortgage is incident to that to purchase it is not so where the acts to be done are prescribed and defined, and particular funds directed to be appropriated for that purpose. Had he pursued his orders strictly he would have purchased no more negroes than to the amount of the bonds, but instead of doing this, he gave his own bond with security for a much larger sum, and a mortgage on the property. But it is said that D. Clitherall, the trustee, having signed the bond and mortgage, is a recognition of the acts of D. Campbell, and to be sure, had he signed them as trustee, it would have been the case; but does he so? No; he signs as security, as expressly appears upon the face of the bond itself. Had it been intended that the purchase should enure to the benefit of the complainant, it would have been unnecessary that the agent should have signed it, it being entirely sufficient that the trustee should have done so. It appears therefore from the testimony ad-

duced to the Court, that in the transaction beween the ex'rs of Williamson and D. Campbell, he acted in his individual capacity without the privity or consent of the complainant or her trustee. In fact there is a circumstance which establishes this point independently of the evidence furnished by the bond and mortgage, to wit, in the account current between him and the trust estate. He debits Mrs. Fraser with the purchase, and credits himself for the amount of the bonds. It is further to be observed that on Mrs. Fraser's return from Virginia, D. Campbell told her the negroes were paid for, and freed of all incumbrance whatever, which lulled her into security, and prevented her making any inquiry relative to the mortgage, and there can exist little doubt, but if she had known of that circumstance, she would not have taken the bargain off his hands, nor recognized his conduct in this transaction.

The Court is therefore of opinion, that if he acted as agent, he transcended his powers, and if he did not, the complainants had

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nothing to do with it, and must be *protected under the statute of limitations. It is therefore ordered and decreed, that the decision of the Circuit Court be reversed, and the injunction be made perpetual.

(Signed) W. THOMPSON.
THEODORE GAILLARD,
THOMAS WATIES.

Judge THOMPSON informed the bar that Judge JAMES concurred in this decree.

I have reconsidered this case, and more particularly that part of it which relates to the question, whether David Campbell acted as the agent for the trustee, or cestui que trust in the marriage settlement of Mrs. Fraser. I have no doubt from all the facts disclosed in the case that he acted as an agent. The bill charges that he did, and that he made the purchase of negroes now in question, as her agent, and he himself has avowed it, by written declarations attached to or connected with the deed relative to the purchase. But it is insisted that if he acted as agent, he transcended his powers by purchasing on credit, and giving his bond and mortgage for the negroes; whereas by his instructions, he was to purchase negroes with the bonds due to the trust estate, from which he was not at liberty to depart, and to involve his principal in pecuniary embarrassments, and to create a lien on the property purchased. Although the instructions spoken of and alleged in the bill, have never been produced or proved, I am disposed to admit, that from the circumstances of the transaction, the bonds were to form the fund for the payment in the purchase of negroes. And I am further disposed to agree that an agent cannot bind his principal personally by any act done in derogation of his instructions, and if there was an attempt in this case to make the principal personally liable, I should consider it unwarrantable; but no such attempt is made. The assignee of the vendor of the negroes, merely claims the benefit of a mortgage of the very property sold, which was

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mort*gaged back to the vendor eo instanti of the sale, to secure the debt. And this I think he is entitled to. It would be very mischievous to permit principals to authorise agents to make purchases, with instructions (not disclosed to the vendor) to pay only out a particular fund, and not to mortgage the property purchased, and it would be dangerous to declare such mortgage void on the ground that the agent had exceeded his authority, more especially after the principal had accepted the purchase, which amounted to a confirmation. Nor could this confirmation be said to have been made ignorantly, for the trustee, Mr. Inglis, was privy to the whole transaction, and even assisted in it, and the mortgage itself was on record. With respect to the state of the accounts between the cestui que trust, and her agent Captain Campbell, it does not appear to me that it varies the case. But if it did, there is nothing in it to produce any effect prejudicial to the defendant, because as far as the accounts appear to be settled (in the two first papers) a balance seems to be due to the agent; and as to the third account, which is unsettled, it was admitted at the trial that on the general balance of accounts, Captain Campbell was a creditor, and qualified as that admission has been since the trial, it still is doubtful whether Captain Campbell is indebted to the trust estate, or that to him; and whilst that doubt remains, I cannot consent to release these negroes from the operation of the mortgage; for if upon a reference of the accounts it should ultimately appear that the trust estate is indebted to Captain Campbell, then this injustice would follow, that the cestui que trust would have had the full benefit of her funds placed in the hands of her agent, and obtain also the property purchased by him, though that property is not fully paid for.

With respect to any alleged declarations of Captain Campbell to Mrs. Fraser that the property purchased by him on her account was free from incumbrances, I am not aware that there was any proof of it on the trial; or that it was admitted; and even if there

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had been, it *appears to me that the principal who employed and trusted, ought to suffer from such misrepresentation, if it really were made, rather than a third person.

Upon the whole of this case I remain of the same opinion that I was on the trial of the cause in the Circuit Court.

HENRY WILLIAM DESAUSSURE.
March 20, 1812.

This case was argued two days by Messrs. Toomer, Lance, W. Loughton Smith and W. Drayton on the part of the appellants.

And by Messrs. Northrop and Pringle on the part of the respondents.*

[* The following statement of the evidence was omitted by accident at the proper place, immediately preceding the decree of the Circuit Court.]

On the trial of the cause the complainant produced the bill of sale of Charles Goodwin, agent for Leroy Hammond, executor of A. Williamson, for fourteen negroes, to David Campbell, dated 25d March, 1790, purchased for 678*l.* 12*s.* 3*d.* On the back of the bill of sale is a memorandum in writing in the following words: "Mem.—The within negroes were purchased by me for Mrs. Fraser, and a bond of Mr. Inglis's assigned to me for the payment of them."

"D. Campbell."

The negroes named in the bill of sale were Monday, Amos, Grace, Cudjo, Betsy, Fanny, Lucy, Patsy, Dennis, Violet, Venus, Eve, Boatswain and Larry.

At the time of purchasing the negroes Captain Campbell gave his bond of same date with the bill of sale, in which Dr. James Clitherall joined him as security to Leroy Hammond, the then

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acting executor of A. *Williamson's estate, in the penal sum of 1357*l.* 4*s.* 6*d.* conditioned to pay 678*l.* 12*s.* 3*d.* in three equal annual instalments.

To secure the payment of the money, Capt. Campbell, and Dr. Clitherall joined in a mortgage of the negroes to Leroy Hammond, acting executor of A. Williamson, bearing the same date with the bill of sale. The mortgage was recorded on the 16th February, 1792.

Several payments made by Capt. Campbell are endorsed on the bond, to wit.

19th July, 1791	£150	0*s.*	0*d.*
6th October, 1792	151	13	4
29th March, 1794	297	18	8

Making a total of near £600.

There was a duplicate loose receipt given by the Mr. Radcliffe, another executor of A. Williamson, for the second payment. It is in these words:

"Charleston, October 6, 1792.—Received of David Campbell the sum of £151 13*s.* 4*d.* on account of a bond given by him and Dr. Clitherall to the executors of General Williamson for negroes purchased for Mrs. Ann L. Fraser, a receipt for which is endorsed on said bond."

"Thos. Radcliffe, executor to A. Williamson."

There is an assignment on the bond, and also on the mortgage from Mr. Radcliffe as executor of Andrew Williamson to J. E. M'Pherson for the amount then due on the bond (July 25, 1805,) which was stated to be £435. 10*s.*

Mr. Crawford was examined on the part of

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the complainant. He stat*ed that he had known the plantation of Major Fraser and his negroes since 1798. He knew the negroes which had been levied on under the mortgage, to-wit, Betsey, Fanny, Dennis, Monday, Boatswain, Venus, Violet. Mr. and Mrs. Fraser have been in quiet possession of the negroes since the year 1798, and he believes for some time before. There has been no claim made upon them to his knowledge. There was no distinction between them and the other negroes of the estate.

The complainants offered as testimony several accounts and statements in the hand writing of Captain Campbell, in which he is said to account for the trust funds in his hands, and the application of them to the purchase of negroes for Mrs. Fraser.

The admission of this species of evidence was objected to, as the extra-judicial declaration of Capt. Campbell, not on oath, nor in the presence of the defendant; that this evidence related to res inter alios acta; that this was not the highest evidence, for the accounts and statements spoke of Mr. Inglis's bond and its assignment to Campbell, which, if admissible at all, ought to be produced. That if the papers offered proved a trust, they would not prove a notice of the designation of a particular fund to pay for the negroes. To this it was answered that the object was to shew the title by which the complainant claimed the negroes in question; to wit, by title derived from Capt. Campbell, in consideration of funds put into his hands, and which had been received by him to invest in negroes, and to shew that he remained indebted to the trust fund: and that had not

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Mrs. Fraser been misled into an *impression that the trust fund had been faithfully applied and the negroes paid for, she might have made herself whole by retaining, as she had the power to do several times. Obliged to decide this question hastily, I was of opinion that these papers were admissible; with the reserve practised in this Court, though impracticable in the Court below as the trial of issues before a jury.

I am not entirely sure that I did right in receiving that testimony; but I incline to think it was admissible, whatever might be its effect on the case. It is however of less importance as I have made up an opinion which would not be changed by the admission or rejection of that testimony; though that testimony certainly strengthens the opinion I have formed.

The evidence so offered and admitted consisted of three papers. The first was a paper in the hand writing of Captain Campbell, which professes to be a statement of Alexander Inglis's bonds, assigned to him for the payment of negroes purchased on account of Mrs. A. L. Fraser; how and when paid off, and how applied to the purposes of the trust.

This statement relates to two bonds, and shews many payments at various times to a large amount, and the application thereof to the negro purchase, and finally the receipt of the balances due on said bonds. The statements came down to March, 1793, and the balances are then stated as follows: on one bond a balance £191 with the following words, "Then received in full and credited on purchase, as is

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every other pay*ment." On the other bond a balance of 521*l.* 14*s.* 4*d.* with the following words, "Then received in full and credited on purchase of negroes, as is every other payment."

The second paper is an account headed as follows: "Dr. Mrs. A. L. Fraser, in account with D. Campbell, Cr." The first item on the debtor side of the account is of 27th March, 1795, in these words, "To balance due on different purchases of negroes to this date, £176. 9*s.* 9*d.*" Then follow various charges against Mrs. Fraser, making an amount (including the first item,) of £738. 2*s.* 3*d.* On the other side there are credits to Mrs. Fraser for the crop of 1795, and two other items to the amount of £1221. 19*s.* 9*d.* and a balance is struck of £483. 17*s.* 6*d.* in favor of Mrs. Fraser. Then follow several charges against Mrs. Fraser, to the amount of £526, and several credits to her to (including one of £52. 10*s.*) the amount of £226. 4*s.* 5*d.* though not added up in the paper.

A memorandum is made at foot as follows: "Mem.—The above balance is struck at £483. 17*s.* 6*d.* because the credit for £52. 10*s.* is given in the mill account, and the other debits and credits are also duly entered there, as is well known to Thomas Fraser."

On the back of this paper there is a memorandum in these words: "Mem. for T. Fraser. You are well aware that this account has never

been closed, as the balance of £483. 17*s.* 6*d.* was carried to the credit of the mill concern, and it is obvious you had no right to call on me for it; the crop of 1795, not being all sold till the beginning of the summer of 1796, and my advances in 1795, exceeded this balance. I

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never had *any other account current of this year, or ever closed one with you finally since the crop of 1794. I must however acknowledge that the debit of £176. 9*s.* 9*d.* in the within accounts, was all that was due to me, after giving credit for the bonds I received from the executors of the estate of Thomas L. Smith, and debiting you with all my purchases of negroes on account of your family." "D. C."

The third paper is an account headed, "Dr. Thomas Fraser in account with D. Campbell, Cr." The debtor side of the account amounts to 3701*l.* 18*s.* 7*d*; the creditor side to £4878. 11*s.* 11*d.* (including the balance due on the crop of 1795, to wit, £483. 17*s.* 6*d.*) the balance stated to be due Thomas Fraser, on 1st January, 1801, is £1176. 13*s.* 4*d.* Then follow a number of charges to diminish that balance, some of them with sums carried out, and many others with no sums filled up; so that the real balance remains unascertained.

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Case LIV.

ROBERT EWING, Survivor of Adam Ewing, v. MRS. ANN SMITH, widow of R. M. Smith and THOMAS R. SMITH, Trustee.

[Tried before Chancellor Desaussure, Charleston, February, 1811.]

[Reported and annotated in 5 Am. Dec. 557.]

[*Husband and Wife* ⟸159.]

S. previous to his intermarriage with D. in March 1796, joined in the conveyance of a plantation and certain slaves, part of the property of D. to two trustees, in trust for the use of the said S. and D. as soon as the marriage should take effect. After the marriage, and between March 1796, and January 1801, S. became indebted to E. to the amount of 448*l.* for goods supplied, for the use of S. and his family, and in part for the use of the trust property.

No payments having been made, it was agreed that if E. would give time for payment, S. and his wife would join in a bond for the payment of the debt. One of the trustees concurring, this was done. The other was not consulted. No payments being made, and no property remaining but the trust estate, E. filed his bill to compel payment out of it. S. and one of the trustees died. The bill was revived. The Circuit Court decided that the wife's engagement, under these circumstances was valid so far as to bind the trust estate. A majority of the Court of appeals reversed the decree.

[Ed. Note.—Cited in James v. Mayrant, 4 Desaus. 610, 6 Am. Dec. 630; Terry v. Brunson, 1 Rich. Eq. 89; Reid v. Lamar, 1 Strob. Eq. 42; Dunn v. Dunn, 1 S. C. 354.

For other cases, see Husband and Wife, Cent. Dig. § 630; Dec. Dig. ⟸159.]

[*Husband and Wife* ⟸182.]

[Cited in Graham v. Graham's Ex'rs, 3 Hill, 148; Wilson v. Cheshire, 1 McCord, Eq. 241; Frazier's Trustees v. Center, Id., 275, 279; Calhoun v. Calhoun, Rich. Eq. Cas. 13; Magwood & Patterson v. Johnston, 1 Hill, Eq. 230; Robinson v. Dart's Ex'rs, Dud. Eq. 131, 31 Am. Dec. 569; Clark v. Makenna, Cheves, Eq. 164; Reid v. Lamar, 1 Strob. Eq. 37, 38, 41; Calhoun v. Calhoun, 2 Strob. Eq. 235, 49 Am. Dec. 667; Waterman v. Kennerly, 3 Strob. Eq. 77; Hastie & Nichol v. Baker, 3 Rich. Eq. 215; Reese v. Holmes, 5 Rich. Eq. 566; Dunn v. Dunn, 1 S. C. 356; Charles v. Caleb Coker & Bro., 2 S. C. 133; Witte v. Wolfe, 16 S. C. 270, to the point that, in the disposition of her separate estate, a married woman is restricted to the particular mode or manner pointed out by the instrument conferring that estate.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 715; Dec. Dig. ⟸182.]

This case came to a hearing in February 1811, and having been very fully argued, the Court took time to consider. In October 1811, Chancellor Desaussure delivered his decree.

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*The complainant in this case filed a bill in this Court on the 30th July 1806, against Mr. Roger Moor Smith, his wife and Mr. Thomas R. Smith.

That bill set forth, that Mr. R. M. Smith became indebted to the complainant between the month of March 1796, and January 1801, for goods, wares and merchandizes, to the value of £448 9s. 8d. supplied to the said Roger and his wife, for the use of themselves and family, and for the use and benefit of the estate, which had been his wife's property previous to her intermarriage with him as appears by the exhibit, A.

That the said estate, consisting of a plantation and sundry negroes was by deeds executed on 29th, February and 1st March 1796, conveyed previous to her intermarriage to the Rev. Thomas Frost and Thomas R. Smith, in trust to and for the use of R. M. Smith and Ann his wife, as is provided in the said deed, which is made an exhibit in the cause.

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*That the complainant applied to the said R. M. Smith for payment of the account without success. That being apprehensive, he had little or no estate of his own, and the principal ground of expectation of payment being from the trust estate, it was proposed and agreed by the parties, that the said R. M. Smith and Ann his wife should secure the payment of the said debt out of the trust estate, by giving their bond, upon the complainants extending the time of payment for three years. And accordingly the said R. M. Smith and Ann his wife, by and with the intervention and privity of Thomas Frost one of the trustees in the said deed, (testified by his being a witness to the bond) executed and delivered to complainant their joint bond on 14 January, 1801, in the penal sum of £896 19s. 4d. with condition for the payment of £448 9s. 8d. with interest on or before 1 January 1804, as appears by a copy of said bond, filed. That the Rev. Thomas Frost hath since departed this life. That com-

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plainant hath applied to said R. *M. Smith for payment of said debt, and though he is in the receipt of the rents and profits of the estate, he hath neglected to pay the same.

Complainant is apprehensive of losing his debt, and prays relief: and that the trust estate may be decreed to be liable to this debt: as for the proper debt of the said R. M. Smith, or of the said Ann Smith, his wife: and as if the said estate was not settled as aforesaid, and as if she were a feme sole, more especially as the consideration thereof was in a great degree for necessary articles, which went to the use of Mrs. Smith and of the trust estate.

The exhibit A. which is the account, is of sundry articles, chiefly for family use, for the use of a lady, and for the use of a plantation and negroes; and some articles for Mr. Smith's personal use. The exhibit B. is a copy of the deed referred to by the bill. It is a conveyance of a tract of land and 47 negroes, a part of Miss Downs's estate to the Rev. T. Frost and Mr. Thomas R. Smith, in trust, and with a proviso, that if the heirs, &c. of the said R. M. Smith should within 6

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months af*ter his decease, pay over to the said Ann Downs his intended wife, in case she shall survive him, the sum $22,000, with interest thereon from the day of his death, and provided also that the said R. M. Smith, (if he survived her) and his heirs, &c. should pay the said sum of $22,000 to such person or persons as she should give and bequeath the same to, by her last will and testament, executed in the presence of two witnesses (which last will the said R. M. Smith covenants to consent and agree to) then the said conveyance of said estate should be null and void.

There is a clause in the deed authorising the said R. M. Smith to sell and convey the said plantation and negroes, with the consent in writing of the trustees or the survivor of them, provided the said R. M. Smith should secure the said sum of $22,000 to the said Ann Downs, as in said deed, by a mortgage of an adequate real and personal estate.

The defendant R. M. Smith and Ann his

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wife, put in *a joint answer to this bill, admitted that R. M. Smith did purchase of complainant the goods in bill mentioned, and being unable to pay for them, he did at the request of complainant prevail on his wife to join him in executing the bond mentioned in said bill. And the bond was witnessed by the late Rev. Thomas Frost, one of the trustees of the marriage settlement of the said Ann. But they the defendants cannot admit that the signature of the said Thomas Frost was intended to signify his consent, that the property under the settlement should be charged with the payment of the said bond. On the contrary, the said defendant R. M. Smith saith that the said Thomas Frost was induced to consent to the said Ann's joining him in the bond by the declaration of the obligee, that her signature was desired only for the purpose of having a claim upon her in case of the death of the said Roger.

The defendants admit that such marriage settlement was executed by them as is set forth in the said bill. But whether by virtue of the said settlement, and the act of executing the said bond, the attestation thereof by one of the trustees, the property settled is chargeable with the debt and liable to be sold for that purpose, is submitted to the judgment of the Court.

The answer of Thomas Rhett Smith, the surviving trustee, admits the marriage settlement as stated by complainant. Defend-

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ant states that he is ignorant of *the transactions between the said R. M. Smith and the complainant. But he insists that it appears by the complainant's own shewing, that the contract for the goods was originally with R. M. Smith alone, and that the credit was given personally to him, and that it appears to have been an after thought to make Mrs. Smith and the property settled amenable to the payment of his debt, by getting her to join her husband in a bond to complainant, witnessed by the trustees.

This defendant cannot admit that the trustee, Thos. Frost, intended by his signature to subject the trust property to the payment thereof, and thus so far to destroy the trust confided to him; but supposes it to have been an inadvertent act. But if the said Thos. Frost did intend thereby to consent to charge the trust property his act was a mere nullity, as the trust was confided in him and this defendant jointly, and neither had a right to act without the other, and this defendant denies that he ever concurred therein. And that even if this defendant had concurred in the act of his co-trustee, for the subjecting the property to the payment of the debts of R. M. Smith, the husband, or to any disposition of his wife for his accommodation other than in the mode pointed out by the settlement, to wit, by deed in the nature of a last will, executed in the presence of two witnesses, the Court would have restrained them, and refused to sanction the measure, as it would be a departure from the intent and object of the settlement. And the defendant, Thomas R. Smith, further insisted that under the said settlement the said R. M. Smith is permitted by a special covenant to sell and convey the property settled with the consent of the trustees or the survivor of them, to be signified in writing on condition that the said R. M. Smith would first secure to his said wife the sum of $22,000, by a mortgage of real and personal property, equivalent to what he should sell. Whence the complainant would infer a right to charge the premises by the joint obligations of the said R. M. Smith and Ann his wife. And

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so equivocal and inform*al an act on the part of the trustee, as that of his attesting

the said obligation, without taking any security from the said R. M. Smith, for the payment of the said $22,000 to the said Ann, under pretence that she has waived her right to said security; whereas by the settlement her agency in relation to such disposition is no where stipulated for, or in any manner sanctioned. Defendant insists that the said bond so far as it imports an obligation from the said Ann, is absolutely null and void; she having been a feme covert when it was executed, and having no power under her marriage settlement to come under such an obligation; and that having no separate estate or interest subject to her individual control, she cannot be looked upon by this Court as a feme sole, as the complainant demands in relation to this debt. And she had no separate estate in relation to which the contract of a feme covert could be made obligatory on her. And this defendant insists that the decrees of this Court in cases somewhat analogous to this, are limited to instances where separate rights are vested in the wife and free agency allowed her, and trustees are interposed not to restrain her will, but on the contrary formally for the purpose of leaving that will free, and to confer on her the privileges of an unmarried woman.

That the case now under consideration falls under that larger class of cases, where the rights of man and wife are mingled, and trustees appointed to guard the wife against her own indiscretion, and the effects of her ignorance of business, and to protect her against any acts of her husband derogatory to her rights, or into which she may be persuaded or driven by him, and by such protection to secure a portion of her estate for her comfort. That in such case it would be a solecism in terms and principles to say that the joint act of the husband and wife can overturn the conditions and limitations of their marriage settlement.

That no decided cases had gone further than to decree that the trustees should apply

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the proceeds of the sepa*rate estate of the feme covert to the payment of the debt.

I must remark upon this answer, that though it is drawn with great skill and ability, it is in some degree objectionable, inasmuch as it is too argumentative. If we depart from the plain narrative forms heretofore in use, which state the essential facts concisely to the Court, our pleadings will degenerate into the loose forms of the memoirs and plaidoyers in use on the continent of Europe, the inconvenience of which would be sensibly felt hereafter. I would recommend to the solicitors to attend to this remark, and to adhere to the ancient usage of the Court.

After these pleadings had been filed, Mr. R. M. Smith departed this life intestate; and B. B. Smith, administered on his estate. Whereupon the complainant filed a supplemental bill and of revivor, and made the administrator a defendant, and demanded an account of the personal estate of the said R. M. Smith, and to have the same applied to the payment of the complainant's demand: and also to have satisfaction of the said debt in the bill mentioned, out of the separate estate of the said Ann Smith, who hath survived her husband.

To this supplemental bill the said B. B. Smith answered, that he admitted the former proceedings in the cause, and that R. M. Smith had since departed this life intestate, and that said B. B. Smith had administered thereon.

That in the opinion of the defendant the estate of the said R. M. Smith will not be sufficient to pay the debts which he owed in his lifetime, or at the time of his death. Indeed he thinks that after payment of the sum of $22,000 to the widow, with interest according to the marriage settlement, there will not remain enough to pay the judgment debts standing against the said R. M. Smith.

That after the defendant had regularly administered, he caused a sale to be made of the effects of R. M. Smith not comprehend-

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ed in the marriage settlement, and the *same amounted to $482, and no more, as appears by account sale, which forms exhibit A.

The other defendants in their answer to the bill of revivor admitted the former proceedings.

At the trial of the cause, Mr. Charles Edmondson, a witness for the complainant, proved the execution of the bond in question, which was given for the amount of a running account.

Mr. Frost was the friend of Mrs. Smith, and said the bond would be given, if time of payment should be extended. He said he was trustee of the lady, and would agree to the bond on those terms.

This was agreed to by the attorney of Mr. Ewing, and the bond was executed and Mr. Frost witnessed it. The voluntary payment by Mr. Smith was distrusted and doubtful, and it would have been put in suit immediately to coerce the payment of the account. But on Mr. Frost's proposition it was agreed to accept Mr. and Mrs. Smith's bond, and his assurances were relied on. It was Mr. Frost who came to solicit indulgence, and procured it on the proposition of the bond. Mr. Frost knew of the account, and witness thinks Mr. Frost acknowledged that most of the goods were obtained for Mrs. Smith.

Entire reliance was placed on the goodness of the debt, when the bond was given.

Mr. B. B. Smith, witness for the defendant, stated that the property of Mrs. Smith was considered to be double the amount of the sum secured by the settlement, to wit, the $22,000. There were two plantations and forty-seven negroes, bonds, &c. &c. One of the plantations has been sold by Mr. Smith

and it went to pay his debts. Other property was substituted for the land sold: thinks it was sold for £2500.

He thinks R. M. Smith was insolvent at the time of the contract. And does not believe the property now left is worth more than the $22,000, secured by the settlement.

This case involves a principle of great im-

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portance, *which has been much agitated. I have therefore reviewed all the cases and formed my opinion upon a careful examination of them. In this I have been greatly assisted by the very able argument of the counsel on both sides of this cause, which left me little more to do, than to examine and compare their authorities and arguments, and to draw my conclusions from them.

The points insisted upon by the complainant were,

1. That the defendant, Mrs. Smith, had a separate estate in the debt secured to be paid her by her husband under the deed.

2. That in relation to that separate estate she could act as a feme sole, and her acts might charge the same at her will and pleasure, unless specially restrained by the deed creating her separate estate.

3. That she had in this case by joining her husband in the bond to the complainant so expressed her intention to charge the separate estate, as would bind it to the extent of its value. And this was not prevented by any thing contained in the deed creating and securing the separate estate.

As auxiliaries the complainants added,

4thly, That if the assent of the trustees was necessary, (which they denied) one of the trustees had expressed his assent by signing the bond as a witness.

And 5. That the bond was given for necessaries for the family, articles for Mrs. Smith's own personal use, and articles for the use of the trust estate. And time was given for the payment, which enabled Mr. Smith to apply the rents and profits which were clearly liable, to the payment of the other expenses and support of his family.

To this it was answered on the part of the defendant.

1. That the debt of $22,000, secured to be paid by the husband to the wife in this case, was not such a separate estate as she could charge, admitting that wives have that power generally over separate estates.

2. That a married woman has no power to act as a feme sole, and by her acts to charge

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the separate estate, *unless such power be expressly given her by the deed creating the separate estate. That no such power was given in this case. But there was a line marked out, by which alone she could walk and act, and dispose of this property.

3. That even if Mrs. Smith could have charged this estate, the act of signing a bond with her husband, was not a proper mode of charging, but was a mere nullity at law, and this Court would not set up or enforce against a married woman, a paper of this kind, which the party could not enforce at law.

4. That the assent of the trustees was necessary in all cases; and was particularly made so by the deed in question. And that one trustee only having assented (and that in an irregular way) it could not bind or give effect to Mrs. Smith's act.

5. That if the bond was given for necessaries for Mrs. Smith, and the trust estate, it could not make her liable, as the husband (who got a considerable fortune by her) was bound to maintain her; and as he had the use of the rents and profits, to enable him to support the expenses of his family, and pay debts incurred for the use of the trust estate.

To all this it was added that this Court was peculiarly anxious to support the rights of femes covert, and would not sanction any acts which tended to defeat their interest in separate estates, which was a danger to which they were much exposed by their situation; as few women could resist the authority of harsh, or the persuasion of affectionate husbands.

The Court would, therefore, guard them against themselves.

Other topics of argument were resorted to on both sides, but I believe they may all be comprehended under the points stated above.

In examining the authorities cited, I shall take them in the order of time, which will enable us to see when, as well as how, the

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doctrine in question was established: *what objections have been made at various times, and how they have been settled.

We shall be able to deduce from them at the conclusion matter to guide us upon all the points now in litigation. The first case of importance is that of Norton v. Turberville, reported in 2 P. Wms. 144, which was decided by the master of the rolls in 1723. This was the case of a feme covert, who had a separate estate. She borrowed money and gave her bond. She ten years afterwards made her will, gave legacies and made executors, and afterwards died.

It was objected that her bond, being a feme covert, is void at law, and she is not bound by it. And then the matter rested as a loan of money to the feme covert, which demand is barred by the statute of limitations.

It was decided that though the bond was so far void as not to be suable at law, the demand could be supported in equity so as to charge the separate estate.

The next case which I notice is that of Stanford v. Marshall, 2 Atk. 68, decided by the master of the rolls in 1740. In that case a father by deed created a trust of real estate, and directed the rents and profits to

be paid to his daughters, whether sole or covert, for their separate use, either into their own hands, or into those of any other person whom they might appoint. The daughters joined their husbands in bonds for money loaned to the husbands. The trustees refused to pay, and the creditors brought a bill to compel them to pay the rents and profits of the real estate.

The Court said the daughters had an absolute power over the rents and profits, and could create any lien they pleased upon their interest in the estate, and therefore ordered the trustees to pay the rents and profits of the trust estate to the creditors.

The next case is that of Partericlie and Poulet, 2 Atk. 383, decided by Lord Hardwicke in 1742. He stated that a feme covert having a separate estate shall be considered so far a feme sole, that if she advances money out of her separate estate by way of

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loan, to her hus*band, to pay his debts, or joins with him in charging her separate estate to relieve his estate, she shall, as her estate is liable to the mortgage she has given, be looked upon in this Court as a creditor, and entitled to be repaid out of her husband's estate.

The next case is that of Wilford and Beasly, 3 Atk. 503, decided by Lord Hardwicke, in 1747, which only establishes that a person interested, subscribing a deed as a witness only, knowing the contents, is a sufficient signing within the statute of frauds.

The next case is that of Darly v. Darly, 3 Atk. 399, decided by Lord Hardwicke, in 1746, by which it was established, that where an estate is given to a husband for the use of the wife, he may be considered as a trustee for her separate use. For no technical words are necessary to make it a separate trust; and the word "livelihood," is sufficient to shew the intention of the giver, that it should be to her sole and separate use.

The next case in order is that of Allen v. Papworth, 1 Ves. sen. 163, decided by Lord Hardwicke in 1748.

He held that if a feme covert having power to receive the rents and profits of an estate to her separate use, and to appoint them as she pleased, brings a bill jointly with her husband for an account, and submitting that the profits should be applied to the payment of the husband's debts, the Court will decree it accordingly. And the bill to which she was a party without collusion, is as much an execution of her power, as an actual appointment would have been, and the profits shall be bound.

Then follows Hearl v. Greenbank, 1 Ves. sen. 298, '9, 303, decided by Lord Hardwicke in 1749. He stated that it was a rule of the Court that a feme covert may dispose of personal estate given to her separate use, and subject to her disposal. As to the real estate, that requires more particularity. The wife bequeathed away the estate from the husband, and this was supported.

The next case was that of Grisby v. Cox, 1 Ves. sen. 517, '18, decided by Lord Hardwicke in 1750. This is a very important

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case, in which we see the principles *which governed the Court, developing themselves more clearly, or at least more fully.

This was the case where on the marriage of a lady, an estate was settled in trustees to receive the rents and profits for her sole and separate use, and as she should appoint and direct, whether sole or covert. The wife by deeds of appointment sells part to the plaintiff, and the husband covenants that the purchase should be free from incumbrances; but the trustees were not consulted therein. The bill was to have the effect of this bargain.

The wife insisted that the plaintiff had colluded with her husband to take away that separate power from her, and that the plaintiff had paid the money to her husband, though he saw this settlement to her separate use. Therefore he did not come into equity unexceptionably and on fair grounds. And that her friends and trustees ought to have been consulted. But the Lord Chancellor said it was impossible not to decree under the circumstances proved (for the wife did not furnish any proof of collusion, or undue influence,) that the plaintiff should have the benefit of this purchase.

"For the rule of the Court is that where any thing is settled to the wife's separate use, she is considered as a feme sole; may appoint in what manner she pleases, and unless the joining her trustees is made necessary, there is no occasion for that."

The wife might have made an immediate appointment for the benefit of her husband, unless there was proof of undue influence over the wife, by ill treatment, or even by extraordinary kind treatment. Then a purchaser stands on stronger ground. The Court had reluctance to be sure to enforce the contract, but felt itself bound to do so in the case stated.

Soon after came the case of Peacock v. Monk, 2 Ves. sen. 190, decided by Lord Hardwicke in 1751. He there laid down the law of the Court to be, that as to personal estate where there is an agreement between husband and wife before marriage, that the wife shall have to her separate use, either

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the whole or particular *parts of her personal estate, she may dispose of it by an act in her life, or by will, as she pleases, though nothing is said of the manner of disposing of it.

And if a wife with separate estate borrows money, and gives her bond, this gives a foundation to demand the money against her, out of her separate estate; she being a feme sole as to that.

As to real estates, as the law regards the interests of the heir at law, more formality and more adherence to the power of appointment seems to be required. (See page 193.)

Then followed the case of Pawlet v. Delaval, 2 Ves. sen. 663, 9, decided by Lord Hardwicke in 1755.

He there decided that a wife is barred from claiming her separate personal estate, which she with her husband and the trustees had called in from the debtors, and had loaned out again in the husband's name.

Lord Hardwicke said that it had not been determined to be the law of the Court that the intervention and consent of the trustee was necessary to support the disposal of the separate estate by the wife, (667.) Nor has it been determined that the wife may not dispose of her separate property even to her husband unless by consent in Court or intercession of friends. It is frequently done by matter in pais, and is supported by the Court, where no menace or imposition appears. If indeed the circumstances required by the trust, by which the act is to be done have not been pursued, the Court might say it should not take place. But here are no particulars required as to the mode of doing it.

In the case of Cartony v. Newman, decided in 1771, as cited in a note in 3 Bro. C. C. 346, a legacy had been given to the wife for her sole use, with a power of appointment by will and in default to her executors. It was ordered on her consent to be paid to her husband.

This was a plain departure from the mode of appointment pointed out by the testator, to wit, by the will of the wife; yet it was supported.

So in Clarke v. Piston, decided in 1777, at

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the rolls, *the wife's separate estate, which she had power to dispose of from time to time, as she should choose, by any note under her hand, was by her consent, without any appointment, and merely by joining her husband in a bill, decreed to be paid over to the husband by the trustees. See 3 Brown, C. C. 346.

Fully as the doctrine has been examined and applied in preceding cases, it received further examination in the case of Hulme v. Tenant. 1 Brown C. C. 16, decided by Lord Thurlow, in 1778. It had been previously argued before Lord Bathurst, who had dismissed the bill. On a rehearing it came before Lord Thurlow.

The case was, that on the marriage of a woman, her freehold and leasehold estates were conveyed to trustees, to receive the rents and profits for her separate use, and to convey the estate to such use as she should appoint by deed or will, under her hand and seal; and in default of appointment to her heirs and executors. The husband borrowed money of Mrs. Hulme and gave his bond, in which his wife joined, and so for a second sum which the wife herself applied for. The bill was filed by the obligee against the husband, wife and trustee, to compel the payment of the bond.

The trustee did not join in the bond, nor assent. There was no mortgage, or any reference to the separate estate.

Upon full argument Lord Thurlow decreed the separate estate should be liable, particularly the leasehold estates.

He examined the cases and concluded from them, that the proper rule was that laid down in Peacock v. Monk, that a feme covert acting with respect to her separate property, is competent to act in all respects as if she was a feme sole. It is impossible he added, to say but that a feme covert is competent to act as a feme sole with respect to her separate estate, where settled to her separate use. And L'd Thurlow said he had no doubts as to these points. But the case before him required him to go further and to decide how far

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her general *personal engagement shall be executed out of her separate property, that if she had by any instrument contracted that this or that portion of her separate estate should be disposed of in this or that way, she or her trustees might be decreed to make that disposition.

But if she enters into an engagement which would make a feme sole liable to the whole extent of the contract as to her person in every respect, it is clear such a general engagement entered into by a feme covert will not bind her as such. But the decided cases have gone so far as to say, that the general engagement of the wife shall operate upon her separate personal property, and shall apply to the rents and profits of her real estate, and that her trustees shall be obliged to apply the personal estate, and rents and profits of the real to the satisfaction of such general engagement.

The principle is that if a Court of Equity says a feme covert may have a separate estate, the Court will bind her to the extent, as to making that estate liable to her own engagements, as payment of the debts, &c.

This case was much considered, and seemed to have settled the doctrine completely.

In the case of Fettiplace v. Georges, 3 Bro. 8. The same subject was again brought before Lord Thurlow and decided by him in 1789.

That was a case where personal estate was given by will to a trustee for the sole and separate use of a feme covert. The feme covert by her will bequeathed the personal property to her niece, and died. Her husband sued for the personal property. It was contended for the husband that the £1000 given by will to the wife for her sole and separate use could not be disposed of by her will, without the assent of the husband.

There was no power of disposal given her by the will of the testator, who gave the legacy to the wife.

The Lord Chancellor said that all the cases shew, that the personal property where it can be enjoyed separately, must be so with all its incidents, and the jus disponendi is one of them.

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*The case of Lillia v. Airey, 1 Ves. jr. 277, was decided by Lord Thurlow in March, 1791. He decided that the creditor of a feme covert has a right in equity against her separate property, as far as that will go. She is a feme sole as to that, but not beyond it: and her bond is a good acknowledgement of the debt.

In August, 1791, the same subject again came before Lord Thurlow, in Pybus v. Smith, 3 Bro. C. C. 340. In that case the wife said in her answer that she did not conceive when executing the deeds that she was conveying her life estate and interest, but only the revision in case of her death without issue. The master on reference reported that the deeds were read to her.

The Lord Chancellor said if the point were open, he should have thought that a feme covert who had a separate estate, should not part with it without an examination in Court. But a feme covert had been considered by repeated decisions with respect to her separate estate as a feme sole. If a feme sole sees what she is about, the Court allows of her alienation of her separate property, and her conveyance of the whole to pay her husband's debts, will be carried into execution.

If a parent intended to give a provision in such a way that she cannot alienate it, he saw no objection to its being done. But such intention must be expressed in clear terms.

In Ellis and Atkinson, 3 Bro. C. C. 565, decided in 1792, it was again decreed that the separate estate of the wife subject to her disposition by deed or will, should be bound by her agreement and paid over to her husband. There being no proof of undue influence, the Court carried the agreement into effect.

In this case the Chancellor considered, whether the wife could dispose of her eventual interest, arising from her surviving her husband, and decided that she could. This was among the last of Lord Thurlow's decrees. He resigned the great seal within three weeks after the decree in this case.

It might have been supposed that this long

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series of *cases had settled this contested question. But it seems that other Judges, struck with the facility with which married women could be induced to charge their separate estates for their husband's debts, or to alienate them entirely for the husband's benefit, and desirous to protect them from their own indiscretion, endeavored to restrain this power.

Accordingly in the case of Socket and Wife v. Wray and others, reported in 4 Bro. C. C. 483, decided in 1793, the master of the rolls, (Sir R. P. Arden,) Lord Alvanly decreed, that where money is vested in trust for a married woman to pay her the interest for life to her separate use, and after her decease to such person as she should by any instrument in writing from time to time or by will appoint, she cannot dispose of the principal at once by deed, but by a revocable act only; and he refused to sanction a transfer of the property to the husband as the wife desired, by the bill filed by her and her husband.

Lord Alvanly said the effect of the deed is, that the money should be paid to trustees to pay the dividends to the wife for life; and after her death, according to her appointment by will.

And the question is, whether under such a trust, she can waive the benefit of the deed, and give the whole capital away at once during her life. He said he thought she could not.

That though he respected the Chancellor who decided Newman v. Cartony, which was in point, he could not conform to that case. He said that if a parent or other person giving property to a feme covert, as separate estate has given a power without restraint, the Court would act upon the property. But there was a restraint in this case; she could dispose only by a revocable act, a will. This case, notwithstanding the master of the rolls attempted to distinguish it from most of those before decided certainly militated strongly against them.

This was followed up in Hyde and Price, 3 Ves. jun. 437, decided in 1797, by the master

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of the rolls, who *decreed that where there is a trust in a deed of separate estate, to permit A. to receive the dividends of stock for the maintenance of the wife, she is not at liberty to grant an annuity out of the dividends. Her act is void. He admitted as in Hulme and Tenant that a feme covert is a feme sole as to her separate property; but not to charge herself personally. But he thought a provision for a wife, living in a state of separation, was not such a separate estate, as she could alienate or charge. She has no dominion over it. She could not bind her husband by her contracts. And if she alienated the maintenance, how could she live?

This view of the subject was strengthened by the decision of the Lord Chancellor Rosslyn, in the case of Whistler v. Newman, 4 Ves. jun. 129, &c. in 1798.

This was a case of settlement of stock, the property of the wife, in trust from time to time to receive the dividends and pay them to the wife for her sole and separate use;

her receipt to be a discharge: after her decease to her husband for life: after the death of the survivor to the children of the marriage: if no children to go according to her will.

The trustees with the privity of the wife sold the stock, and paid the money to the husband, taking his bond of indemnity. He died insolvent. The widow and children filed a bill against the trustees, who were decreed to replace the fund, and to pay the dividends to the widow from the death of the husband.

She was prevailed upon to assent to the sale of the stock (as appeared by the examination of the wife, to which the trustees had a right.) But she stated it to have been partly by coaxing, and partly by bullying. (See p. 144.)

The Lord Chancellor in giving his decree, reviewed the cases, and seemed not wholly satisfied with Hulme and Tenant, and Pybus and Smith, which placed the feme covert, having separate estate, so wholly on the footing of a feme sole as to the separate fund; because it tended to defeat all the provisions

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intended for the be*nefit of the feme covert. But he said that those cases were very different from the one before him. They were cases of creditors of the husband with whom the wife joined to secure the debt. And that as it might be necessary to review the cases in relation to the creditors of the husband, where the wife joined to secure the debt, it would be a matter for consideration, whether the Court will do more than leave a legal right undisturbed, but not to improve the security.

In the case before him the Lord Chancellor considered the trustees as having acted grossly against their duty. They made the wife witness to the bond, as evidence of her consent, which shews she was deceived and imposed upon. The cases have gone the length, that if a married woman has separate property, she may dispose of it, and the trustees are bound to follow her disposition.

He regretted these decisions, but, he thought himself bound by them. And they were different from the case then under discussion. They were cases of clear, substantial creditors dealing with the wife upon a security she thought fit to give them.

Then came the case of Moores v. Huish, 5 Ves. jun. 692, decided in 1800, by the Lord Chancellor Rosslyn, in which the Court refused to enforce a security upon rents and profits, settled in trust to receive and pay them yearly as received, to the separate use of a married woman. The Lord Chancellor said that the difference of Pybus and Smith, and the other cases is, that in those the wife had a power of appointment; whereas this is a mere trust to receive the rents and profits, and pay them from time to time to the wife.

The case before him was not that of a creditor endeavoring to get a security for a just bona fide debt, but the purchaser of an annuity at a very low price, charged on the interest of the wife, who had applied to the trustees, and had full notice from them, that the husband was a ruined prodigal man, and the fund secured for the separate use of the wife. Bill of the creditors dismissed. These

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cases seemed to have shaken the *doctrine which the older cases appeared to have settled. Though in truth they were decided on peculiar circumstances different from the former.

But others have since arisen in which it has been considered wiser to adhere to the rule which had been established by a long series of decisions.

In the case of Sperling v. Rochefort, 8 Ves. jun. 164, 174, decided in 1803, the Lord Chancellor Eldon distinguished between the cases where nothing is settled to the separate use of the wife, and where there is a separate provision for her. And he recognized the doctrine that a feme covert is considered as a feme sole, as to her separate estate, as was decided in Hulme and Tenant. He said the cases decided by Lord Hardwicke go very much to the extent that to all intents as to the separate property, the wife is to be considered as a feme sole.

That nothing could be more irregular than the act done by the wife in Hulme v. Tenant, nothing less like an execution of the power. But Lord Thurlow held that the instrument, which as a bond was nothing, and which was not attested as required by the power, was a sufficient indication of the intention of the wife as to the separate property; with regard to which she must upon the authorities be deemed a feme sole.

The Lord Chancellor added that though he wished the law might be as represented in Whistler and Newman for the protection of married women he found it impossible to reconcile all that is said in that case to the former cases.

In 1804, this contested question again came under revision before the master of the rolls in the case of Wagstaff and Smith, 9 Ves. jun. 520.

This case was where the testatrix bequeathed a certain sum in bank annuities in trust, to permit and suffer the sister of the testatrix to take or receive the interest or dividends of the stock to her own use during her life, independent of her present or any future husband. She joined her husband in

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a deed to charge her *life interest with an annuity to a third person. The trustee resisted the execution of the agreement. In the argument the case of Fettiplace and Georges was relied upon to establish that one of the incidents to the separate property of a married woman is the power of disposition, notwithstanding the doubts in Socket and Wray's case. That it is not necessary to give her

the power of appointment as that is incident to the quality of the property settled to her separate use. And it was insisted that Moores and Smith was decided on the circumstances.

The master of the rolls said the only question was whether the lady has an absolute complete life estate to her separate use. If she has, then unless the former doctrine of the Court, that as to the separate property a married woman is to be considered as a feme sole, is abrogated by the later decisions, she had a right to make any disposition she pleased of that property. That is the broad unimpeached rule. In this case, there are no words of control or of restriction. Her disposition of it must be supported The trustee was decreed to carry the agreement into effect.

Then followed the cases of Richards and Chambers, and Seaman v. Duill, in 10 Ves. jun. 580, 6, decided by the master of the rolls (Sir W. Grant,) in March, 1805.

The master of the rolls said he was called upon to decide the important and much agitated question, whether it is competent to a married woman by examination in this Court to relinquish the provision secured by the marriage settlement, and to transfer to her husband that property, to which he cannot make any claim, and over which she has not reserved any disposition. He had no doubt as to the life estate. Many cases settled that. And she might also execute an appointment in favor of her husband or any other person, which appointment in the event of her death in his life, would be a valid and effectual disposition of the property. But the point was, whether the contingent interest which was secured to the wife, in the event of her

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surviving *the husband, can through the intervention of this Court, be given up by her, whilst in a state of coverture.

In examining the cases he abstained from those that relate either to the separate property, which in equity she may have; or property over which she has reserved, or had given to her by the settlement, a power of appointment.

In O'Keate and Calthorpe, cited in Sperling and Rochefortt, 3 Ves. jr. 164, Lord Hardwicke did not conceive the Court had any such jurisdiction, as is attributed to it.

He says "If she has any power, let her exercise it; but the Court cannot give it," where none has been given or reserved to her by the deed or will.

The case of M'Cormick and Buller, 8 Ves. jun. 174, was the first case in which that authority has been clearly and unequivocally exercised by the Court. This was followed by Ellis and Atkinson, 3 Bro. C. C. 346, note. And Guise and Small, 1 Anstrutker, 277. But the case of Nevison and Longden, in the exchequer in 1800, questioned the decision in M'Cormick and Buller, and Socket and Way, 4 Bro. C. C. 483, contradicted it.

Upon the whole the master of the rolls was of opinion that the Court ought not to aid in such cases. That the examination and consent of the wife in Court should not enable her to exercise any greater power over her settled property than is reserved by the settlement. The Court cannot enlarge the power. The Court dismissed the bill and the petition.

Then came Parkes and White, 11 Ves. jun. 209, 219, 227, 232, 237, decided by Lord Chancellor Eldon, in November 1805. In this case the wife's freehold and copyhold estates were conveyed to trustees, to allow the wife to receive the rents and profits for her sole and separate use, free from the debts of her husband. After her decease, to be subject to the dispositions of her will; and in default of a will, to the child or children of the marriage, and in default of issue, to the use of the heirs of the wife.

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*The wife joined her husband in conveying her estates, contained in said settlement, for life, and the reversion, by different deeds and at different times; and the husband received the money. After some time the wife filed her bill against her husband, the trustee and the purchaser, to set aside the deeds as obtained by the control and influence of her husband, and that she had not received any valuable consideration.

The Lord Chancellor said, it was extremely important that this question should be settled once for all. That his mind was in great distraction on this subject. If it be said that though Lord Thurlow following his predecessors, as far back as the doctrine can be traced, repeatedly decided upon this principle, this Court has now a right to refuse it, he was not bold enough (he declared) to act upon that position.

Previously to Whisler and Newman, Ellis and Atkinson, Pybus and Smith, Hulme and Tenant, Peacock and Monk, and other cases had been decided. Lord Thurlow decided most reluctantly in Ellis and Atkinson, and Pybus and Smith.

But he did not consider the point open. Upon principle, a woman contracting marriage, looses all the powers she had as a feme sole; and yet this Court allows her to place herself by contract in the situation of a feme sole and so it was at law, though that is now got rid of there. (See the cases cited in a note 5 Vesey, jr. 17.)

The principle is that all the words (giving powers to the wife to dispose) are only an unfolding of all that is implied in a "gift to the separate use." Lord Thurlow has considered the point well in Hulme and Tenant and looked to the authorities. A woman having a separate estate, may give it to her husband, as well as to any one else. Though the wife's putting her name to a bond with

the husband is a mere nullity at law, it is evidence in equity of her intention, though not as the settlement required.

Lord Thurlow thought himself bound by

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authority to *say, as she could have no other intention than to charge the separate estate, that informal instrument was such a charge; and he by decree executed that intention.

Lord Eldon then intimates delicately that Whistler and Newman, decided by Lord Rosslyn, was in opposition to all the authorities for a century, and he could not support it against that mass of authority; (223, 226.)

Lord Eldon also in page 225, asks if it be established as it is, that the wife is at liberty to dispose of her separate estate in possession, why will not the same principle do, for the estate in remainder? He saw no good reason.

His judgment was that a married woman having an estate, to her separate use, is capable of selling it, provided she is dealing with persons competent to deal with her, and not taking unfair advantages of her.

The next case was decided at the rolls by the master in July, 1806; 12 Vesey, 501, Witts and Dawkins.

This was a trust under a marriage settlement, to pay the rents and profits according to the appointment of the wife, from time to time, in writing. In default of appointment to the wife, for her sole and separate use. She made sale of the premises, and the Court supported the sale.

The next case was decided by the master of the rolls in December 1806. It is that of Stuges and Crop; 13 Vesey, 189.

It was decided that a married woman is considered as a feme sole as to property settled to her separate use, whether in possession or reversion. And as such therefore, has as much a disposing power over her reversionary interest, as over her interest in possession; If the instrument do not positively restrain her power of appointment or sale. Her consent on examination, is not necessary to pass her separate property; and it is of use only as evidence of parting with the equity.

The last case which I shall examine from

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foreign law *books is that of Essex and Atkins, 14 Vesey, jr. 542, decided by the master of the rolls in 1808.

This was a grant of an annuity by a feme covert out of a separate estate, bequeathed to her, and not subject to the debts of her husband. In her answer, she stated it to be a transaction of her husband alone, and for his benefit alone, and that she was compelled by ill usage to execute the deed. That she hesitated long and gave her consent unwillingly, from dread of her husband. There was some evidence of ill treatment by the husband. But the weight of evidence was, that she consented deliberately, upon full explanation of the business.

One of the executors and trustees gave notice to the intended purchaser, that he would not pay the dividends to any person but the feme covert; alleging her complaints of her husband's ill conduct to her, and he shewed him the will. The purchaser however completed the act, and the wife signed the deed. And now the purchaser came for a specific performance of the contract. The counsel for complainant cited and relied on the cases of Fettiplace and Georges, and the cases on that side of the question. The counsel for the wife relied on the cases of Socket and Wray, Whistler and Newman, and Mores v. Huish.

The master of the rolls, said he did not like the purchase of the annuity after notice from the trustee. His doubts arose out of Lord Rosslyn's judgment in Moores and Huish, according to which the Court of Equity ought not to interpose in such circumstances for the purpose of giving effect to the purchase. But as it is only in equity, that the contract of a married woman, with regard to her separate property, can be at all enforced; the Court must of necessity decide upon its validity. The Court cannot leave the purchaser to his legal remedy, for he has none. It cannot be said he ought to have no remedy, except upon the ground that there is no valid contract. In some cases Lord Thurlow with great reluctance acted so

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as to give effect to improvident en*gagements of the wife; but did not think himself at liberty to say, the Court would not interpose where the subject was entirely of equitable cognizance. If the transaction cannot on its own merits be impeached, the declaration of the trustees cannot make it null and void. Notwithstanding Lord Rosslyn's doubt, the established doctrine is, that a married woman can bind her separate property without the trustees, unless their assent be made necessary by the instrument which gave her that property. Their dissent cannot have any effect, where their assent is not made necessary. And their evidence that she was unwilling, cannot be evidence that she acted by coercion. If upon the evidence she was a free agent, and understood what she did, the Court must give effect to her contract. The Court accordingly decreed a specific performance of the contract.

In concurrence with these authorities is the doctrine in Newland on Contracts, page 25.

There was one case tried in this country, at Camden, where it was decided that the husband purchasing in his own name a cotton gin, but for the use of the settled estate of the wife; and he being insolvent it was decreed that the separate estate, which had the benefit should be liable. And upon appeal the decree was confirmed.

The case of Kiernan and Spierin [2 Desaus. 460] was the only one cited by the

counsel, decided in the Court at Charleston. In that case the Court was of opinion that the feme covert joining her husband in a mortgage of a house and lot of land secured to her by marriage settlement, was a sufficient appointment: although perhaps not such an appointment as was contemplated.

We have thus gone through a long and laborious examination of the decided cases on this subject; and we have traced the doctrine from its first appearance in the Courts of Equity to the present time. We have seen how it stood on the British authorities for a long space of time; how it received a temporary shock from the zeal of some Judges in later times, who were anxious to guard femes covert against their own acts, and

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their own *too great facility to the wishes or urgency of their husbands, and how it was re-established by still later Judges, who conceived it to be too bold and hazardous to depart from a settled rule of long standing, for a supposed advantage, however plausible.

We have seen too that but few cases on this subject have been decided in our own Courts, and that as far as they have gone they have been in concurrence with the great body of authorities we have examined.

The truth is there has been an attempt to reconcile conflicting principles. By the simple rules of the common law, the union of man and wife was deemed so complete that there was a junction of persons, minds and fortunes. The wife's existence was absorbed in the husband's, and he adopting her and her debts, and assuming to maintain and provide for her, became entitled to all her personal estate absolutely, and to the enjoyment of all her real estate for life.

When in the progress of refinement and of commerce, corruption came with them, and also great hazards to fortunes from the spirit of adventure, the caution and providence of parents endeavored to guard against casualties, by giving property to their daughters as a separate estate not liable to the debts of the husband. This at once dissolved the charm which bound up the fortunes and wills of the man and wife in one common bond of interest and affection. It was the introduction of a principle familiar to the civil law, but new to English law, that man and wife were distinct persons, with distinct properties, and distinct powers over them.

A separate estate, free from the control of the husband and subject to the will of the wife, made her a free agent, quoad that property, and she could act upon it as a feme sole. But it was soon found that wives however legally free were much under the control of their husbands, and too readily yielded up their separate estates to them, by direct gifts, or by engagements to their creditors. This induced some of the Judges to interpose and to endeavor to control the free exercise of

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this *power of free agency, which the character of a feme sole as to the separate estate bestowed, But upon the fullest consideration it has been found, that upon the introduction of the principle, that femes covert could hold separate estates, free from the control of their husbands, the jus disponendi, and all the other consequences of the holding separate estates necessarily followed. And after an ineffectual struggle the doctrine seems to have settled down where it was originally placed by the Court.

The result then is that a feme covert entitled to a separate estate in possession, remainder or reversion, is held to be a feme sole to the extent of the separate property, and the jus disponendi follows of course.

She may give it to whom she pleases, or charge it with the debts of her husband, where no undue control is used over her. And her disposition will be sanctioned or enforced by the Court, even without the assent of the trustees, unless that assent be specially made necessary by the deed or will creating the separate estate. And this power of disposing the separate estate is not restricted by the deed or will, pointing out a particular mode of disposing or charging the particular estate, unless the deed or will negatives any other mode expressly.

Upon the fullest and most attentive examination of the cases, I think these doctrines are clearly made out and established.

To apply these doctrines founded on the decided cases, to the cause under consideration.

There was a debt, created and secured by a deed, operating as a mortgage from the husband in favor of the wife, payable after the death of the husband, if he died first, and subject to her disposition by will, if she died first. It being a debt from the husband does not alter the case. This certainly was intended to be, and was a separate estate, not subject to the control of the husband. If it were not a separate estate to the wife, what was it? I cannot consider it in any other light than as a separate estate. The

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jus disponendi followed of course, *unless the deed creating the separate estate expressly restricted it. In this case it was contended that the deed contained such a restriction in two respects; one in requiring the assent of the trustees which was not obtained; another in prescribing the mode of the wife's disposing the separate estate, to-wit, by will, which it was insisted precluded any other mode of disposing; and consequently preventing the wife from charging the separate estate by her bond, as she has done in this case.

With respect to the first, the answer given by the complainant's counsel is obvious, and I think conclusive. The restriction is not on

the wife; it is on the husband. The deed declares that he should do no act to dispose of or encumber the property pledged as a fund to raise the sum of $22,000, for the wife, without his substituting other property of equal value. This is no restraint on the wife's power of disposing the $22,000, or charging the same, which power resulted necessarily from the very creation of a separate estate.

With respect to the second supposed restriction, it is answered by saying that though the deed declares the wife may dispose the separate estate by will, it does not exclude other modes. And we have seen by the decided cases, that there must be a negative to restrain the full effect of the jus disponendi resulting from the very nature of the estate. See Lord Thurlow's expressions in Pybus and Smith, 3 Bro. C. C. 349.

Besides, as was judiciously remarked by the counsel for the complainant, there were two contingencies provided for by the deed. One, that of the wife's dying first; in which case the separate estate was subject to her disposition by will. The other, of the wife's surviving the husband, in which case there is no restriction at all on the wife's power of disposal. The latter is the case which has happened; consequently the charge made upon the separate estate by the wife is totally unrestrained by the deed, and is valid and binding, and this Court is bound to enforce it.

It is not necessary to go through all the

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arguments in *detail. They are sufficiently noticed in the view which we have taken of the cases. Every point made, and every objection proposed in the case under consideration has been made and overruled in some or other of the cases examined.

Upon the whole, here is a case of a feme covert, for whom a separate estate is created by a deed. Its being to take effect in future is not a solid objection to her power of charging it, as we have seen expressly decided. Its being of part of the wife's estate, while the remainder was allowed to go unrestricted to the husband, furnishes no reason for a restraint on her power of disposal; for the marital rights would have given all the personal estate of the wife absolutely to the husband. But part was carved out of her fortune, as a separate estate; the right of disposal was an incident to that estate. The deed does not restrain that disposal at all, in the event of her surviving her husband. She has survived. The restraint actually interposed was on the husband, not on the wife.

The assent of the trustees was not made necessary to any act of the wife. The express permission to dispose by will in the event of dying first, would not, if that event had happened, have restricted the wife to that method alone of charging the separate estate, as we have seen by the cases.

The mode of charging which has been pursued in this case by the wife's joining her husband in the bond, is not objectionable. We have seen that this mode has been sanctioned by many of the decisions. The bond is a nullity at law, and the creditor has no remedy there. But in equity it is considered as evidence of the wife's assent to the separate estate being charged with this debt to the extent of the separate estate, but no farther; for the bond can neither touch her person, nor any other property she may have, except the separate estate. There is no evidence of any undue influence or improper conduct or control of the husband to obtain the wife's assent and signatures; on the con-

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trary it seems to have *been given freely; and an affectionate friend and trustee seems to have had an active and not blameable agency in the transaction, as a beneficial arrangement for the wife. If it had not been done, the creditors could have enforced the demand and stripped the family of every shilling of income, during Mr. Smith's life, till the debt was paid.

The complainant filing his bill in the life time of Mr. Smith, is not a valid objection to the claim; at most it could only be said he came too soon. At any rate he is not too soon now. But I do not think he did come too soon. See Tenant and Hulme. When the bond became due, he had a right to sue, and the decree would at least have given the creditors the rents and profits during Mr. Smith's life, and would have made the separate estate liable at his death.

As there is no provision made for children in the deed, and the wife had the whole property in the separate estate, the whole is liable to the charge she has made upon it.

The nature of the debt would have made no difference, provided there had been no turpitude in it.

But it reconciles us to the decree which must result from these premises, to find that the debt of the husband in question was not incurred for himself alone, or for unworthy purposes. It was for articles supplied partly for the family, partly for the use of Mrs. Smith herself, and partly even for the benefit of the trust estate.

The cases of creditors coming to the Court for relief under such circumstances, appear to be more favored than gifts to the husband. (See even Whistler and Newman.)

The only difficulty which occurred after what has been said, was, how the Court could reach the property in question? In the course of that struggle which took place in the discussion of this question in Westminster Hall, those Judges who were most reluctant to make the separate estate of the wife liable

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for the husband's debts, *upon her pledge of

the separate estate for that purpose, raised up that difficulty, when the property consisted of choses in action. It was said that this Court generally acted in personam; that to be sure in the case of a feme covert with a separate estate, the Court could not act in personam, and must therefore act upon her separate estate; but if that estate consisted of choses in action, a levy could not be made upon them, any more than it could in any other case of choses in action, and this Court could not touch it.

The history of this doubt and the changes of opinion upon it, is singular. In the case of Taylor v. Jones, 2 Atk. 600, Lord Hardwicke in 1743, had no difficulty in decreeing stock to be sold and the produce to be applied to the payment of the debts of the husband.

In the case of Hulme and Tenant, 1 Bro. C. C. 16, decided by Lord Thurlow in 1778, he reluctantly, but acting under the force of authorities, made the separate estate liable, and decreed the income of the real estate to be applied to the payment of the debts, and expressed no hesitation as to any personal estate; on the contrary, the acting upon the real estate where the wife had not been examined in Court, as to her assent to bind or dispose of the real estate, was considered the greatest difficulty; but that was got over. But in the case of Dundas v. Dutens, decided by Lord Thurlow in 1790, (1 Ves. jun. 196,) he doubted if this Court could act upon choses in action, and expressed himself very strongly on the subject. Yet in the following year in the case of Pybus v. Smith, 3 Bro. C. C. 340, 6, which was a case of separate estate, consisting of real estate and money in the funds, Lord Thurlow, considering a feme covert with a separate estate to be a feme sole, quoad that, declared the whole to be liable to her husband's debts, for which she had agreed to make them liable.

This case was followed by a series of others in support of it, till the time of Lord Alvanly and Lord Rosslyn, who did not like the doctrine of making separate estates liable, and strove to get rid of the old authorities.

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*Lord Eldon on his first coming into the Court of Chancery, paid deference to these later opinions; and in the case of Nantes v. Corrock, decided in 1803, and reported in 9 Vesey, 182, expresses the same doubt and difficulty about making the separate property, consisting of stock or other choses in action liable to the process of the Court; and he stated that the cases of Hulme and Tenant, & Pybus & Smith, had been shaken by L'd Rosslyn.

But when Lord Eldon had sat longer on the bench, and had occasion to consider the subject, and examine the authorities more fully, he became satisfied that it would be too dangerous to depart from the long series of decided cases, and to adopt the new opinion of Lord Rosslyn. He preferred the maxim of, stare decisis, in order that the law might be settled and known, to any supposed improvement. Accordingly in his subsequent decrees he abandoned the doctrine of Lord Rosslyn, and adhered to the old decisions of Lord Hardwicke and Lord Thurlow, and made the separate estate of the wife, of whatever it consisted, liable to the disposition of the wife, either in favor of her husband, or to pay his debts.

And I do think it would be much too hazardous to venture to change the law at this day.

Upon the whole, after a very strict examination of the authorities, and upon great consideration, I feel myself constrained to decide in favor of the complainant.

Complicated and extensive as this subject is in itself, and as it has been made by the ingenuity of counsel, and by the difference of opinion of a few of the Judges from their predecessors and successors, I have however come to a conclusion entirely satisfactory to my judgment, whatever my feelings may be.

If I had any serious doubts, I would recommend an appeal, to have the question solemnly settled. But I have none, which would justify my recommending what would only be a new source of delay and expense. The parties however will exercise their judgment upon that point, and with my entire con-

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currence in whatever they *may determine to do: It is therefore ordered and decreed that the amount of this debt be paid out of the separate estate, or of the sales thereof, as far as the same may extend towards the payment of the debt.

HENRY WILLIAM DESAUSSURE.

From this decree an appeal was made on the following grounds:

1. That according to the principles of the common law, the deed or contract of a married woman is a mere nullity; that where they are enforced by equity, it is only in reference to their sole and separate interests and estates secured to them by marriage convention, when it is also the object and intention of such marriage convention, either positively expressed or seen through the medium of necessary implication, to vest in them the interests and estates and to confer on them in relation thereto the powers, privileges and free agency of a feme sole; and that as in the present case, so far from its having been the object or intention of the parties to the settlement either expressed or implied, to subject the property in dispute to the acts of Mrs. Smith, as a feme sole during her coverture, the manifest and only object of the settlement was to preserve one moiety of her paternal fortune, namely the 22,000 dollars, (the other half having been given up to her husband,) entire and free from diminution or charge at the dissolution of the marriage for

her absolute and individual benefit, if she survived her husband, and subject to the use of his will (which could only be operative at the dissolution of the marriage), if he survived her, the bond under these circumstances was as much a mere nullity as if she had been without a settlement, and had intended to bind by it the interest she had after the death of her husband, in her paternal inheritance.

2. That even supposing (what is not admitted,) Mrs. Smith has a sole and separate interest in the property during coverture, notwithstanding the deed mentions his sole and absolute use in case she should survive her

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hus*band, when by becoming again a feme sole, whatever unfettered rights she then had must necessarily be sole and absolute, yet as the only act she could perform during coverture under the positive terms of the settlement was limited to an instrument in nature of a will witnessed by two credible persons, and such being ambulatory and recoverable, and to be executed in the presence of respectable persons was (consistently with the objects of the settlement) calculated to protect her rights against the influence of her husband, the terms requiring this mode were emphatically a negative to any other which would expose her to his influence, and that therefore the execution of the bond, which is a palpable departure from the mode prescribed is ipso facto, null and void, both as a bond and contract to bind her interest.

3. That Mrs. Smith, during her coverture, having no other powers under the settlement incidental to a feme sole, except that of executing a deed in nature of a will, which could only affect his interests after his death, and was recoverable during her life, the bond executed by her was a mere nullity both in law and equity, and could not be rendered valid by the attestation or assent of her trustee, Mr. Frost.

4. That supposing this act binding on the interests of Mrs. Smith agreeably to the decrees of the Chancellors of England, (which is not admitted,) yet as the only cases which can at all bear on the circumstances of this case have occurred since the revolution and have no binding authority in our Courts, and as the rule has been condemned by those Chancellors, and submitted to only from necessity, and as our Courts of Equity have never yet received the doctrine to the extent carried by the English cases, the subject is "res integra" in our Courts, and they ought not to adopt principles which the British Chancellors regard as wrong in their origin.

5. Because the decree is in other respects contrary to the law of equity.

K. L. Simons, defendant's solicitor.

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*The appeal came to a hearing in March, 1812. The Court of Appeals took time to deliberate. At the sitting of the Court of Appeals in March 1813, the Chancellors being divided in their opinions, delivered them separately.

As this cause is of great importance, and the subject has never before in this country received a judicial decision, and as I differ from the opinion delivered by the Circuit Court, which is intitled to great weight, on account of its very able examination of the subject and the strong support it derives from precedents, it is proper that I should state fully the reasons and grounds on which I think the decree ought to be reversed. The facts which appear to me most material are these. On the marriage of the defendant, Mrs. Smith, a deed was executed by her husband, by which he agreed in consideration of her having previously conveyed to him a considerable estate, to secure to her sole and absolute use (if she should survive him) the sum of $22,000, with a power to appoint the same by will, (if she should die before him) to such persons as she should see fit. Some time after the marriage, Mr. Smith being indebted to Messrs Robert and A. Ewing, and being threatened with a suit, prevailed on his wife to join him in a bond to them for the amount of his debt, for the purpose of charging her separate estate with the payment thereof. Mr. Smith has since died, and this bill was brought by the complainant to compel Mrs. Smith to pay the debt out of the property secured to her by the settlement. It will not be necessary to consider all the questions which have been made in this case, because on some of them I concur with the decree. I agree that the estate settled on Mrs. Smith must be regarded as a separate estate. It is expressly declared to be to her sole and absolute use, and although it was only eventual, yet I can see no reason why such an estate should not be subject to the disposition of a married woman, (if the power is given to her,) as well as one in possession. I therefore acquiesce in the cases as

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far *as they decide on this point. But the last decisions on this subject, and indeed some of the earlier ones have extended the power of a married woman over her separate estate to a length to which my judgment cannot go. The doctrine laid down by them is that feme covert with respect to her separate estate, is a feme sole; that her power of disposing of it is not derived from any deed or will; but is incidental to such an estate, and therefore that the exercise of this power shall not be confined to any particular mode, unless every other mode is excluded. I cannot assent to this doctrine in this great extent, because it appears to me to be incompatible with the established principles of our law, and because it does not appear to be authorised even by the principles of the civil law on which it is said to be founded. It is indeed true as a general rule, that an ab-

solute right of property, gives an absolute right of disposition: but this rule is only applicable to persons of full legal capacity; and it is strange that any English Judge should have ever lost sight of the common law so far as to apply it to a married woman. By the common law the legal existence of a married woman is suspended during the marriage, and therefore all contract and acts done by her, except as an attorney to her husband, are void. She may indeed divest herself of her interest in lands, either (as in England,) by joining with her husband in levying a fine, or (according to our mode) by executing a separate release. She must however in either case be privately examined as to her voluntary consent. But it is said this subject is regulated by the rules of the civil law. Let us see how far it is supported by those rules. By the civil law the estate of a married woman consisted generally of two kinds—that portion which was settled on the marriage was called her dowry, and that which was reserved was called her paraphernalia. The dowry was intended as a common fund for the maintenance of the family, and was subject to the use and management of the husband during his life, but the right of property continued in the wife, and if she

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survived *him, the whole dowry became hers again absolutely. No part could be aliened during the marriage, unless some extraordinary case required the alienation, such as the redeeming out of captivity, or out of prison the husband, the wife, or their children, or other necessary cases; but in every case the alienation was not permitted, except by a decree of Court, the Judge enquiring into the merits and circumstances of the case. The paraphernal estate of the wife was all such part of her property as was not settled upon the marriage, and over this it appears her power was absolute. The rents and profits of it were exclusively her own, and she might alienate or charge it in any manner she pleased, without the consent of her husband. But we see the same law which takes away from the husband all right over the paraphernal estate condemning this unbounded liberty allowed to the wife of enjoying such estate independently of her husband. I have extracted this account of the civil law from 1 Domat, 159 to 172, who furnishes the original authorities for every part from the digest and the code of Justinian. It is worthy of remark here, that the portion settled on Mrs. Smith, is precisely the dowry of the civil law. It was subject to the use and management of her husband during his life, and at his death it was to become hers absolutely. If the civil law therefore in all its extent was to be the rule on the subject, this estate was not alienable during the marriage unless for some imperious cause, and under the sanction of this Court, and the bond given to the complainant by Mrs. Smith would be void. But it seems that only so much of the civil law as might be injurious, and no part which might be beneficial to a married woman, has been adopted by the English Court of Chancery. By its decisions the estate of a married woman, intended as a provision against misfortune, and completely secured from the legal power of a husband, may by his influence or his authority over her, be squandered in wasteful living or ruinous speculations, and she has no protection in the guardian care of a Court, nor any

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resource in a dowry *which is unalienable. Where is the equity in this partial adoption of the civil law, and this relinquishment of common law principles? I have searched in vain for the reasons to justify it. I find indeed reasons for the civil law rule which never existed in England, and still less here. Among the Romans, the matrimonial bond was of precarious obligation; divorces were allowed on the most frivolous pretexts; according to Cicero the husband might, without any judicial sanction, repudiate his wife by saying to her in the presence of witnesses, "restuas tibi habito, cede domo," and even the wife might divorce herself by pronouncing the words "valeas, tibi habeas tuas res, reddas meas." This facility of divorce and this distinction of persons between husband and wife, sufficiently account for the law of the Romans which considered the wife as a feme sole with respect to her separate property. But the matrimonial bond in England can only be dissolved by an act of Parliament, and here only by death. When we see then even the civil law, notwithstanding the feeble ties by which marriages were bound, condemning the uncontroled power of a married woman over her separate estate, why should we adopt a rule so dangerous to the peace of the married state, so inconsistent with the concern which is manifested in other respects for the interests of married women, and so repugnant to the principles of the common law? The only answer which can be given, is that the law has been so settled by English Chancellors, and therefore this Court must be bound by it. This raises the very important question, how far the decisions of the English Court are authoritative in this. By our act of assembly passed in 1721, for establishing a Court of Chancery here, it was declared "that the said Court shall adjudge and determine all causes according to the known and established rules of the high Court of Chancery in South Britain. This act it must be admitted, adopts the English system of Equity as far as it was established in 1721, and the principles then settled were no doubt obligatory here until the

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revolution, *and are indeed still so as far as they are compatible with the change of government. But neither before the revolution, no more than since, was this Court ever

bound to a servile adherance to the precedents of the English Court. This Court ought to be independant of every other in the exercise of its Judgment. I do not mean to say that we may adopt other rules for judging. God forbid, that I should assume such a power. I feel already the responsibility sufficiently great, of expounding laws, without encreasing it by making them. I would not then undertake to alter the settled principle, that a married woman may alien or charge her separate estate under a power given to her to do so: for that principle was settled, I find, before the year 1721; but in applying that, or any other principle, to subsequent cases, I should feel that I was not fulfilling the purpose for which my country has been pleased to place me here, if instead of exercising my own judgment in the best manner I could in construing and applying any principle to cases as they occur, I should implicitly follow the construction given to it in similar cases by the judge of a foreign Court, and obey his decisions as verba magistri. I have a high and grateful sense of the value of the illustrations which both law and equity have received and are still receiving from the great light and experience of English Judges; but I may be allowed to say with the most enlightened of them, (Lord Mansfield) "that although precedents serve to illustrate principles, yet the law depends upon principles." The present case affords also a pecuiiar latitude for the free exercise of the judgment, for although the broad rule as insisted on for the complainant was laid down by L'd Thurlow as early as 1778, in the case of Hulme and Tenant, yet in the subsequent cases of Frederick v. Hartwell, determined in 1785, Socket and Wray, determined in 1793, Whistler and Newman, in 1798, and Mores and Huish so late as 1800, we see other judges of the same Court dissenting from this rule, and laying down a more limited one, which clearly shews that

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the *law on the subject was not considered by them as having any fixed certainty before, or they would not have felt at liberty to depart from it; and even in the case of Hulme and Tenant, it appears that Lord Bathurst had before given a different opinion from Lord Thurlow and dismissed the bill, I might further add that even to this day, notwithstanding the decisions which have been thought so conclusive for the complainant, the law is still unsettled; for Mr. Sugden, in a late excellent treatise on powers, after reviewing all the cases on this subject, concludes by saying "that the distinctions taken in them, appear so extremely refined and subtle, that it is almost impossible for a practitioner to advise confidently on any case, where the very words have not received a judicial determination." Sugd. on Powers, 108. I think therefore, it may be fairly said, that the ground of authority is taken away from any precedents by which this Court could be bound. But if it were not so, and if those relied on for complainant had their full weight, I should think even on the ground of construction, that the power of Mrs. Smith over her separate estate was restricted to an appointment by will, and that she could not charge it with debts. It is admitted in the strongest of those cases that where the power of disposing is exclusively restricted to a particular mode, it cannot be exercised by any other. It is true there is no express restriction in this case, but such an intention appears evident to me from the nature of the settlement. Mrs. Smith's power of appointment was confined to the event of her dying before her husband; she was not to have the absolute use of the fund provided for her, except in the event of her surviving him. This was intended then as a future resource, for future enjoyment, and therefore a power of alienating or diminishing it in any way could not have been contemplated, for this anticipation of her interest would defeat the great object of the settlement. But although this case might be thus decided on the ground of construction without deviating

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from the pre*cedents, yet this would leave the principal questions undecided, and it is of great importance to the community that some fixed principles should be laid down by the Court for the future government of the subject. I can see no difficulty in doing this, for considering the subject as res integra in this Court (which appears to me manifest from the view before taken of it.) we have only to adopt those principles which have been recognised as the most true and most safe by all the Eng. Chancellors from Lord Thurlow down to Lord Eldon, although they have not all acted upon them. In the case of Pybus and Smith, (3 Bro. 340.) Lord Thurlow after deciding in favor of the conveyance of a married woman of her separate estate under a general power, declared "that if the point were open, he should have thought a feme covert, who had a separate estate should not part with it without an examination." And in a preceding case of Ellis and Atkinson, he had actually required an examination. In the case of Frederick and Hartwell, Lord Kenyon, then master of the rolls, insisted on the wife's coming into Court to be examined whether her deed for appointing her separate estate was executed under influence or not. In Socket and Wray, (4 Bro. 483.) and Whistler and Newman, (4 Ves. 129.) Lord Alvanly and Lord Rosslyn complain of the rule which placed femes covert, on account of their separate estates, wholly on the footing of femes sole, and refuse to inforce it in the extent before laid down. In Sperling and Rochfort, (8 Ves. 164.) Lord Eldon while he recognizes the rule laid down in Pybus and Smith, expresses a wish "that the law was as represented in Whistler and

Newman for the protection of married women." And in the case of Parker v. White, (11 Ves. 209,) so late as 1805, he declares "that his mind was in great distraction on the subject; that no Judge ever felt so strong an inclination to say the act of the wife should not avail, as Lord Thurlow had in Ellis and Atkinson, and more particularly in Pybus and Smith, in which case his reasoning was unanswerable, if the point had

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been open." "That upon *principle, a woman contracting marriage loses all the powers she had as a feme sole, and yet this Court allows her to place herself by contract in the situation of a feme sole." And he adds that Lord Thurlow had said "that upon true principle, if the contract makes her a feme sole, her faculties as such are to be collected from the terms of the instrument which makes her such." Here then we see the English Chancellors, although differing as to the obedience which they owed to precedents, yet all uniting in condemning the absolute dominion given to married women over their separate estates, and all concurring in recognizing and declaring what ought to be principles. I may therefore confidently say that even if Lord Thurlow and Lord Eldon were now sitting on this bench, and called on to settle the law for this community, they would settle it on those principles. Instead then of opposing their high authority, I feel expressly authorised by them in declaring the opinion; that a married woman who has a separate estate cannot part with it, or charge it in any way, without an examination; that as by marriage she loses all the powers of a feme sole, a separate estate does not confer all those powers on her, and that therefore the power of appointing such estate must be expressly given, and the mode prescribed, be strictly pursued. As the bond given by Mrs. Smith has not these sanctions, I am of opinion that it ought not to be enforced, and that the decree of the Circuit Court should be reversed.

Signed, THOMAS WATIES.

I concur in this opinion.

Signed, W. JAMES.

I concur in the opinion for reversal. The decree is conformable to the late English decisions; but I consider the case as res integra in this country and that to sanction the principle in the extent it is laid down in those decisions would be to defeat the great object of marriage settlement, the protection of the

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property for the wife *and children. To free from the restraint of marriage settlements, the acts of the wife arising from the influence of affection to the husband would render settlements ineffectual in a point in which they are most necessary, and it is more consistent with the security of the property to the wife and children, the purpose intended by marriage settlements, to restrain the acts of the wife than to consider her as a feme sole.

THEODORE GAILLARD.

The act of the legislature of 1721, establishing the Court of Equity in this state (then province) says that "the said Court shall proceed, adjudge and determine in all cases brought into said Court as near as may be according to the known laws, customs, statutes and usages of the kingdom of Great Britain, and also as near as may be according to the known and established rules of his Majesty's high Court of Chancery in South Britain." If this act be not repealed, which I presume will not be contended, the decisions of the English Courts of Chancery, anterior to the revolution, are imperatively to govern in our Courts of Equity. If this be not the case where exists the necessity or use of gentlemen of the bar, to incur the expence of purchasing such vast quantities of the reports of that country, and such consumption of the time of the Court in attending to the quotations from them, and what landmarks would professional gentlemen have, by which to form their opinions, or direct their clients. I admit that principle is preferable to precedent to a certain extent, but a bad principle uniformly acted on and acquiesced in, is to be preferred to fluctuating decisions, which are liable every day to change, and frequently depend upon the extent of the Chancellor's mental faculties, and legal acquirements. It is contended that the English authorities should not govern this case, but as res integra, the Court has a right to decide it upon the principles of the civil law. I should myself be glad to know by what authority this Court can assume the

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doctrine of the civil law. *There exists no act of the legislature vesting that power in them, and as far as my knowledge extends, they have not been incorporated into our system of jurisprudence further than they have been adopted by a series of decisions not repugnant to common law principles. The pandects of Justinian, so far from being considered as authority, are scarcely read by one student in twenty, but chiefly by gentlemen of extensive information, more for amusement than use. But admitting those principles should prevail here, it does not apply to this case, and hard indeed would be the situation of the complainant, were his interest to be destroyed for the purpose of establishing a new principle. The civil law admits that a woman's dowry may be conveyed or disposed of, for the purpose of releasing her husband from gaol, which is precisely the present case. The bond given by the defendant to the complainant was for that express purpose, with the full consent and approbation of her only acting trustee. But I will go further, and for arguments sake

only, put the British decisions out of the question, no man will surely say that our own decisions are to have no weight. The case of Mrs. Eveleigh, which I believe was unanimously decided by a full bench, was precisely in point with the present. In that case a cotton machine was purchased for the use of the trust estate, and the Court decreed that the trust estate should pay for it. In this case the articles supplied by Mr. Ewing were for the use and benefit of the trust estate, and it is my opinion that they should be paid for out of the trust estate. It is further contended that if the doctrine contained in the decree should prevail, that marriage settlements would be a mere nullity; that according to the opinion of a learned Chancellor, a man can kick or kiss his wife into any measure; but I cannot myself conceive that an examination before a judge would have a tendancy to extinguish the fears of being kicked, or the hopes and desire of being kissed. Nor do I believe that such examination would more effectually prove the

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voluntary *declaration of a woman, that the legal execution of a bond entered into with the consent and approbation of her trustee. I am therefore of opinion that the great weight of authorities is in favor of the decree, and that it ought to be affirmed.

Signed, W. THOMPSON.

I have reconsidered the decree given by the Circuit Court, and adhere to the opinion there expressed, for the reasons therein given. I am therefore for affirming the decree.

Signed,

HENRY WILLIAM DESAUSSURE.

March, 1813.

Bee, Grimke and Simons for appellants.

Ford and Pringle for respondents.

Three of the Chancellors being of opinion that the decree was erroneous, it was ordered that the decree should be reversed.

Chancellor Hugh Rutledge died early in the year of our Lord eighteen hundred and eleven, and Thomas Waties, then a Judge in the Court of Common Pleas and Sessions, was elected a Judge of the Court of Equity in his room, at the session of the Legislature in December, 1811.

Chancellor Waties held the Circuit Court of Equity in Charleston, in February, 1812.

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*Case LV.

Administrators of BYRNE v. Adm'rs of STEWART.

[Tried before Chancellor Waties, Charleston, February, 1812.]

[*Constitutional Law* ⟸87, 199.]

An act of the legislature declaring that no ordinary of the state sho'd practise law, as an attorney or solicitor is not unconstitutional. The officer has his choice, but must conform to the law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 166, 556; Dec. Dig. ⟸87, 199.]

[*Attorney and Client* ⟸14.]

[An attorney at law is not a public officer.]

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 21; Dec. Dig. ⟸14.]

[*Constitutional Law* ⟸199.]

[A prohibition in the constitution against the passage of ex post facto laws applies exclusively to penal or criminal cases.]

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 551; Dec. Dig. ⟸199.]

[*Constitutional Law* ⟸45.]

[Cited in Massey v. Glenn, 90 S. E. 323, to the point as to what circumstances will warrant the courts in declaring a law unconstitutional.]

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 42; Dec. Dig. ⟸45.]

[*Constitutional Law* ⟸48.]

[Cited in State ex rel. George v. Aiken, 42 S. C. 230, 20 S. E. 221, 26 L. R. A. 345, to the point that the constitutionality of a legislative act is presumed.]

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. ⟸48.]

[This case is also cited in State v. Starling, 15 Rich. 126, regarding the meaning of the phrase "the law of the land."]

The question in this cause arose upon a rule taken out in the above case against Charles Lining, to shew cause why another solicitor should not be substituted in his place for the defendants, on account of his being the ordinary of Charleston district, and disqualified as such from practising as a solicitor by an act passed by the Legislature in December, 1811.

It appeared that Mr. Lining was admitted to the bar in the year 1774; was appointed ordinary in February, 1783, and resumed the practise of an attorney and solicitor in 1786.

Mr. Pringle, Mr. Ford and Mr. Simons argued against the rule. I have not been furnished with any note of Mr. Pringle's argument.

Mr. Simons. The question depends upon the construction of the 2d sect. of the 9th art. of the constitution.

"No freeman of this State shall be taken, or imprisoned, or deprived of his freehold liberties, or privileges, or allowed, or exiled, or in any manner destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the law of the land; nor shall any bill of attainder, ex post facto law, or law impairing the obligation of contracts, ever be passed by the Legislature of this State." This is the solemn declaration of the rights of the people of this State.

Rules for the construction of the constitution.

"The construction if merely literal must be pernicious; it must be a sound and liberal exposition, animated by the same spirit which dictated the constitution

"The trust is most important, and pre-supposes great virtue in the functionary entrusted.

"Without virtue the institutions to be protected by the constitution cannot exist.

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*What were the objects of the convention in borrowing and enlarging the 29th article of Magna Carta? Not to limit a monarch, for we had none; but to check the powers invested with sovereignty."

To prevent the legislature from legislating upon any but general and public principles, which would embrace the governors as well as the governed," to forbid partial laws.

"When therefore a law is repugnant to these principles, though it may wear the face of public law, it invades the constitution."

When consistent with these principles, though it may seem to interfere with the letter, the law is still constitutional.

There is no danger from this power in the Judges. It is a shield, without a sword.

Examine the article.

No bill of attainder or ex post facto law shall ever be past. Definition of ex post facto law, by Blackstone.

"When after an action indifferent in itself is committed the legislator for the first time declares it to be a crime and inflicts a punishment on the person who has committed it."

All laws must in some degree have an ex post facto relation. Laws of primogeniture. But the odious principle is the having a special victim.

Words of the constitution: "Attainder is the penalty of capital punishments, therefore ex post facto laws were added in the constitution for attainder is ex post facto."

"Whatever therefore operates generally on the citizen before the act has been declared a crime in all, is ex post facto; acts pro re nata."

Among the Roman ex post facto laws, were denominated privilege or private laws.

The terms of the constitution are emphatic: "at any time, in any degree."

See the act of the legislature: "The effect is to deprive Major Lining of his profession."

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*Private, supposing it to affect the whole class of ordinaries, but here it makes a victim of Major Lining.

Suppose the law had declared that Mr. L. should forfeit his estate if he continued in office?

What cannot be done directly shall not be done indirectly.

Effects of the principle.

"Nihil est crudelius, nihil perniciosius, nihil quod minus hæ civitas ferre possit."

Odious in a monarchy, a canker in a republic.

No freeman of this state shall be taken or imprisoned, or deprived of his freehold liberties, or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land.

1. Shew the interest of Mr. Lining.

Surely not such a freehold as mentioned in the constitution, that is a freehold in land, nor such an office, that is an office of profit, or trust under the state.

But it is such an office as constitutes an incorporeal hereditament.

2 Blackstone, 36.

Magna Carta, art. 29th, ordains that no person shall be deprived of his freehold, &c. but by the judgment of his peers, or according to the law of the land, which does not only relate to common disseizins; but the King may not otherwise seize into his hands the freehold of the subject. Wood's Institutes, 614.

Privilege.

Attornies at common law have privileges. They acquire their right to practise under particular statutes, and by virtue of diplomas.

Property. Industry and faculties are most valuable property in a republic.

The constitution copies and enlarges 29th article of Magna Carta. 1 vol. Reeves, 249.

Against whom was the constitution in-

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tended to pro*tect the citizens, not from individuals, for the laws were sufficient; but from public bodies.

Examine the effect of the law.

He was in the enjoyment of his office as ordinary and profession as a lawyer. Their tenure was lawful. The act itself implies its lawfulness.

By the 1st section of the 3d and 2d of the 5th, he can be removed only by impeachment, and by the 2d section of the ninth article, his profession can't be taken away.

But this law makes it necessary to surrender one or the other.

Mr. Ford. Since this rule was moved yesterday, I have given to the question it embraces some consideration, not enough to enable me to discuss it in a manner answerable to its importance, though sufficient to satisfy my own mind of the manner in which it ought to be decided.

I could have wished indeed that circumstances had admitted of a little more time for investigation, more especially that I might have been enabled to present the argument in a manner correspondent with the expectations of the Court.

But it was a case under every circumstance admitting of no postponement. To several suitors in this Court it would have operated a delay or impediment of justice; and to a free citizen of this country, it would have operated a suspension of those precious liberties and privileges which she purchased by her revolution, and which are guaranteed to all by the sacred charter of her constitution. It is a question of no common import

that now comes before the Court. If in the constitution of the Roman Commonwealth, the whole republic felt concerned in an invasion of the rights of one Roman citizen, however humble and obscure, how much more in our truly republican government, where those rights are better defined, more zealously guarded, and more peacefully enjoyed. Here indeed the rights of one are the rights of all. The enjoyment of thy liberty is a pledge to me, that I shall possess mine. Our

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privileges *are all bound up in one common bond, not one of which can be withdrawn without shaking the whole mass. Upon this union depends their safety. These are embodied in the constitution which is committed to the judiciary like the holy fire, to the Vestal, to be preserved pure and entire. Here it is that the last civil stand for the constitution must be made. Other departments of the government may act thoughtlessly and unadvisedly without full time to deliberate, without the aid of discussion; but here in the tribunals of justice, their acts are liable to be brought emphatically to the touchstone of the constitution, which the judges are sworn "to preserve, protect and defend."

When an act of the legislature is brought into competition with the constitution, the task imposed on counsel is delicate, and on the court painful. Far be it from me to ascribe to our legislature even an indifference, and far less hostility to the great principles of the constitution. I am sure they did not intend to invade it: and if incautiously they have done so, I firmly believe they will be amongst the foremost to rejoice that means yet remained to avert its consequences. Here read from 1 Cranch, 176.

1. Position that an ordinary is a judicial officer, and has cognizance of causes in an inferior court.

I will not go into the books for proof and illustration of this. They are full, but rely on our own acts of assembly.

The 1st clause of the act of 1789, expressly calls them judges of the Court of Ordinary of this state. Pub. Laws, 491.

The XVI sect. of an act of the same session implies it by giving an appeal from their "judgment or sentence" to the Court of common pleas. P. L. 489. See P. L. 472.

2. Position. That an attorney and solicitor of the Courts of law and equity in this state are public officers, constituted under the laws of the state and vested with rights and interests of which they cannot be divested,

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*except by a trial by their peers or by the law of the land.

The stat. 3 Ed. 1 C. 29, (P. L. 28,) provides for their being silenced and imprisoned for any manner of deceit or collusion to the guile of the Court or the party, "and thereof be attainted," meaning convicted.

This statute was passed in the year 1275, under a Prince who made several stretches of arbitrary authority, yet he did not provide punishment without prosecution and conviction.

"And it is the right of all persons, plaintiff or demandant, tenant or defendant in all actions real, personal or mixed, to appear by attorney." 1 Comy. 446.

A great variety of statutes have been passed in England, to declare the powers and duties, and prescribe the qualifications of attornies.

If an attorney be retained, his authority continues to the end of the cause, and no other can intermeddle without his consent or death, and after he accepts the warrant, he cannot refuse to be the attorney of the party. 1 Comy. Dig. 443.

An attorney is an officer of the Court and is punishable in a summary way; 3 Black. Com. 25. 1 Comy. 444.

An attorney has divers privileges. 1 Comy. 405. His privilege is the privilege of the Court.

But it is needless to go into all the English law, relative to the office of an attorney at law or solicitor in Equity, because we have sundry statutes of our own, on the subject, and which go to establish this position.

They are exempted from the statute of 28, Ed. 1, C. II, against maintainance, made of force, P. L. page 30, and may take a fee for his counsel or pleading.

But if a person be poor, the judges shall appoint attorney and attornies for the same poor persons and all other officers requisite and necessary to be had for the speed of the said suits who shall do their duties without any reward for their counsels help and business in the same." St. II. H. 7, C. 12. P. L. p. 44.

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*What other class of citizens is there in this country and under our free constitution, whom the Court and the Public Laws can thus command on duty in the service of another without compensation? Not one. From what source can this liability thus to be disposed of arise, what foundation for it? Surely no other than that they are the officers of the Court, public officers over whose time and services the law assumes a controlling power.

And if an attorney be appointed by the Court and refuse to undertake the defence, he shall be silenced, and disfranchised. Pub. Laws, p. 387. I shall recur to this word "disfranchised" afterwards.

This would be enough to establish that attornies and solicitors are public officers. But instead of any tedious detail of the statutes, I will specify the features of the office.

1. They are appointed by authority of the law.

2. None can be appointed but those who possess the qualifications fixed by law. P. L. p. 116 and 363, 81, 2.

3. He must take the oath of allegiance and the oath of office. Ibid.

4. Their compensation is fixed by law in like manner as other public officers.

5. They are officers of justice, and are classed amongst other public officers in the books. See 4 Comy. dig. 289, Office E.

6. There are sundry public offices that are declared by law to be incompatible with the office of an attorney, which they are forbidden to exercise.

Public Laws, p. 271, 5, 10. "Sheriff, under sheriff, sheriffs, clerk, or other sheriff's officer."

Id. S. 15. Clerks of the Courts of Law.

But all these offices were prospective; not one officer so intended to be disqualified was as yet nominated or appointed. (See the title.)

Conclusion. That the office of ordinary is a judicial office; that of an attorney a public office.

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*And each hath a freehold in his office. See 5 Bac. Abr. 200.

Now to put a person out of either of these offices is to disfranchise him.

The Legislature have themselves expressly said so. Recur to Public Laws, p. 387.

How is a freeman to be disfranchised?

The IXth article of the Constitution will answer the question.

Lex terræ has been solemnly adjudged, to mean the common law, and acts of Parliament down to the time of Ed II. Vid. Zylstra v. City Council. 1 Bay, 384.

Now let us test this act of the legislature by this article of the constitution and the principles already established.

Before this constitution was made, Major Lining held two offices, ordinary, and attorney and solicitor.

He had exercised them for many years; they were neither incompatible of necessity, nor declared so by any law.

Not of necessity, because the office of an attorney and solicitor of the superior Courts of this state hath from the earliest times to the present day, been exercised by persons holding judicial offices in inferior tribunals.

Justices of the peace and of the quorum, recorder of the city of Charleston, master in equity (judicial office) and ordinaries of the districts.

Attornies were every year appointed by the legislature justices of the peace and of the quorum.

The constitution found all these offices united in divers persons and left them so.

And no law has declared them to be in their nature incompatible.

And here it ought to be remarked that the law having declared certain offices incompatible with that of attorney, amounts to a legislative declaration, that others are not so; expressio unius est exclusio alterius.

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*Is the constitution then a law to the legislature? The very 9th article on which we rely declares so.

Can then the legislature pass a law to oust a citizen of his franchises without crime, without accusation, without trial by his peers?

Can they annex a new tenure to a judicial office and declare the office vacated for want of it, when the 3d article of the constitution declares "the commission shall be held during good behaviour."

An attorney at law has been an ordinary for 28 years, and now the legislature declare that if he continue to be an attorney, he shall forfeit his office.

As well might they declare him to forfeit his office if he continue a planter.

Practice and acquiescence fixes the constructive compatibility of the two offices. And practice and acquiescence have even been adjudged to fix a construction of the federal constitution, by the superior Court of the U. S. See Stuart v. Land. 1 Cranch, 299. See 309.

In the case of Huger and Osburne, 1 Bay, 198, judge Burke intimates strongly his opinion that there is between the state and its officers a contract by which the state is to be bound, notwithstanding legislative acts.

Our Courts have often done justice to individuals contrary to the acts of the legislature.

In the case of the State v. Gaillard; 1 Bay, 492, they allowed a discount that was barred by a positive act of 1786. P. L. p. 405.

In the case of the master of this Court, it was decided contrary to a positive act that ordered the appointment of a commissioner, that the master could not be so superseded. See the decree of the Chancellors in the year 1800.

Refer to the luminous exposition of the chief justice of the U. S. on the question how far the Courts are bound by an unconstitutional law, in the case of Marbury v. Madison, 1 Cranch, 176.

Can the legislature pass a law to prevent a

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man from *being admitted an attorney? Can they pass a law to strike an attorney off the rolls without trial?

Mr. Smith, in support of the rule. There is a distinction between the constitution of this State and that of the United States. The constitution of this State has all power not taken away; that of the U. States no power not delegated.

The profession of an attorney is neither an office or a freehold.

The 8th article of the constitution shews the profession is no freehold.

1 Cranch, 179.

The Santee Canal case.

3d Blackstone, 24.

The argument of Mr. Lining's counsel would preclude the passage of every law.

Major Lining may still retain the office of ordinary.

Chancellor WATIES, after taking time to deliberate, delivered the following judgment:

A rule was taken out in this case against C. Lining, Esq. to show cause why another solicitor should not be substituted in his place, for the defendants on account of his being the ordinary for Charleston district, and disqualified as such from practising as a solicitor by an act passed in December, 1811.

The defendant shewed for cause that the act of the legislature which restrains him as aforesaid, is void, because it is an expost facto law; and that it is also void because it deprives him of a right of freehold, without the judgment of his Peers, or any law authorised by the constitution.

Opinion of the Court.

It has been correctly said in the argument that the question for the Court in this case is not whether the act complained of is a just and proper one, but whether the legislature had a right to make it? The power and the duty of the Court to declare an act void, which violates any right of the citizen

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secured to him by the constitu*tion, have been admitted on both sides, and I feel so strong a sense of this duty, that if the violation complained of was manifest, I should not only declare the act void; but in doing so I should think that I rendered a more important service to my country than I could by discharging the ordinary duties of a Judge for many years.

It is the peculiar and characteristic excellence of the free governments of America, that the legislative power is not supreme; but that it is limited and controlled by written constitutions, to which the Judges, who are sworn to defend them, are authorised to give a transcendent operation over all laws that may be made in derogation of them. This judicial check affords a security here for civil liberty, which belongs to no other governments in the world; and if the Judges will every where faithfully exercise it, the liberties of the American nation may be rendered perpetual. But while I assert this power in the Court, and insist on the great value of it to the community, I am not insensible of the high deference which is due to the legislative authority. It is supreme in all cases in which it is not restrained by the constitution; and as it is the duty of the legislators as well as of the Judges to consult this and conform their acts to it, so it ought to be presumed that all their acts are conformable to it, unless the contrary is manifest. This confidence in the wisdom and integrity of the legislature, is necessary to ensure a due obedience to its authority; for if this is frequently questioned, it must tend to diminish that reverence for the laws which is essential to the public safety and happiness. I am not, therefore, disposed to examine with scrupulous exactness the validity of a law. It would be unwise to do so on another account. The interference of the judicial power with legislative acts, if frequent or on dubious grounds, might occasion so great a jealousy of this power, and so general a prejudice against it, as to lead to measures which might end in the total overthrow of the independence of

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the judiciary, and with it this best pre*servative of the constitution. The validity of a law ought not, then, to be questioned, unless it is so obviously repugnant to the constitution, that when pointed out by the Judges, all men of sense and reflection in the community may perceive the repugnancy. By such a cautious exercise of this judicial check, no jealousy of it will be excited, the public confidence in it may be promoted, and its salutary effects be justly and fully appreciated.

I will now examine, consistently with this general view of the subject, the constitutional objections which have been made to the act under consideration. And 1st, it was contended, that this is an ex post facto law, because it deprives the defendant of the right of practising as a solicitor while he holds the office of ordinary, which it was lawful for him to do when he was appointed to that office, and which he has continued to do ever since. It must be admitted that this is, in one sense, a retrospective operation of the law; but this is not the technical and appropriate meaning of an ex post facto law. It appears from the best authorities, that the words ex post facto, when applied to a law refer only to crimes and penalties. Judge Blackstone is explicit on this subject: "The making of laws ex post facto," says he, "is when after an action indifferent in itself is committed, the legislature then, for the first time, declares it to have been a crime, and inflicts a punishment upon the person who has committed it." 1 Black. Com. 46.

If we look into the constitutions of several of the other states, we shall find that this restricted sense of the words ex post facto is expressly declared to be the only sense in which they are understood. And in the case of Caulder and wife v. Bull and wife, determined in the Supreme Court of the United States, the same construction was given to these words by all the Judges.

The constitution of the United States declares that no state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, (which are the

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very words of our constitution,) and *Judge Patterson in delivering his opinion in the

case, asks where is the necessity or use of the latter words, if a law impairing the obligation of contracts be comprehended within the terms ex post facto? It is obvious from the specification of contracts in the last member of the clause that the framers of the constitution understood and used the words in their known and appropriate signification, as referring only to crimes and penalties. However injurious then the act complained of may be to the interests of the defendant, yet the constitutional objection to it, as an ex post facto law, has no foundation. It was further contended that the office of solicitor was a public office, and being for life, was an incorporeal freehold, of which by the second section of the ninth article of the constitution, the defendant could not be deprived but by the judgment of his peers, which means a trial by jury, or by the law of the land, which means the common law.

It is not necessary, in the view which I have of this case, to consider what is the true meaning of the words, "the law of the land," as intended by our constitution. It may not however, be amiss to observe for the sake of information that it has been determined by the Constitutional Court, in several cases, that the lex terræ contemplated by our constitution, not only means the common law, which is unquestionably the sense in which it is understood in Magna Charta, (according to all the commentators upon it) but also comprehends all acts of force at the time of making the constitution, so that any act which then abridged any of the privileges secured by the constitution, may be considered as constitutional exceptions to the privileges themselves.

I will now proceed to consider the objection which has been just stated. This at first had great weight with me, not because the office of solicitor is a public office, for this does not appear to me to be the case. He is not appointed by the legislature, nor is he amenable to it, for he does not possess any portion of the public authority. His admission to

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practice is indeed *regulated by law, but it is in the power of any man, who will comply with the legal requisites, to become a solicitor, independently of the will of the legislature. He can be considered in no other light than that of a private agent for the citizens of the country, who may employ him to do their legal business in the Courts; and although the law requires of him certain qualifications, and he receives a license from the judges, yet his office is no more a public one than would be any other profession or trade which the legislature might choose to subject to similar regulations, and which is the practice in many other countries. But the objection of most weight is, that this act as it affects the defendant, will deprive him of a right which may fairly be considered as a species of property. It cannot be doubted that a man's trade or profession is his property; and if a law should be passed avowedly for the purpose of restraining any member of this bar, who was not a public officer, from exercising his profession, I should declare such a law void. But this law is made for public officers; it is a general regulation for all the ordinaries in the state. Its object no doubt was to place a high judicial office above temptation; and I think it a very wise and salutary object. For although the correct and upright conduct of the defendant in the exercise of both his judicial and professional duties, might have afforded sufficient security for the same correct conduct in future, and might have entitled him to an exemption from the general restriction of this law; yet it must be admitted that cases may occur in which the duty of the Judge might be exposed to strong temptations, from the interest of the practitioner; and the corruption of human nature does not permit us to expect the same integrity in every other ordinary in the state. The act has without any exception in his favor, restrained every ordinary from practising as an attorney or solicitor; and surely the legislature was competent to pass such an act. Has it not a right to prescribe to a public officer the duties he shall per-

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form, and to make any requisi*tions of his time that it pleases? It has by various acts reduced the fees of many of the public officers, and it has increased the labors of some so as indirectly, by increasing their expenses, to diminish their salaries. But these acts are not therefore invalid, although they affect the rights of office much more directly than the act under consideration. For this does not deprive the defendant of any right which was attached to the office of ordinary, as an official privilege. The profession of a solicitor never was an appendage to it. This act has indeed declared them incompatible, and therefore, requires that the ordinary while he holds his office shall not practice as an attorney or solicitor. The operation of it will no doubt oblige the defendant either to renounce his profession or resign his office. But I must repeat the distinction already made; this act does not abridge the rights of a private citizen; it only imposes a restraint on a public officer. With respect to the former, the legislative power is distinctly limited by the constitution, but the exercise of it towards the latter must from the very nature of its relation to it, be necessarily allowed a greater latitude. It is to be hoped, however, that the legislature will never require from a public officer a greater sacrifice of his ease and private interest than the public interest indispensibly demands, for no government can ever be ably and faithfully administered, unless those who administer it, are encouraged to a cheerful discharge of their duties, by a reasonable assignment of them, and a liberal support. But the act

complained of is not fairly exceptionable even in this respect: and as it does not appear to me in any view of it to be inconsistent with the constitution, the rule against the defendant must be made absolute.

THOMAS WATIES.

There was no appeal from this decree.

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3 Desaus. *481

*Case LVI.

JOHN WITSELL and L. WITSELL, Administrators of Thomas Croll v. JOHN LINDER, G. J. LOGAN and Others.

[Tried before Chancellor Waties, Charleston, February, 1812.]

[*Descent and Distribution* ⇐21.]

Relations in the fifth degree entitled to the estate of an intestate, before those in the sixth degree. No right of representation allowed in such case.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 61; Dec. Dig. ⇐ 21.]

T. Croll died intestate, leaving a real and personal estate, without leaving alive father or mother, brother or sister, wife or child. The complainants were his next of kin in the fifth degree in the maternal line; and the defendants were related to him in the sixth degree. The only question for the determination of the Court was, whether any and which of these parties were entitled to the estate under the statute of Feb. 1791.

Chancellor WATIES delivered the following decree:

It appears fully from the evidence produced in this case that the complainants are the next of kin to the intestate, Thomas Croll, in the fifth degree in the maternal line, and that the defendants stand related to him only in the sixth degree. I am therefore of opinion that the complainants are exclusively entitled to the estate of the said intestate, and do decree accordingly. It is further decreed that the testimony given in this case be perpetuated. The costs to be paid out of the estate of the intestate.

There was no appeal from this decree.

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3 Desaus. *482

*Case LVII.

CHARLES J. COLCOCK and ELIZA FERGUSON, Executor and Executrix of W. C. Ferguson, and D. FLUDD and Others v. ANN FERGUSON, Executrix of Thomas Ferguson.

[Tried before Chancellor Waties, Charleston, February, 1812.]

[*Infants* ⇐48.]

A bond and mortgage given by a person under age declared void—and a perpetual injunction granted.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 109; Dec. Dig. ⇐48.]

This was a bill to set aside and declare void a bond and mortgage given by the late W. C. Ferguson, when he was under age, to Mrs. Ann Ferguson, executrix of Thomas Ferguson, deceased, for certain purposes relative to the estate of Thomas Ferguson.

Chancellor WATIES delivered the following decree:

The defendant in this case having admitted that the bond and mortgage described in the bill of the complainants, against which they pray to be relieved, was given by W. C. Ferguson, the testator of the two first named complainants, when he was under the age of 21 years: It is ordered and decreed that the said bond and mortgage be delivered up to the said complainants to be cancelled, and that there be a perpetual injunction against all proceedings thereon at law. The costs to be paid out of the estate of Thomas Ferguson.

There was no appeal from this decree.

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3 Desaus. 482

Case LVIII.

MOODIE and BLACK v. PENMAN, SHAW & CO.

[Tried before Chancellor Waties, Charleston, February, 1812.]

[*Executors and Administrators* ⇐527.]

A creditor abroad authorised his agent to administer on the estates of any of his debtors who might die intestate. The agent administered on one of those estates, and gave security for the faithful performance of his duty. But he applied the funds of the estate to his own purposes, and became bankrupt. The creditor abroad brought suit on the administration bond against the securities and got judgment. The securities filed a bill for relief, on the ground that the administrator was the agent of the creditor, and acted on his account, and that his acts were the acts of the creditor. The Circuit Judge decided that the securities did not make out a proper case for relief and dismissed the bill. But the Court of Appeals reversed the decree, and gave relief to the securities.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2355; Dec. Dig. ⇐527.]

After hearing the case, Chancellor WATIES delivered the following decree:

I will briefly state the material facts on which I shall found my opinion in this case.

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*The complainants became bound as securities to Edwin Gairdner in a bond to the ordinary of Charleston district, for the due administration of the goods and effects of Alexander Shiras, who died indebted in a considerable amount to the defendants.

Gairdner having failed to return into the office of the ordinary, an inventory of the estate of Shiras, or any account of his administration, the defendants procured an assignment of the administration bond, sued the complainants, and obtained a verdict

against them for $3000. The complainants have brought this bill to be relieved against the verdict on the grounds, that Gairdner was the confidential and general agent of the defendants, that he was authorized by the ample powers given him by a letter of attorney from the defendants, and by their own construction of those powers to administer on the estates of any of their deceased debtors, whenever their interests should require it; that he had administered on the estate of Shiras, in the capacity of their agent, and that the complainants had become his securities to the ordinary in order to serve the interests of the defendants.

It appeared from a letter of Gairdner's to the defendants, that he had before administered on the estate of one Manly, and he therein informs them that he had done so, on their account, and requests that they will furnish him with a special power to administer for them whenever the case should require. In their answer, to this letter, dated the 18th of July, 1800, they express themselves in these words, "a power of attorney shall be sent you as recommended, but there are such from E. Penman, in '95 and '96, which ought to be amply sufficient to justify you in every attempt to secure and take charge of our interest." And in another letter to Gairdner dated 19 July, 1800, they say, "this serves only to hand you the power of attorney which you wished we should forward, we trust it will answer the purpose intended." This power of attorney was not produced. The only one given in evi-

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dence, was one dated *the 5th of February, 1798, which contained only the usual general powers; but the ordinary certified that Mr. Gairdner, on his application for letters of administration on the estate of Shiras, took out a citation as attorney to the principal creditor.

The defendants in their answer have denied that they ever authorised Gairdner to administer in their behalf, on the estate of Shiras: that they did not understand that the general powers given him, by their letters of attorney, authorised him to administer on the estate of any of their debtors, who should die intestate; that they believe that Gairdner administered on Shiras' estate, on his own account, and to secure his own debt due to him from Shiras; in proof of which, he had taken to himself all the emoluments incident to his administration, and had given them no credit for the same, which he would have done, if he had been administrator in their right. It appeared from the books of Gairdner, that Shiras was in his debt about $7000 & from the certificates of the cashiers of the two banks, that Gairdner had taken up notes of Shiras after his death, to the amount of $6300. On the other hand it was proved by a witness who said he was well acquainted with the concerns of Shiras, that these were chiefly confined to dealings with the defendants, who were his principal creditors, and he believed his only creditor. That Shiras did some business in the bank, and that Gairdner was his indorser, but that Gairdner borrowed from him two notes every week.

On these facts it was contended for the complainants that Gairdner should be regarded as the agent of the defendants in this administration, and that therefore they ought not to be liable to the defendants for his mal-administration, for all his acts were virtually the acts of the defendants themselves. The question arising out of this case is certainly a novel one, for no cases were cited, and probably none can be found, in which a similar one has before occurred. It must therefore be decided on general principles. I was at first so strongly impressed

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with the obvious hardship on the side of *the complainants, that I felt disposed to seek for any ground in the case which would justify me in giving relief, and if it had appeared, from the evidence, that Gairdner had become the administrator of Shiras, solely to serve the defendants, that the complainants had been induced to become his securities with the same view only, and that the defendants had explicitly authorised him to administer for them, so as completely to identify themselves with him, and to make all his acts their own, I should not have hesitated in giving the relief prayed for by the complainants; for otherwise it would be permitting the defendants to take advantage of their own wrong. But such a strong case has not been made out by the evidence, and the facts and circumstances are so equivocal that I feel bound to decide the case on legal grounds only.

And first. It has not been sufficiently proved that Gairdner administered on Shiras' estate, solely on account of the defendants. There are indeed strong circumstances, to induce such a belief; but these are opposed by other strong circumstances to the contrary. I do not lay any stress on the evidence furnished by the books of Gairdner, for it was proved, that these held out to his creditors the monstrous illusion of a balance of $400,000, when the fact is, as it has since appeared, that in every settlement of his transactions the debits have been found against him; and with respect to his paying the notes of Shiras due to the banks, there is reason to believe that these, although apparently the debts of Shiras were in fact his own, thus disguised, to obtain a fuller credit for himself. But although Shiras was not indebted to Gairdner, and this formed no motive for his administering, yet there were other circumstances, which it must be admitted, furnished the strongest possible motives. Gairdner was at the death of Shiras,

liable to the banks as the indorser of Shiras, and whether on his own account, or that of Shiras, makes no difference; he was besides on the brink of bankruptcy, and without re-

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ferring to his general conduct on that oc*casion, it may be fairly presumed, that in this particular case, the funds of Shiras presented a strong temptation to administer on them, as it has since appeared that he applied them to his own necessities.

Secondly. There has been no proof that the complainants were induced to become the securities of Gairdner, for the purpose of serving the interests of the defendants. Gairdner it was proved was at that time in the highest credit; and there is no reason for believing that the confidence of the complainants in him, was founded on the credit of the defendants.

But thirdly. Although it should appear that Gairdner administered on the estate of Shiras, for the exclusive benefit of the defendants, and that the complainants became his securities on their credit, yet there is another ground in the case, which appears to me to present a greater obstacle than any other to the relief prayed for by the complainants: and this is the want of sufficient proof that the defendants did in fact authorise Gairdner to represent them as an administrator.

It was insisted for the complainants that the general powers contained in the letter of attorney to Gairdner was produced, which authorised him, under the construction given to them by the defendants, to administer for them on the estates of any of their debtors when their interests should require it. This construction of his powers is not in my opinion warranted either by the usual and proper meaning of them, or by the letters of the defendants which have been relied on. Gairdner was no doubt their general agent, and a highly confidential one; but the powers given to him cannot by any fair construction be made to extend to such an extraordinary agency as that of administering for his constituents on as many of the estates of their deceased debtors as he might choose. The general power granted by the most ample letters of attorney can extend to the employment of such legal means as the principal would himself have a right to employ for the accomplishment of his business. But what

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right had the defendants *themselves to administer on the estates of their deceased debtors? As creditors they had no such right. The granting administration to any persons except the next of kin, is expressly committed by our law to the discretion of the ordinary. How then could the defendants convey to their agent a power which they themselves did not possess? It is indeed said in Toller's Law of Executors, page 79, which was relied on as an authority for the complainants, "that an administration may be granted to the attorney of all the next of kin, or of all the executors, provided they reside out of the Province." This can mean nothing more than that an administration may be granted, durante absentia, to the agent of those who have a right to it by law. But the present case is essentially different; it is not a provisional administration, granted to Gairdner, during the absence of the defendants: and it was not granted to him in their right, for they possessed none. It does not indeed appear to me that the right to an administration can be delegated in any case; even where the King, as ultimus hæres of a bastard, transfers his claim by letters patent, it is said in the book before quoted, "the ordinary grants administration to the patentee, rather out of respect to the King than strictly of right." An administrator is called the officer of the ordinary; he is appointed by him and becomes a trustee for the next of kin, & for all the creditors of the intestate: he therefore gives bond to the ordinary with security for the due performance of this trust. How then could he be said to be the agent of any private constituent, and especially of persons who had no right to the administration themselves; and therefore could not depute him, as their representative in the office. But it was contended (and this is the only ground on which the complainants could prevail,) that the defendants intended to vest in their agent, Mr. Gairdner, this extraordinary power; and although they had no right to do so, yet that with respect to their own claims on him as an administrator, they ought to bear the loss occasioned by his mal-

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administra*tion, and not his securities, the complainants. I have already said that the words of the letter of attorney do not admit of this construction; and I do not think that the letters of the defendants can fairly be understood in this extent. It is not reasonable to believe that the defendants could have intended to make themselves responsible to all the creditors of their deceased debtors, on whose estates their agent might administer. For if he is to be regarded as their representative in an administration, they must be bound by all his acts as such. His bond to the ordinary must be considered as their bond, and his responsibility to the next of kin, and to all the creditors of an intestate must be their responsibility; there can be no discrimination in his agency, as it respects their debts and the debts of other creditors. If the complainants therefore were to be discharged from the demand of the defendants because Gairdner was their agent in the administration, they might for the same reason compel the defendants to indemnify them against the demands of the next of kin or any other creditors of Shiras; and on the same ground Gairdner might have made them liable in other administrations to any extent.

It is not credible that this could have been their intention. But why, it may be asked, did Gairdner require a power to administer, and why did the defendants write that they had sent him such a power? I think it a sufficient answer to say that an administration is sometimes productive of only fruitless expenses and it was a proper caution in Gairdner to require the sanction of the defendants for such a measure, that he might be authorised to charge them with the expenses. I have no doubt that it was also intended to render an administration subservient to the interests of the defendants; but this could not convert it into a private agency. Gairdner as an administrator assumed a distinct capacity; his duty as such was entirely separate from his general duties as an agent; it was a personal and in some degree a public one. He derived his authority from the ordinary, and the security given for his faith-

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*ful administration was required by the law, and not by the procurement of the defendants. As this is a general security for all the creditors of Shiras, and the complainants must have so understood it, and as they have not established any facts which should entitle them to relief, I am bound to say that the defendants must have the benefit of this security as well as any other creditor. It is therefore ordered and decreed that the injunction be dissolved, and the complainant's bill be dismissed with costs.

THOMAS WATIES.

March 7, 1812.

From this decree an appeal was made on the behalf of Moodie and Black, the complainants:

1. That as Edwin Gairdner, as attorney for the defendants, under the powers admitted and proved, would have had a right to sue for and recover from any other person that might have administered on Shiras' estate, the amount of defendant's debt, (supposing assets sufficient to pay it,) so he had a right, being administrator himself to retain it, and that any assets liable for defendant's debt that came to his hands were equivalent to a payment to him for defendants, and payment to him for them was equivalent to a payment to themselves. And also, inasmuch as the sureties of any other administrator that might have been appointed, would not have been liable for any misapplication of the defendants' debt, if paid to him by such administrator, in like manner his sureties cannot be liable for the misapplication of assets which he had the same right to retain in the one case that he would have had to receive in the other; and that the circumstances of the verdict's having been for a breach of the condition of the bond, in not returning an inventory and appraisement of the assets, and rendering an annual account of his administration cannot vary the equity of the case, as such neglect on the part of the adm'r

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cannot give to creditors higher claims *on him than if he had actually received and wasted the assets.

2. That the correspondence of defendant's and the certificate of the ordinary conclusively prove that Gairdner in administering on Shiras' estate acted under the immediate authority and explicit instructions of the defendants, and that his administration as far as concerned the interests of the defendants; was as their own act, for any injury from which they are not entitled to indemnity from the complainants, and that although the complainants might not be exonerated from the claims of other creditors of Shiras, it is repugnant to the principle and law of equity that they should be liable to the defendants for a breach of trust resulting from their own confidence, and acts which they themselves had empowered.

3. That under the special power to administer whatever assets came to the hands of Gairdner, and were liable to the debts of defendants, were as payment of the debt to defendants themselves.

4. That it is contrary to equity that the defendants should recover damages from the complainants for any waste or neglect by Gairdner, from which defendants may have suffered, because they enabled him to do the injury, and without their appointment of Gairdner as attorney, the ordinary would not have granted him the administration; and also because they stood in the way of complainants preventing his waste, as with the plenary powers he had to receive their debts and manage their concerns, this Court would not in the face of them, have suspended the powers of Gairdner, as administrator, for not discharging his trust to defendants on any application from complainants.

5. Because the decree is in other respects contrary to the law of equity.

The appeal came to a hearing before the Court of Appeals; present Chancellors James, Thompson, Desaussure, Gaillard and Waties.

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*Mr. Simons, for appellants. Gairdner demanded that a power of attorney from Penman, Shaw and Co. should be sent to him to recover debts from their debtors in Carolina, with power to administer on the estates of intestate debtors; they promise they will send such a power; there were such powers in 1798.

The reasons of the decree apply to other creditors of Shiras, the intestate, but not to the case where the administration was taken out by the confidential agent of Penman, Shaw and Co. His acts were theirs, and his abuse of the administration was their abuse, and therefore the securities in the administration bond ought not to be liable to his

acts in relation to Penman, Shaw and Co. though as to other creditors they would be so.

Suppose some other person had administered, and Gairdner as attorney for Penman, Shaw and Co. had received the money from the administrator, and then wasted it, it would have been the loss of the principal, Penman, Shaw & Co.

As administrator he had a right to retain what was due to himself, in his own right, or as attorney for some other creditor.

The power cannot be doubted, and the probability is that the securities were induced to become bound to favor defendants's views.

The letter of the 19th July, 1804, from Penman, Shaw and Co. says, "we have sent such a power as you want." This must refer to the power to administer on their debtor's estates.

Gairdner administered as attorney for the principal creditors, Penman, Shaw and Co.

As to Gairdner's administering on his own account as creditor, the evidence is against the allegation; for he does not appear to have been a creditor.

Then he administered for the principal creditors, and the securities were induced to become securities on account of Penman, Shaw and Co. to favor their wishes that the administration should be granted to their friend and agent. Penman, Shaw and Co.

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reposed the confi*dence in Gairdner, and he who trusts most must suffer most.

It is not certain that if Gairdner had neglected to return an inventory, there would have been assets enough in his hands to pay the debts of Shiras. At all events this case is not stronger than if there had been a waste of assets; and if there had been such a waste, then the money came unto Gairdner's hands, who should have obtained it for Penman, Shaw and Co.

Mr. Heath, for respondents. There was not sufficient evidence of the power from Penman, Shaw and Co. to Gairdner. Administration is not a subject of delegation. There is no evidence of Moodie and Black being induced by friendship, interest or otherwise, to become securities for Gairdner, as administrator. Positive evidence that Black was the friend and supporter of Gairdner.

A man may be the general agent of a principal creditor of an intestate, and yet he may be administrator of that intestate, and he and his securities liable to the principal creditor as well as the other creditors in case of wasting the assets.

Mr. Ford, for respondents. The attempt is to change the ground of the liability of administrator, and turn him from a public officer of known functions, duties and responsibilities, to a mere private agent, on a sort of equity difficult to discern or apply, and susceptible of great abuse and even perjury. This may be the case in the sheriff's office and other public offices, and it would be very mischievous.

It is settled by the Court below that the ordinary, has an absolute discretion in granting letters of administration among creditors as stated by Judge Waties and agreed to by all the Judges.

There is not only no right in Penman, Shaw and Co. to the administration; but if there were, there is no right in them to assign it.

It would be an unsettling the legal foundation of the responsibility of administrators.

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*The defendants here have a legal right, well established by a verdict and judgment. The present attempt is to shake this legal right so established, on a presumed and slight equitable ground.

The defendants had adequate remedy at law; for all the evidence had here, the complainants could have had at law. If they came for discovery, and obtain a discovery of facts which make out a valid equity, then relief would follow; but he has not obtained any discovery.

Gairdner represented himself as principal creditor of Shiras; his books shew it; and whether true or not, it shews that he sought the administration in his own name and right, and for his own benefit, and not merely as agent of Penman, Shaw and Co.

But he had higher interests; he was in distress, and wanted the command of money.

Besides, Gairdner and Shiras were reciprocally endorsers for each other, and 'twas his interest to get hold of the funds of the estate of Shiras.

All these things shew that Gairdner did not take out administration in right of Penman, Shaw and Co.

Mr. Pringle, for appellants. The recovery at law was on strict legal ground. Shiras had other creditors besides Penman, Shaw and Co. some of whom might have had a preference, and others a right to come in equally and proportionably with Penman, Shaw and Co.

It is not easy to prove that Gairdner administered on account of Penman, Shaw and Co. He was not likely to speak of it to any but those to whom it was necessary, to-wit, the ordinary, to obtain the administration, and to the securities to induce them to join in the bond, on account of Penman, Shaw and Co. He declared to the ordinary (as appears by his certificate) that he administered for the principal creditor; then who was meant by the principal creditor? Penman, Shaw and Co. It is certain and proved they were large creditors; but the proof of other creditors has not been clearly made out, as to numbers or amount.

The letters do shew that the confidence of

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Penman, *Shaw and Co. was unbounded, and that the taking on him (Gairdner,) the ad-

ministration was for Penman, Shaw and Co. as he was not a creditor himself.

The answer does not negative the charge of Penman, Shaw and Co. having given a power to Gairdner to administer for them.

It was proved in Manly's case that Gairdner had administered merely for Penman, Shaw and Co.

The letter saying that Penman, Shaw and Co. would send out a power for a particular purpose, is itself a power; at least as that was the intent, the Court can supply the defect, and will do so.

The letters ask for a power to administer, and 'tis agreed to be given, not for Gairdner's purposes, but Penman, Shaw and Co. and that long before Shiras died.

Chancellors JAMES, THOMPSON and GAILLARD delivered the following decree as the judgment of the Court, reversing the decree:

Edwin Gairdner was the general agent in this country of Penman, Shaw and Co. Gairdner and Co. wrote to them on the 25th of March, 1800, to this effect: "We must beg you will lose no time in forwarding a power of attorney, from Penman, Shaw and Co. dated 18 months or two years ago, including a clause to administer when the case requires." It can be witnessed by Inglis, who can prove it at any time. This Mr. Turnbull has recommended. In answer to this in their letter of the 11th of July after, Penman, Shaw and Co. say "a power of attorney shall be sent you as recommended; but there are such from Edward Penman in 1795 and 1796, which ought to be amply sufficient to justify you in every attempt to secure and take charge of our interest; and on the 19th of the same month, they wrote another letter, saying "This serves merely to hand you the power of attorney which you wished we would forward, and we trust it will answer the purpose intended. Gairdner having received this power of attorney applied to the ordinary as attorney for Penman, Shaw and

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*Co. for letters of administration on the effects of Shiras, who had died indebted to them, and took out a citation as their attorney. Gairdner entered into bond to the ordinary on the 4th of September, 1801, with Moodie and Black, as his sureties. They, Moodie and Black, have been sued on this bond, and a verdict obtained against them for a considerable amount. Gairdner is insolvent. These are the facts in the case.

Gairdner it seems thought it necessary to apply to Penman, Shaw and Co. for a power of attorney, containing a clause authorising him to administer when the case should require. Penman, Shaw and Co. thought this power included in the general powers received by Gairdner from Edwin Penman in 1795 and 1796. Finding this not so, they sent a new power containing this clause: Their object was to enable Gairdner to recover the debts due to them in this country; Gairdner could not administer without security; the object of Penman, Shaw and Co. could not be obtained without his giving it. Moodie and Black became Gairdner's sureties, and by doing so enabled him to effect the purpose intended by Penman, Shaw and Co. by their power of attorney. It is said that Moodie and Black had great confidence in Gairdner, and that they were not induced by motives of friendship for Penman, Shaw and Co. to join him in the administration bond. The application for administration was made by Gairdner, attorney of Penman, Shaw and Co. The citation shews it. Moodie and Black certainly had great confidence in Gairdner, and in the general wreck of his affairs suffered materially. Their joining in the administration bond, is also a proof of their confidence in him, for there can be no doubt that as his sureties they are liable for his mal administration to all the creditors of Shiras, except Penman, Shaw and Co.

As to Penman, Shaw and Co. the equity is, that Moodie and Black are through Gairdner their sureties. It would be against equity and conscience to make them liable to their principals, Penman, S. & Co. Moodie & Black stand in the same relation to them that they

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do *to Gairdner, and Penman, S. Co. are identified with Gairdner. The distinction between the liability of Moodie and Black, for Gairdner's acts to the other creditors of Shiras, and not to Penman, Shaw and Co. is an obvious one; it does not in any manner lessen the legal responsibility of administrators; nor does it render Penman, Shaw and Co. liable for all Gairdner's acts. Gairdner is the administrator of Shiras, not Penman, Shaw and Co. We think the complainants entitled to relief; and that the decree ought to be reversed.

(Signed) W. JAMES,
W. THOMPSON,
THEO. GAILLARD.

To the above the following addition was afterwards made:

On motion of Mr. Pringle, ordered that the decree made in this case on appeal on the 11th March, 1813, be explained by adding to the end thereof these words: "And that the judgment entered on record against complainants, on behalf of Penman, Shaw and Co. on the 16th of Feb. 1805, on the bond to Charles Lining be perpetually enjoined."

Chancellor DESAUSSURE delivered the following opinion, concurring with the Court:

I have had great difficulties in making up an opinion in this case, and I am not entirely satisfied with the one which I have formed. But after much embarrassment I feel myself compelled to acquiesce in the opinion of a

majority of the Court, with the restriction therein expressed.

(Signed.) HENRY W. DESAUSSURE.
12th March, 1813.

Chancellor WATIES delivered the following opinion, adhering to his opinion in the Circuit Court:

As I cannot after reviewing the facts in this case, see them in any other light than I have before done in the decree, although anxious to do so, I think that the decree

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*ought to be affirmed. I am glad however that a majority of the Judges have taken a stronger view of the evidence in favor of the complainants, for the equity is clearly with them.

(Signed.) THOMAS WATIES.

This case was argued by Messrs. Simons & Pringle for the appellants.

And by Messrs. Heath & Ford for the respondents.

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Case LIX.

Executors of ANDREW HOLMES & CO. v. BIGELOW and PROUD and Others.

[Tried before Chancellor Waties, Charleston, March, 1812.)

[*Seamen* ⇐27.]

Seamen libelling and selling the ship have no right to resort to the cargo, for payment of the balance of their wages. They must sue the captain or owners at law.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. § 159; Dec. Dig. ⇐27.]

[*Shipping* ⇐21.]

A partner in a ship is held to his responsibility on a losing voyage, and adventure, unless he expressly dissented from the voya.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 80; Dec. Dig. ⇐21.]

[*Assignments* ⇐84.]

Assignees of a person deceased and not his executors, are entitled to the amount awarded out of the fund assigned, to be applied to the purposes of the assignment.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 148; Dec. Dig. ⇐84.]

[*Interest* ⇐11.]

One agent ordered to deliver up funds to others who are authorised to settle with him finally. The agents made chargeable with interest on monies coming into their hands, from the time of their receiving them till paid away.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 29, 36 38; Dec. Dig. ⇐11.]

This case comes before the Court on the report of the master, and exceptions to that report. The numerous and various claims insisted on, and the great intricacy in which they are involved, would have rendered it a most difficult and laborious task to decide on them, if the parties had not consented to refer them to accountants, whose very able investigation and award make a part of the master's report, and to which the parties have submitted, with a few exceptions. The first exception made is to the award of $7410.80, to be paid out of the proceeds of the cargo of the ship Hindostan, for the balance of seamen's wages. This exception must be sustained. The seamen by having libelled and sold the ship and received the proceeds, have exhausted the only lien which they had for their wages, and for the balance they must resort to their remedy at law, by an action against the captain or owners. A second exception was made to the report on behalf of the defendant, Howard Allen, who by the report is considered as a partner in the voyage, and his claim adjusted as such. His counsel has contended that although originally a partner as to the voyage first

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contemplated, yet another voy*age having been substituted without his consent, he is not bound as a partner, but is entitled as owner of one fourth of the ship to the original value of such part, and also to freight. There appear to be no sufficient grounds for this claim, either in law or in fact. H. Allen and Bigelow and Proud were the first projectors of a mercantile enterprise, and although this was abandoned, and there was no express evidence of his assent to the subsequent one agreed on by the other parties, yet it may be fairly inferred from all the documents, that he was privy to and concurred in it. There was certainly no evidence of any act on his part which signified his dissent. The case therefore cited from 4 Bac. 611, which was relied on in his favor is a strong one against them. In that case it was held that although a part owner may dislike a voyage, in which the ship is lost; yet it shall be intended a voyage, with his consent, if there is no express prohibition proved. This exception therefore on the behalf of the defendant, H. Allen, must be overruled. A third exception made to the report, was on the part of the defendants, Bigelow and Proud, because the referees have awarded to John Everingham the principal sum of $7310.35, with interest, and the further sum of $1579, with interest, for insurance on the return voyage; and also $1204, with interest, to John S. Adams for insurance likewise, which said sums are directed to be paid out of the general fund, previous to any decision among the claimants. The defendants, Bigelow and Proud, have excepted to this part of the award, on the ground that the whole deficit chargeable to them, (being $22,501.48, with damages and interest,) is directed by the award of the referees to be deducted out of their moiety of the funds, in which deficit is included one half of the said sum of $7310.35, and that of course the other moiety of the said funds, should be charged with the other half of the said sum, and that the other sums for insurance ought

not to be deducted prior to a division, as those insurances might not have covered any of their interests. The first part of this ex-

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ception which *respects the $7310.35, appears to be well founded, and is therefore sustained. And in order to correct the erroneous effect of the award, which directs that the whole of the said sum shall be deducted out of the general funds previous to any division among the claimants, it is ordered and decreed that a moiety of the amount of the principal and interest of the said sum of $7310.35, shall be set off against the $22,501.48½, with the damages and interest thereon. As to the two remaining sums for insurance, it does not sufficiently appear to the Court that the insurance might not have enured to the general benefit in the event of a loss, and therefore I do not feel disposed to alter the report in that respect. The exception then as to the two sums of $1579, and $1204, is overruled. A fourth exception has been made to the report on behalf of John Stoney and S. Adams, who are also defendants in the case, on the ground that they are entitled to the balance directed by the award to be paid to the executors of A. Holmes & Co. under an assignment from the said A. Holmes & Co. for the benefit of a certain class of creditors. This exception is sustained, and it is therefore further ordered and decreed that the said balance adjudged by the award to be paid to the executors of A. Holmes & Co. shall be paid to the said defendants, John Stoney and John S. Adams, the assignees under the said deed of assignment to be by them applied to the uses thereof. The report is in all other respects confirmed. As the whole of the funds appear to be in the hands of the defendant John Bolton, in Georgia, I am inclined to adopt the mode recommended by the report for disposing of and dividing them among the parties according to their several rights. But the counsel are at liberty to move for any further order on this point. The costs of suit must be paid out of the general funds. THOMAS WATIES.

March 7, 1812.

The court after hearing the observations and arguments of the solicitors for the com-

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plainants and defend*ants, direct that John Bolton of Savannah, in the state of Georgia, one of the defendants in this case, do forthwith deliver all the monies, bonds, notes, choses in action, cotton, goods and merchandise and other articles arising from the sales of the cargo of the ship Hindostan unto Christopher Fitzsimons, John Stoney, and Robert Maxwell, that they shall dispose of the said cotton, goods, merchandise, and other articles either at Savannah or in Charleston, for cash or credit, as they may think most for the interest of the concerned; that the said Christopher Fitzsimons, John Stoney, and Robert Maxwell, do receive and collect the said bonds, notes, and choses in action, and that they do pay away and distribute the said monies, bonds, notes, choses in action, cotton, goods, merchandise, and other articles, according to the decree of this court; or should it be deemed more advisable, that they do distribute the said bonds, notes, choses in action, cotton, goods, merchandise, and other articles, specifically, among those entitled to the proceeds thereof, according to the said decree. It is further ordered that the said Christopher Fitzsimons, John Stoney, and Robert Maxwell, shall be chargeable with interest at the rate of seven per cent per annum, upon all the monies received by them as aforesaid, from the time or times that they shall be received, and a reasonable time to be allowed thereafter for the distribution of the same; that they shall also be authorised to adjust and settle all accounts and differences with the said John Bolton, relating to the premises, and to give him sufficient releases and discharges therefor. It is further ordered that all expenses in relation to the said matters, shall be defrayed out of the monies and other funds to be paid and delivered to the said Christopher Fitzsimons, John Stoney, and Robert Maxwell.

March 15, 1812.

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3 Desaus. *501

*Case LX.

SAMPSON DICKINSON v. Survivors of BOLD & RHODES.

[Tried before Chancellor Waties, Charleston, April 8, 1812.]

[*Partnership* ⇐⇒59.]

Question of the renewal of a copartnership. A proposal by one party to renew it, received and acted upon by the other is binding on both.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 84; Dec. Dig. ⇐⇒59.]

[*Partnership* ⇐⇒262.]

But it may be dissolved in the same informal manner, by mutual consent implied by the acts of both parties.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 602, 605, 606; Dec. Dig. ⇐⇒262.]

[*Partnership* ⇐⇒277.]

And one of them shall not afterwards set up a claim to share in the profits of a new business of a different kind entered into by the other, to which the former contributed neither money, stock or labor.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 622, 624; Dec. Dig. ⇐⇒277.]

This bill has been brought for an account of the profits of a copartnership which was carried on under various forms for many years. It commenced in July, 1787, and the complainant contends that it continued until July, 1801; the defendants insist that it ceased in December, 1798. The question then is, (and it is the only one in the case) how long

did the copartnership continue? It appears from the original articles that the period fixed for its duration was seven years, but after the expiration of that period, the defendants being desirous of renewing the connexion, transmitted to the complainant in London (where he resided) the articles of copartnership, with an indorsement of a renewal of them for another term of seven years, to commence from the expiration of the former one. The complainant in his answer to the letter of the defendants, which inclosed this renewal of the articles, says, that he will agree to it, if he is relieved from his difficulties on the arrival of the ship Carolina. The Carolina did arrive, and with such remittances as seem to have satisfied the complainant: for it appears he continued to discharge his former duties as a copartner, by purchasing and shipping goods to the defendants without any charges for commissions, and they continued to carry on their trade here, and to make him remittances under their original firm. But there is no evidence that the complainant ever sent any formal renewal of the articles to the defendants, and it was therefore contended by them that the copartnership which continued was not for seven years, but was determinable at any time at the will of either of the parties. This ground cannot be supported. I consider the complainant's resumption of his duties as a partner on the original terms, as a substantial renewal of the articles on his part, and such an assent to the written renewal of

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them by the de*fendants, as would be binding on him if the defendants were now insisting on it. None of their letters or acts contradict this construction. It is true that in Dec'ber, 1798, they indorse on the articles a declaration that the copartnership is then dissolved; but this very act is a proof that they considered the copartnership as before existing under the articles, or why thus endeavor to cancel them? Besides, it was an ex-parte act, and there is no evidence that the complainant ever had any notice of it; indeed the defendants seem sensible that it could have no effect, for we find them afterwards in May, 1799, giving credit in the books of their firm here, to Sampson Dickson & Co. their English house, for a shipment of goods then received.

But although there is this full evidence of the renewal of the copartnership on the original terms, yet I think on another ground it ought to be considered as dissolved before the term expired; and this is, that both parties evidently contemplated such a dissolution. We see in their letters a mutual dissatisfaction prevailing, and a mutual wish expressed to bring their concerns to a close. The defendants in their letter of the 18th of July, 1799, complain that the last shipment of goods was made without any orders, and the complainant sends no more after that time. The defendants discontinue all trade, and engage in the factorage & commission business. These mutual acts of the parties may be fairly construed to amount to a dissolution of the copartnership; and if the complainant had not concurred in it, yet as it is not pretended that he sustained any injury from the defendants withdrawing themselves, & as the new business in which they engaged required no stock, and was carried on exclusively by their personal exertions, I should consider the copartnership as virtually dissolved on this ground; for it would be unconscionable, that the complainant should share in the profits of a business to which he contributed neither money, goods, nor labor. But since the defendants have expressly recognised the existence of the copartnership in

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May, 1799, by the entry in their *books before mentioned, and this could not be the moment of its determination (for some time must be allowed for disposing of this last shipment from the complainant) it is most reasonable to say that it continued until the end of that year. This view of its duration is further authorised by the letter of Mr. Bold to the complainant, dated in July, 1799, in which he says "let us have all our accounts current, that we may prepare for a close, with the close of this year." I feel bound then by these facts to declare that the copartnership was confirmed between the parties until the end of December, 1799, except as to the business done by the defendants in the factorage and commission line during that year.

It is therefore ordered and decreed that the master do take an account of the clear profits of the said copartnership, and report the amount thereof, if any, which the complainant will be entitled to receive, and that the parties do produce to the master all their books of account and other papers relating thereto. And as the said copartnership has been of long continuance, and consists of complicated concerns, which will require more time for a complete investigation than the master can spare from his other duties, it is recommended to the parties to appoint one or more accountants to assist him in making the said investigation; and if the parties shall refuse or omit to do so, it is ordered that the master do employ at their joint expense, some experienced accountant as an assistant to him in this duty. The costs are reserved until the master shall make his report. THOMAS WATIES.

3 Desaus. *504

*Case LXI.

W. H. GIBBES, Master in Equity, v. OTHNIEL GILES and Wife.

[In the Court of Appeals, 25th March, 1812.]

It is ordered that the decretal order made by the circuit court so far as respects the payment of the money, be affirmed. But it being represented to the court that there is a marriage settlement in this case which comprehends the property in question, it is further ordered that the money be paid over to the trustee in the said marriage settlement if comprehended therein.

(Signed) H. W. DESAUSSURE.
THEODORE GAILLARD,
THOMAS WATIES.

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3 Desaus. 504

Case LXII.

ABIGAIL WEBLEY, EDWARD WEBLEY and JOHN W. WEBLEY v. BENJAMIN LANGSTAFF, Executor of John Beale.

[Tried before Chancellor Gaillard, Charleston, Nov. 1812.]

[*Wills* ⇐487, 781.]

A person had made provision by a deed for a woman who lived with him, as his housekeeper and her two sons. On his death bed, when making his will, he was asked if he would give any thing to the two boys—he said no; they were provided for already. But the woman said no, the provision was good for nothing, whereupon he said, then I bequeath them so much, (which was the same sum as in the deed.) On his death both provisions were claimed. The judge who tried the case admitted parol evidence of the conversation which led to the bequest in the will; and decreed that it was a case of election—the boys might take under the deed or will, but not both. The provision for the woman in the deed was decided to be good; and no provision being made for her by the will, there is no case of elections as to her. Decree unanimously affirmed by the Court of Appeals.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1023, 2016; Dec. Dig. ⇐487, 781.]

The bill states that John Beale being possessed of a large real and personal estate, executed a deed on the 24th March, 1803, in the presence of two witnesses, by which he gave to Francis Bremar and Florian Charles Mey, in trust for the complainants, the sum of £1500, and he assigned unto them all the rents arising from the hire of a certain wharf called Beale's wharf, (then under lease of seven years at the rent of £800 per annum, to Benjamin Langstaff and Thomas Frink,) in trust to secure the payment of the said £1500 to wit, £500 to the absolute use and benefit of Abigail Webley, and £1000 to the use and benefit of the complainants, subject to the limitations contained in the said deed. The bill further states that the said deed was

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made on account of the *faithful services of the said Abigail Webley as house-keeper to the said John Beale, as a provision for her and her two sons, the complainants, Edward Webley and John W. Webley, an infant, under the age of 21. The bill further states that the said Benjamin Langstaff and Thomas Frink knew of the said assignment, and were bound to pay the sum of £1500 to the said trustees as soon as it should become due, from the rents of the said wharf, but the said Benjamin Langstaff and Thomas Frink paid to the said John Beale himself in his life time, such sums as accrued during that period; and since his death the said Benjamin Langstaff has retained the said rents as executor of the last will of the said John Beale, deceased. And the said trustees have neither of them received one penny of the said sum of £1500 or the interest thereon, to which your oratrix and orators are entitled. The bill further states that the said John Beale duly executed his last will, bearing date 23d October, 1807, and soon after departed this life, leaving the same in full force. Among other things he willed as follows, viz. "I leave to Edward Eberley and John W. Eberley £1000 to each of them, to be paid on their respectively attaining the age of 21 years." The testator appointed several executors to this will, of whom only Benjamin Langstaff has qualified. The bill states that your orators Edward Webley and John W. Webley are the persons alluded to in the will, as their christian names will shew, and that the error in the name is only a clerical inadvertence. That therefore your orator Edward who is of full age, is entitled to receive the full amount of his legacy, with interest from the death of the testator, he having no other competent maintenance; that your orator John W. Webley is entitled to have the interest which has accrued and which may accrue, until he may become of age, appropriated to his maintenance, and the principal placed under the direction of this honorable court, that he may receive it at his arrival at the age of 21 years. The bill further states that the estate of the testator is very large, and has

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come into the hands of *Benj. Langstaff, the only qualified executor, who is well enabled to pay the aforesaid several sums and interest; but although demands had been made upon him for the payment of the same, yet he hath upon several pretences wholly refused. The bill then concludes with a prayer that the said Benjamin Langstaff render an account of the sums due or paid on account of the wharf, that he pay to your oratrix the sum due her under the said deed, and to your orator Edward Webley, the money due him—prays writ of subpœna, and concludes in the usual manner.

The answer admits that John Beale died possessed of considerable real estate, but denies that he died possessed of large personal

estate: the whole or greater part thereof having been given to complainant by deed of gift, or otherwise in his life time. The defendant saith that the only knowledge he has of the deed filed with the bill, was derived from a conversation with the testator in his last illness. But the defendant denies that he was notified of the execution of that paper, or that it was done with his knowledge; and he avers that from the time of the conversation above mentioned till after the death of the said John Beale, neither of the trustees or the complainant ever called upon him for the rents of the said wharf. The defendant avers, that from the month of March, 1803, aforesaid, to the day of the death of the said John Beale, the said Langstaff and Frink were constantly in advance to the said John Beale for repairs to the wharf, groceries, fuel, cash for domestic expenses, &c. by anticipations on the rent of the wharf, which was done with the privity and assent of complainant; she and her family reaping the benefit of the supplies. And at the time of the death of the said John Beale, there had accumulated a balance in favor of the said Langstaff and Frink of upwards of £600. The defendant says that during that period the testator had no income but that derived from the wharf, and 80*l.* per annum from W. Keating, and two years rent from J. Condy.

The defendant in his answer further states,

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that he was *in the testator's chamber on the 23d October, 1807, when William Loughton Smith took his instructions for drawing his will, and avers that the following occurrences took place. The testator told Mr. Smith that he left all his property to his daughters in England, and their children. When Mr. S. had concluded the devises, he enquired of testator "if he did not mean to leave something to the boys in the next room;" (meaning the complainant's sons) the testator answered "no, for they were already provided for." The complainant (Abigail Webley) immediately said "no, Mr. Beale you know it is good for nothing," and appealed to this defendant (who supposing the complainant to allude to some appropriation of rents of the wharf which he knew were absorbed by the demands of Langstaff and Frink) readily confirmed the assertion: whereupon, the testator said he would leave them £1000 each, to be paid upon their coming of age. Mr. Smith asked whether they were to receive interest on their legacies: he said "no." Some time after in an adjoining room, the complainant produced to Mr. Smith and to defendant, a paper saying "this is what Mr. Beale meant by his provision for the boys, but it is of no account, as Mr. B. has taken up the rents for his expenses." She again appealed to defendant, and he confirmed the statement as before. Soon after, Mr. Smith advised defendant, as the will was meant to be a substitution for the provision of the deed, that he should apply for the same. Defendant accordingly applied for the same, but complainant answered that it might be of no account, but she would take advice. The defendant further says that the testator gave (he believes as a substitute for the 500*l.* mentioned in the deed) on the 10th November, 1805, to Abigail Webley, a house on Sullivan's Island, together with all his negroes, furniture, &c. by a deed of gift, as a recompense for her faithful services. And the defendant insists that the last deed and the will, destroyed the first deed, or that the will was obtained by misrepresentation, and is void.—The defendant admits that the com-

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plainants, Edward *Webley and John W. Webley, are the persons alluded to in the will, but denies that they are entitled to any interest on their legacies, except from the time they shall become due. The defendant denies that either of the said legatees are of age. The defendant conceives that the goods received by the said Abigail are sufficient for the maintenance of her sons.

The cause came to a hearing before Chancellor Gaillard, in November, 1812. On the trial it was moved by the counsel for defendant, that Mr. W. L. Smith, who had taken the instructions and drawn the will of the testator, John Beale, in his last illness, should be examined as a witness to prove what had been said on that occasion.

After argument on the question of the admissibility of parol evidence, the Judge desired to have the evidence stated, that he might form an opinion of its admissibility. Mr. W. L. Smith then stated that whilst he was drawing the will of the late Mr. John Beale, it was suggested to him that it might be his wish to provide for the two boys, the Webleys, the sons of his house-keeper. To this he answered that they were already provided for; upon which Mrs. Webley said "no, Mr. Beale, that provision is good for nothing," and appealed to Mr. Langstaff, who assented to what she said. On this Mr. Beale then said, "I then give them 1000*l.*" Being asked whether he meant 1000*l.* between the two, he said "no, 1000*l.* to each." And to another question whether he intended interest to be paid on the legacies, he said "no." And accordingly a clause was inserted in his will, by which he bequeathed to Edward Eberley and John W. Eberley (sons of Mrs. Abigail Webley,) 1000*l.* to each, to be paid on their respectively attaining twenty-one years of age. The Judge having heard Mr. Smith's statement, received it as evidence.

The cause then having been argued, Chancellor Gaillard delivered the following decree:

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*The intention of the testator must be the rule of decision. Mr. Beale by a deed dated

in March, 1803, had assigned the rents and income of his wharf to trustees to pay to Mrs. Webley £500 and £500 more to each of her two sons. He sent for Mr. Smith to make his will, and directed him to give his estate to his daughters. On being told that it might be his wish to provide for the boys, the two Webleys, he replied, "they are provided for already." This drew from Mrs. Webley this expression: "No, Mr. Beale, that is good for nothing;" and appealed to Mr. Langstaff, who assented to what she said. On this Mr. Beale said "then I give them one thousand pounds." Being asked whether he meant one thousand pounds to the two, he answered "£1000 to each." And to another question, whether he intended interest to be paid on the legacies? He said "no." This evidence is admissible; it does not contradict the will; it only relates to declarations of the testator at the time of making his will, and to a fact on which he made it. These declarations too are consistent with the will. The testator intended to give to each of the Webleys one thousand pounds, and has done so. He intended that the legacies should not draw interest before they should become payable; they draw interest only from that time. The only question as to the two Webleys is, whether they are entitled to the legacies, and to the thousand pounds, in the deed of March, 1803. It is very evident he did not intend that they should take both. His expression on being told that the deed of March, 1803, was good for nothing, "then I give them one thousand pounds," is conclusive. This raises then a case of election. The Webleys cannot take under the deed and will too. They may take under either. The next question relates to Mrs. Webley. It is said that Mr. Beale intended the deed of November, 1803, in lieu and substitution of the deed of March, 1803. There is nothing in this deed from which this inference can be drawn. Mr. Langstaff thinks that Mr. Beale so intended; but there is no proof of this.

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*Mrs. Webley's conduct in saying to Mr. Beale that the deed of November was good for nothing, is free from any imputation of fraud or intention to deceive Mr. Beale. Immediately after the will was executed, she shewed the deed to Mr. Smith, and said this is the paper Mr. Beale spoke of. She and Mr. Langstaff were probably both led into the mistake that the deed was good for nothing from the circumstance that no money had been received under it, in consequence of Mr. Langstaff's having a lease of the wharf, and being always in advance for Mr. Beale, and what is material and has great weight with me is that Mr. Beale, until immediately before he executed his will, was under an impression that the deed of November was good. If he had left any thing in his will to Abigail Webley, she would be put to her election also. But she is not named in the will. It must be referred to the master to ascertain what is due to Mrs. Webley under the deed, and she must be allowed interest from the time she was entitled to receive the 500*l.* that is as soon as from the rents and income of the wharf that sum would have been due, after paying the subsisting charges on it. It is also referred to the master to report the sums due on the legacies, with interest from the time they are directed to be paid. It is ordered and decreed that the executors of Mr. Beale do pay to the said Abigail Webley, whatever sum may be due to her under the deed of March, 1803, and the legacies to the two Webleys with interest from the time of their respectively becoming due, should the said complainants elect to take under the will of the testator, John Beale. The costs to be paid out of the estate.

THEODORE GAILLARD.

From this decree an appeal was made, on the ground that the Court erred:

1. In admitting parol evidence of the declarations of the defendant's testator at the time of making his will.

2. In putting the sons of Mrs. Webley to

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their elec*tion, either to take under the will and renounce their claims under the deed, or to take under the deed and renounce their legacies under the will. Under this head it will be contended, as it was at the trial, that the parol evidence, even if it were admissible, does not make out a case of election.

The appeal was heard by the Court, consisting of Chancellors James, Thompson, Desaussure, Gaillard and Waties.

Mr. K. L. Simons, for the appellants.
Mr. W. L. Smith, for respondent.

Mr. Simons for appl'ts stated the evidence. The deed, was dated 24th March, 1803, recorded 14th Nov. 1803, Mr. Beale to Francis Bremar and Florian Charles Mey, in trust. Deed, 10th November, 1803, from Mr. Beale to Abigail Webley, (providing for her.)

Deed, 22d October, 1807, relating to two negroes, annexed to the foregoing. Deeds recorded. Mr. Beale's will in October, 1807, giving 1000*l.* a piece to Mrs. Webley's sons.

He insisted that this is not a case of satisfaction or performance, nor election, nor ademption. Roberts on frauds, p. 46, Note No. 15. Blandy and Were, 1 P. Wms. Wilcox and Wilcox, to shew that this will is not a performance of the provisions of the deed of 24th of March, 1803.

The question of performance applies only to executory contracts.

Barret v. Beckford, 1 Ves. 521, to shew this is not a case of satisfaction. Saville v. Saville, 2 Atk. 461; Allen v. Allen, 2 Ves. 37, 2 Fonbl. 327; 1st Ves. Jun. 298, Forsyth

v. Grant, 2 Ves. Jun. 464. Richardson v. Elphin: 1 Bro. 130. ——— v. ———: 3 Atk. 183. Room v. Room: 1 Bro. 555. Holmes v. Holmes: 1 Bro. 425. Grave v. Salisbury: 2 Bro. 521. ——— v. Man: Powel v. Cleaver, 2 Bro. 518: Baugh v. ———, 1 Ves. ser. 257; Broughton v. ———, 7 Bro. P. C. 112; Eastwood v. Pinke, 2 P. Wms. 618.

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*Satisfaction must be something of the same kind, in certainty, quantity and quality.

The legacies in this case could not be in satisfaction, of the provision of the deed.

The will was ambulatory and might not have taken effect for many years.

Under the deed there was a provision for survivorship; not so in the will.

The legacy might have become a lapsed legacy.

Nor is this a case of election. For that is a case where a man takes under a will, and is not permitted to claim against the will. No such case arises in this cause; for the claim under the deed and the will, are not in opposition to each other.

This is not a case of ademption. A will may adeem in another will; but a will cannot adeem what is given under a deed. If a will provides for a son, and afterwards the father gives him an equal amount, this may be ademption. Lord Talbot's cases, 240.—Brown v. Selwyn. Chancery cases, 240. 2 Atk. 373. 2 Vesey, jun. Stanyarn v. Stanyarn, 591. Peakee 116. 2 Pothier, 205. The result of these cases is, that where writing is necessary by the statute of frauds, there parol evidence is inadmissible, except in cases where it is necessary to explain; 1. circumstances of the family; 2. condition of property, as parcel or no parcel; or unless there be a patent ambiguity. Where writing is not necessary to give effect, there parol evidence is admissible in cases of patent ambiguities.

Mr. Smith for defendant. It is laid down in all the cases, that parol testimony is admissible in cases of election. 1 Bro. 296. Evidence may not be used to explain what testator meant by the words he used; but it may as to facts on which the testator made his will. 1 Vesey, 323. Mascall v. Mascall; 3 Atk. 77; 3 Ves. Hinchcliff v. Hinchcliffe. Papers found in the hand writing of the testator, explaining his affairs, were received as parol evidence. 8 Term, 147. Doe on Dem. of Small v. Allen. Parol evidence was admitted.

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*See p. 66. 7, in Roberts, to shew that Lord Talbot had been wrong in refusing parol evidence in Brown v. Selwyn.

It is of importance that the declarations of the testator should be at the time of making the will, 2 Fonbl. 477. Parol evidence not admissible to add to or alter a will unless fraud or mistake is alleged. Trimmer v. Bayne, 7th Ves. 508; Robinson v. Whitley, 9th Ves. 577; 14th Ves. 322; 2d Washington's rep. p. 55.

The entire exclusion of parol evidence would exclude it even in cases of fraud, which cannot be contended for. 1 Binney, 610, 612; 2 Hen. Bla. 213. Parol evidence admitted to prove that one legacy was intended. Cuthbert v. Peacock, 2 Vern. 593.

The Court of Appeals unanimously affirmed the decree of the Circuit Court, for the reasons given therein.†

† The doctrine of election is well laid down in the 2d vol. of Schoales and Lefroy, 440, in the case of Birmingham and Kirwan. Lord chancellor Redesdale there says, that the foundation of the rule of election is, that a person cannot accept and reject the same instrument—and this rule is equally applicable to any species of instrument, whether deed or will; and is a rule of law as well as of equity. But the court of equity by its mode of proceeding, can give the rule more effect and application to various cases; and it applies to dower as well as to other cases. But the intent to exclude dower, must be demonstrated by express words, or by clear and manifest intention. See Villa real v. Galway.—Ambler, 682. What amounts to satisfaction of one provision by another, is a question of intention. See Richardson v. Morgan, 1 Bro. C. C. 63. 2 Bro. C. C. 394, 3 Vesey, 516, 530. See the cases collected in Bellasis v. Uthwatt, 1 Atk. 427, in a note of Sanders' edition.

Parol evidence to rebut the presumption, that a portion given in the life time was intended to be in lieu or satisfaction of a legacy, is admissible, without regard to the nature of the parol evidence. Lord Thurlew, lord Kenyon, and other judges, admitted parol evidence; but judge Butler (sitting as chancellor) said, that if he sat long in court, he would drive out parol testimony on these questions; but lord Eldon said the rule for the admission of it was too firmly established to be shaken. These cases are never sent to a jury.

3 Desaus. *514

*Case LXII.

GEORGE CABORNE v. WM. GODFREY and Others, Executors and Legatees of Robert Caborne.

[Tried before Chancellor Desaussure, February, 1813.]

[*Contracts* ⇐54.]

A promise made by a father to his son in writing to provide for him on his marriage, by the gift of certain property, is binding. And though the father never performed the promise in his lifetime, and made other dispositions by his will, the son is entitled to recover from his father's executors.

[Ed. Note.—Cited in McKeegan v. O'Neill, 22 S. C. 467, 474.

For other cases, see Contracts, Cent. Dig. § 239; Dec. Dig. ⇐54.]

[*Limitation of Actions* ⇐12.]

[The statute of limitations does not apply in cases between parent and child.]

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 49; Dec. Dig. ⇐12.]

This cause was argued very fully in the Circuit Court of Equity, but as the argument

was repeated and enlarged in the hearing on the Court of Appeals, it will be stated hereafter.

The Court took time to deliberate, and afterwards delivered the following decree:

This is a suit brought to recover a certain number of negroes under a letter written to the complainant by his father, a short time before his marriage; and also to recover the property bequeathed to him by his father's will, unless the same should be set aside, as far as it operated against the complainant. The letter is in these words:

"Great Swamp, 15th Nov. 1796.

"Dear George,—I am informed you are going to be married; if so, I sincerely wish you and the lady happy, whoever may be your wife, and hope you will do all in your power to render her life so. Whether you marry or not, I shall leave you in a deed of gift, eleven or twelve negroes, and half my stock; this you will be certain of and perhaps more. I am now about having the writings drawn by a lawyer. Why don't you write a few lines this way and let me know the truth of the report.

I am your affectionate father.

"Robert Caborne.

"To Mr. George Caborne."

In less than two months after the date of this letter, to wit, on the 12th January, 1797, the son, George Caborne, intermarried with Mrs. Catharine Cain, who brought him some property, whereon they have principally subsisted during the marriage. Mr. Caborne, the father, neither delivered his son any negroes or a deed for any in his life time, nor did the

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son institute any suit *for them during his father's life time, which it is said his respect for his father prevented. They lived at a distance from each other, nevertheless the harmony was not broken. In June, 1808, Mr. Robert Caborne, the father, made his last will and testament, wherein and whereby he made the following dispositions: That after the payment of his just debts and funeral expenses, he gave and bequeathed to his dear wife, Mary Caborne, one moiety of his ready money, and the other moiety of his ready money he bequeathed to his dear son, George Caborne. He also bequeathed his negro slaves and his stock of cattle to his son George and William Godfrey, as trustees, to permit and suffer his said wife to have the use and labor of nine slaves, (whom he named) with the increase of the females, and half of his stock of cattle for and during the term of her natural life and no longer, and from and immediately after her decease, then in trust for the use of his son, G. Caborne, during his natural life and no longer. And upon the further trust to permit and suffer his son George to have the use of seven negroes, (whom he names) with the increase of the females, and the other half of his stock of cattle during the term of his natural life and no longer; and from and immediately after the decease of his said wife, Mary, and of his son George, the testator bequeathed all the aforesaid negro slaves (excepting Sam.) unto William Godfrey, Sarah Griggs and William C. Pinckney, to them and their heirs and assigns forever. To William Godfrey he bequeaths Sam. above mentioned. He desires proper measures to be taken to emancipate the girl Bella. All the rest and residue of his estate the testator bequeathed to his wife Mary and his son George to be equally divided between them. Mr. Robert Caborne, the testator, died in April, 1809, leaving his will in full force; whereupon William Godfrey proved the same in the Court of Ordinary and qualified thereon as executor. The testator left no other family than his wife and his son George, and he left little or no estate but what is mentioned in the will. The inventory of his es-

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tate men*tions nineteen negroes, and it is agreed that the ready money left by him amounted to about three thousand dollars. The legatees to whom the negroes are devised over at the death of his wife and son are not related to the testator. The son George is dissatisfied with the will and there is an expression in the bill praying that the will may be set aside, and declared void. It does not appear however that he contested the will in the Court of Ordinary, which was the proper tribunal for its discussion in the first instance. I must therefore consider the will to have been properly proved and established. And I presume the expression in the bill meant no more than that the will should not be allowed to operate to the prejudice of the complainant's rights founded on the letter promising him eleven or twelve negroes, to whom he insists that he is entitled as well as to the bequests in the will; for no testimony was adduced, and no argument was used against the due execution of the will.

On the argument of the cause the claims of the complainant were resisted on the following grounds. 1st. That the letter of the 15th Nov. 1796, from Robert Caborne to his son George, contains no positive promise at all; and that if there was any positive promise it was without any valuable or good consideration, and therefore is nudum pactum and void. 2d. That if it were not nudum pactum, the promise has been performed and satisfied, and that by the will. 3d. That if not satisfied it is a case of election, and that the complainant must choose between the promise and the will. See 2d Ves. 67.

In considering the first question I admit that the promise must be positive, in order to be binding. On examining the letter carefully it does appear to me to contain a distinct and positive promise to give the son eleven or twelve negroes and half his stock. He says of this you may be sure, and perhaps more. He himself makes the distinction between what is certain, and what is to depend upon further consideration; and he adds, that he is now about to have the writings

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drawn up by a law*yer. When we consider this as a letter from a father to a son, and not penned with the precision of a formal deed, I cannot well imagine how the assurance or promise could have been more distinctly or positively made. It was objected that it was uncertain as to the number of negroes, the promise being in the alternative eleven or twelve negroes. But surely the promise is certain as to 11; it might be more, but not less. It was further objected that the quantity of estate in the negroes is not stated. But in gifts or dispositions of personal property, no words of inheritance or perpetuity are necessary; every disposition of negroes, cattle or other personal property is absolute, unless restrained by words limiting the extent of the gift or disposition. This is the general rule, and it is to be taken in the strongest sense, where the provision is about to be made by a father for an only child on the point of marriage. With respect to the consideration of the promise, it appears to have been made with a view to his son's marriage. He tells his son he has heard that he is about to be married, and he is evidently pleased with it. He therefore holds out encouragement to him to proceed and carry his intentions into effect. He assures him he will make a provision for him, which he states. It is material that the letter has no other object and treats of no other subject than the contemplated marriage, and the provision he would make for him in that event. He adds indeed as has been urged in argument for the defendants, that he would give him the negroes and stock, whether he married or not. But surely the promise to give the son eleven negroes on the marriage is not weakened by the declaration that he will give in all events. The language of the father fairly viewed is, I have heard you are about to be married, I am well pleased with this; I am on that account drawn to make you this communication, stating what I can do for you, and promising to make that provision to encourage and aid you in your marriage. But such is my natural affection for you, that I promise to make you that gift at all events.

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Would not the effect be conclu*sive on the mind of a parent, whose daughter was courted by a young gentleman on his producing such a letter to him from his father, that the provision promised him, was well assured and certain? Undoubtedly it would. What use was made of the letter, and what effect was produced by it, was not shewn by any evidence; but it was calculated to produce a great effect, and to remove objections on the score of fortune. And we see that in fact the marriage took effect within two months after the date of the letter. The vehement presumption therefore is that the letter had contributed to the desired effect. I feel therefore warranted in saying that this was a solemn promise made by a father to a son to induce and promote his marriage and that the marriage took effect soon after with a lady of some fortune, and that marriage being the highest consideration known to the law, the promise is binding on the father, and that the subsequent generality of the promise ought not to weaken the effect of the leading consideration. It was objected that the locus penitentiæ remained with the father till the deed was executed or the negroes delivered. But I answer that if the locus penitentiæ was in the father, it could only be till the marriage took effect; after that, it was at an end. And it is not pretended, and there was not a shadow of proof that he did recall the promise (made in his letter) before the marriage; or that he changed his mind as to his son's marriage. And I doubt much if after a treaty of marriage to which the father consented and had promised to make a provision, and the affections of the parties were engaged, whether the father would be at liberty to retract his promise without there existed some strong reasons to justify his objections. I think some of the cases go as far as this, and I am sure the reason and equity of them do. If the non-performance of a contract or promise, was to be considered as evidence of the existence and exercise of the locus penitentiæ, how many contracts should we see dissolved on that pretense, which yet our Courts decree the execution of. Another

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objection was made that this *promise was general, not with a view to a particular lady, and no treaty was made with her or her friend. It is I think fairly answered, that the strong probability is, that when the father heard that his son was courting, he heard also who the lady was and was satisfied. Besides the son was of mature age, and the father wished the son settled, and manifestly confided in his discretion as to his choice. He leaves it to him and approves of whatever he should do, and writes a letter promising a provision which was calculated to procure his son a favorable reception. Besides the son has an interest as well as the lady in the promise, upon which he finally is induced to take on himself the burthen of a family. A solemn promise in an informal writing, founded on natural affection, which is a good consideration, is as binding as a formal deed, especially when it leads to so important and burthensome an act as the assuming the expenses of a family. Some stress was laid on the lapse of time between the date of the letter and the demand of the complainant. In ordinary cases the lapse of time has weight; in some cases it operates as a positive bar to the demand; in others it furnishes a presumption of a waiver of claim; in others a legal presumption arises that the demand has been satisfied. In cases like this however the statute of limitation does not apply, and time is not important. In point of fact it is not pretended that the

father ever delivered the negroes or the stock to the son, and there is not a tittle of evidence to shew a waiver by the son; and in my opinion the relation of a son to a father ought to take away any presumptions arising from his not enforcing his demand by suit. It would have been very ungracious in the son to have extorted immediately, by process of law, what had been promised by the father from affection, and postponed perhaps by his necessity or convenience. His dutiful forbearance ought not to be construed into a waiver of his right, or to work a prejudice to his demand. One more objection was stated, that no time was fixed for the performance of the promise. It is true no precise day was

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named in the *letter; but the promise had reference to the expected marriage, the occasion was at hand, and he assures his son the deed was drawing. I will not go through all the cases on this first point of the case which we are considering. A short view will be sufficient: 1 Fonbl. 179. The text of Fonblanque (by Mr. Ballow) supported by the decided cases, shews that an agreement by letter in relation to marriage, takes the case out of the operation of the statute of frauds. The case of Wangford v. Fotherly, 2 Vern. 322, shews that a general letter, written by a father promising a portion of 1500*l.* with his daughter, and seeming to approve her marriage, would support a decree for a portion against his estate after his death. See Halfpenny v. Ballet, 2 Vern. 373; Cocks v. Mascall, 2 Vern. 200. In Luders v. Anstey, 4 Ves. jun. 501, it was decided that a settlement should be made according to a letter written previous to a marriage, though there was no express assent. The Lord Chancellor says (pages 512, 514) the marriage having taken place immediately, a distinct, positive dissent would be necessary to prevent the effect of the letter. The case of Ayliffe v. Tracy, 2 P. Wms. 65, I am not entirely satisfied with, and it is differently stated in 9 Modern, p. 3, and in that case the Lord Chancellor relied on the husband's accepting the legacy in the room of the portion agreed for, though less in amount; and upon another daughter having less than either the legacy or promised portion. Upon the whole therefore I am of opinion that the promise in the letter was sufficiently positive and precise, and under the circumstances of the case was binding on the father.

It is therefore ordered and decreed that the complainant shall have the benefit of the promise contained in his father's letter, and that the executor, Mr. William Godfrey do deliver to complainant all the negroes of the estate, except the woman ordered to be set free, and except those bequeathed to the widow for life, so that the number eleven be made up, and if there be any deficiency in the number that the same be made up by the

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sale *of such part of the estate as may not be included in the bequest to the widow. And that the executors do account with the complainant for the profits and labor of the said eleven negroes from the death of the testator. And that they pay over to the complainant one half of the ready money bequeathed to the complainant, with costs of suit out of the estate.

(Signed,) HENRY WILLIAM DESAUSSURE.

From this decree of the Circuit Court, the defendants appealed on the following grounds:

Because the decree of the Circuit Judge is predicated on the idea that the promise contained in the testator's letter of the 15th November, 1796, was a promise in consideration of marriage; whereas the words of the said letter clearly negative that idea, and shew as conclusively that marriage was not the consideration of the said promise, as if he had said so expressly.

That the words in the said letter are, "whether you marry or not," which are as expressive that marriage was not the consideration of the promise, as if he had said "without regarding the event of your marriage, which forms no part of the inducement or consideration of this promise."

That if this is so, then the promise was merely nudum pactum, which could not be enforced by this Court.

That the cases in 2d Vern. 322, 373 and 200, relied on by the Circuit Court in support of its decree turned on the principle of a portion or settlement in consideration of marriage, and though in the two latter cases there was no writing signed, yet it was proved that the marriage was afterwards had by the consent of the father, and so the contract in consideration of which the promise was made, executed by one party. But here the promise was not made in consideration of marriage, but expressly otherwise, and therefore those cases do not apply.

That the Circuit Judge also erred in his construction of the above words of the said

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letter when he says, "but *surely the promise to give the son eleven or twelve negroes on the marriage is not weakened by the declaration that he will give in all events;" because in fact there was no such promise to give the negroes on the marriage, or in consideration of the marriage, but nothing more than a declaration that he intended to give him eleven negroes without any regard or reference to his marriage.

That the case in 4 Ves. jun. 501, 14, is similar to those in 2d Vern. and turns expressly on the ground of a written promise by the husband to the wife before marriage as an inducement and consideration to and for marriage, and to obviate objections on the part of the wife, in consequence of which the mar-

riage took effect, and therefore is wholly inapplicable to the present case.

For all which reasons these appellants do appeal from the decree of the Circuit Court aforesaid, and pray that the same may be reversed, and that the bill of the said complainant may be dismissed with costs.

At the hearing on the appeal, the following argument took place:

Mr. Fraser, for the complainant, produces the letter from the father of Mr. Caborne, a short time before his marriage approving his intended marriage, and promising him eleven or twelve negroes, by deed of gift, and half of his stock, whether he married or not. The date of the letter, 15th November, 1796. The marriage took place on the 12th January, 1797. The letter implies a consent to the marriage.

The word give, implies an absolute estate in the negroes and other property. The idea conveyed is, that it was an entire gift, without limitations or conditions. 1 Fonbl. 206.

The letter imports a consideration made in reference to marriage: 2d Ventris, 361, Bird v. Bloss. One wrote a letter signifying his assent to the marriage of his daughter with J. S. and that he would give her 1500*l.* sufficient promise within the statute of frauds.

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(Here *was a treaty of marriage.) 2 Freeman, 201, Wanchford v. Fotherly. (Here was a treaty of marriage.) 2 Vern. 373, Halfpenny v. Ballet. No evidence that the father before or subsequent to the marriage declared any dissent to the marriage.

The father has made a will giving less to the son. This is not a compliance with the contract. 2 Vern. 322, Wanchford v. Fotherly. After the letter promising a marriage portion, a settlement was to be drawn, but the young people meanwhile married. As they were ready to go to church, the father of the lady declared he would give them nothing; yet the Chancellor decreed for complainant, though his wife was dead. Lord C. said the father's countermand when ready to go to church was nothing after; the young persons' affections were engaged. 2 Vern. 200, Cook v. Mascall; case of a treaty of marriage. 1 Vern. 110, More v. Hart; Gray and wife v. executors of John James, decided by Judge James and affirmed by the Court. The letter in the case before the Court not more ambiguous than the letter in the case of Gray and wife.

An objection is made to the lapse of time between the letter & the marriage. In cases where lapse of time has been held to be a waiver or abandonment; it is where long delays have occurred; where great changes have taken place; where some plain act of waiver has occurred.

Newland on contracts, 242, quotes Gibson v. Patterson, 1 Atk. 12, to shew that time not important. No abandonment or waiver, by the son nor father.

The will departed from the contract in June, 1808. It gives him a life estate only, in seven negroes. Also some other negroes to his wife for life; then to his son George for life, and limits over to strangers. The rest and residue of his estate to his wife and son George, (which residue is stated by the answer to the $3000, divisible between the mother and son,) no ready money. If the will gives less than the letter, it is not in satisfaction of the promise in the letter; and

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therefore shall not *be a substitute. The child shall take both: Newland 275, Talbot v. Duke Shrewsberry; 2 P. Wms. 130; 2 Eq. Cases, 203. Assimilates it to dower, where the widow is not barred of dower by bequests in a will unless clearly so. 2 Freeman, 242, rule as to widow's dower; 2d Com. on contracts, 416.

Mr. Parker, for defendants appellants, makes five points. 1. No promise in consideration of marriage. 2. No promise at all. 3. If any promise it was nudum pactum. 4. If not nudum pactum, it has been performed. 5. If not performed, the son must elect.

As to the first. The words of the letter are "whether you marry or not, I will give you eleven or twelve negroes," clearly not a promise in consideration of marriage. It was whether he married or not. It was a thing to be done. The locus penitentiæ remained open. Then the cases do not apply. All parties supposed to have knowledge of the laws.

Mr. Parker concurs entirely in the case of Gray and wife v. executors of James, decided by Judge James; but insisted it did not apply.

Second point. The letter from Mr. Caborne to his son is no contract at all. The case different between parents and sons; mere effusions of parental affection. Sons claiming under such assurances, must shew that the father meant to obligate himself at all events, to convey this property to his son. The father promises to leave the son the negroes by a deed of gift. This is an ambulatory promise, and leaves the locus penitentiæ. This is the law between strangers contracting for valuable consideration, a fortiori a voluntary promise to a son. No consideration expressed on the paper; no love and affection. The promise was voluntary and was not performed, not executed. The letter wants certainty; it says eleven or twelve negroes. The deeds were to be drawn; but were not; locus penitentiæ; and he has availed himself of it. This is nudum pactum, 1 Fonbl. 342; 7 term reports 350, Rann v. Hughes.

Agreement without consideration is nudum

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pactum, *whether in writing or not. Censures the doctrine of Pillans v. Vanmierop, in 3 Bur.

Fourth. If not nudum pactum, the agree-

ment has been performed. Nothing in the letter says what estate was to be given to the son, for life, or absolutely. The will has given seven negroes for life; nine to wife for life and then to son for life, and all the stock, and half the personal estate left in residuum, say $1500.

Fifth. If complainant is entitled to execution of the promise of the letter, he must elect between the letter and the will.

2 Ves. jun. 367, Whistler v. Webster, the doctrine of election differs from the doctrine of satisfaction, and has no relation to quantities or values. 3 Ves. jun. 191, Wilson v. Mount. In the case before the Court Mr. Caborne claims under the will, and shall not claim benefit of a promise in hostility with the will. The will disposes of all his property: 1 Ves. jun. 135.

In this case a disappointment must arise, if Mr. Caborne claims under the will and the promise.

Mr. Simons, for the complainant, respondent. As to the will having performed the promise contained in the letter, by the bequests in the will. Roberts on fraud, 47.

The performance must be of something of the same kind, quantity and value, and must concur in time.

The contest usually is between different children, and the Court strives to restrain double portions to some children to the prejudice of other children. But here there is a contest between the only child of testator and mere strangers.

1 Ves. 520, Barret v. Beckford. Double portions not favored lest too much be taken from the heir. But he is not favored by our laws which equalize: satisfaction and performance synonymous. 2 Salkela, 461, Saville v. Saville; 2 Ves. 38, Allen v. Allen; 2 Fonbl. 327; 1 Bro. 130, Haynes v. Micho; 1 Bro. rep. 555, Holmes v. Holmes; 1 Bro. rep. 425, Graves v. ———.

Compare the facts of this case. A promise by letter to give eleven or twelve negroes,

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and a will making other *gifts. It is objected that the promise is not to give an absolute estate in the negroes. It might be for life; but it was a promise to provide for a family. How different the will. It is not a performance; all the legacies are for life, except the residuum in money, and most of the legacies are contingent, (dependent on his surviving his mother in law.) The residuum, (about $1500), cannot be considered as a satisfaction for eleven or twelve negroes, worth at least $4500.

The letter is not confined to the eleven or twelve negroes and part of the stock. It says that certain, and perhaps more.

Not certain by the letter when the property was to be given to the son; something obscure. But examine the letter carefully (with a view to a marriage) and it seems that it was to take effect when the marriage takes effect. If so then the father kept the property, and the son is entitled to the full benefit of it.

In 2 Bro. rep. 516, 521, it is laid down that the rule of construction under these cases on this doctrine of satisfaction is not to be extended.

Question of election. Defendant must shew it is a case of election, and that the will is inconsistent with the promise, by tending to defeat other legacies.

Such a promise from a father is a debt of the highest order; due by testator to his son. It is a debt, and his will professes to provide first for debts.

The son and father never quarrelled, lived in harmony. Can it be believed that the father would under such circumstances, cut off a son with a mere life estate, by his will, leaving his son and his children unprovided for, in favor of strangers; yet such would be the effect of the construction of defendants. It is more natural to suppose that he meant to comply with the promise by letter, and make further provision by will.

Probability is that testator meant to purchase negroes for his son, else it would have broken his gang too much, as he had but about nineteen negroes.

As to the stock, that left could not have

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been that spo*ken of in the letter. It must have died off in twelve or fifteen years, between the date of the letter and the death of testator. Something will be still left to the strangers.

The lapse of time between the promise and the death of the father, is said to be against the son. This might be of importance between strangers; but not between father and son. Son could never sue his father in his lifetime, without disgrace; therefore no abandonment of his claim.

Mr. Prioleau, for Mr. Caborne. 1. The letter created a debt which was obligatory on the father. 2. The will has not satisfied the debt. 2 Vern. 322, Wankford v. Fotherly; 5 Viner, 522, Hodgson v. Hutcheson. The promise enforced even in a case where a father retracted. Ves. jun. 199, Dundas v. Dutens.

The promise in this case was in consideration of marriage. The whole letter looks to the marriage. It originated in enquiry relative to the marriage, and ends on the same subject. Evidently to encourage the son's marriage. He soon after the receipt of it married. The violent presumption is that he and the lady married on the strength of the letter. 1 Sanders, note 211, 6. 1 Vern. 110, 201: Perhaps the best rule is that any damage, or any suspension, or forbearance of his right, or any possibility of a loss occasioned to the plaintiff by the promise of another, is a sufficient consideration for such

promise, and will make it binding, though no actual benefit accrued to the party undertaking: 3 Burr, 1673.

The will is not a satisfaction of the promise: 1 Atk. 427, Bellasis v. Uttwhatt. The thing given in satisfaction must be of same nature, &c.: 1 Ves. jun. Forsyth v. Grant; 2 Vern, 298, Goodfellow v. Burchell; 3 P. Wms. 6; 1 Bro. Ch. Cas.; 2 Vern. 258.

A contingent legacy or provision cannot satisfy a portion: 2 P. Wms. Eastwood v. Burke. 1 Bro. 129, 3 Atk. 96: Wherever there is a difference in any circumstance, a legacy shall not be taken in satisfaction of a prior debt.

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*3 Ves. jun. 466: Slight circumstances laid hold of by the Court, to prevent the legacy being considered as a satisfaction for a debt. Kekewicke's digest 216: Legacies to strangers to abate in preference to legacies to children. All the property came to the complainant's father by his wife, the complainant's mother.

The Court of Appeals delivered the following decree:

The only point made in this case arises on a letter from a father to his son, who was about to marry; in which he says, "I am informed you are going to be married; if so I sincerely wish you and the lady happy, whoever may be your wife, and hope you will do all in your power to render her life so. Whether you marry or not I shall leave you in a deed of gift eleven or twelve negroes and half my stock; this you may be certain of, perhaps more. I am now about having the writings drawn by a lawyer. Why don't you write a few lines this way to let me know the truth of the report?" The son married two months after the date of this letter, and the father died without complying with his promise, and the bill is brought for a performance of it. The counsel for the defendants says that this promise was not made in consideration of marriage, and that it is not binding; that it is a general promise to the son whether he married or not, and is nudum pactum. The letter was written on the occasion of the report of the intended marriage of the son, relates to that subject, and the marriage followed soon after. The promise to the son if he married, is not in the least impaired by the expression in the letter "whether he married or not." The promise in the event of marriage is still of force, and the only operation of the words "whether he married or not," is to give to it a greater extent. The son married and is entitled to have the promise to him made good. The decree is affirmed.

(Signed,) THEODORE GAILLARD,
HENRY W. DESAUSSURE,
Wm. DOBEIN JAMES.

3 Desaus. *529

*Case LXIII.

ARCHIBALD JAMIESON, Assignee of Roderick and John Young v. FORBES, WALKER and Others.

[Tried before Chancellor Desaussure, February, 1813.]

[*Assignments for Benefit of Creditors* ⟸258.]

A person to whom a bond is assigned, not in his own right, but as the attorney or assignee of others, for the benefit of creditors, shall not apply it to satisfy or secure his own debts. If he does, the transaction shall be set aside, and the bond restored to its original destination.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 733; Dec. Dig. ⟸258.]

[*Assignments* ⟸98.]

[Where a bond assigned to a person as attorney for another, and to be applied to a particular purpose, was pledged by the attorney, for his own debt, it was *held* that the pledgee, who had notice that the pledgor held the note as attorney, could not retain it against the true owner.]

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 176; Dec. Dig. ⟸98.]

The complainant states the sale of certain property by the master in equity under a decree of this Court at the suit of the complainant, and that Alexander Forbes, one of the defendants, pretending to act as complainant's attorney, obtained possession of the bond and mortgage ordered to be taken by the master to secure the payment of the price of the property sold; and that the said Alexander Forbes, without any authority or power whatsoever, pretended to transfer the said bond and mortgage to Robert Walker, another of the defendants, as a collateral security for a debt due or pretended to be due by the said Alexander Forbes to the said Robert Walker. Complainant further states, that the said Alexander Forbes had possessed himself of various debts and books of account, the property of complainant as assignee as aforesaid, for which the said Alexander refuses to account. And further complainant states, that William L. Smith and Thomas Bennet, junior, the persons interested in the said bond and mortgage had refused to promise that they would not pay over the money due upon the said bond to any other person than the complainant. Complainant prays relief.

The defendant, Robert Walker, states in his answer that he has heard of the sale of the property mentioned by complainant, and that it had been secured by bond and mortgage; but the mortgage he had never seen; that the bond was in the possession of Alexander Forbes, who was considerably indebted to this defendant; that he believed the said Alexander Forbes has full power over the said bond; and that this defendant took an assignment of the said bond in payment of his said debt, pledging himself to refund the

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surplus to the said Alex. *Forbes; that this

defendant applied to the master of this court, who told him that the said A. Forbes might do what he pleased with the said bond; and that a balance of five hundred and fifteen dollars, forty-five cents, still remains due by the said A. Forbes to this defendant; that a suit has been instituted by this defendant against Thomas Bennet, junior, and Eliza Smith Fraser on the said bond. This defendant insists that the whole transaction on his part was bona fide; denies all confederacy, and prays to be dismissed, and so forth.

The bill is taken pro confesso against A. Forbes.

The answer of William Lougton Smith was filed, but he hath since departed this life.

Mr. Bennett has answered. He and Mr. Smith only ask that the Court would protect and direct them in the payment of their debts on the bond in question.

On the trial of the cause the bond was produced, and it appears to have been made payable to Mr. Wm. H. Gibbes and his successors in office, for a much larger sum than the amount said to be due by Forbes to Walker; and an endorsement appears on the back of it by which Mr. W. H. Gibbes, as master in equity, assigns it to Alexander Forbes, attorney to the concern of Roderick Young, and assignee of the same by order of the court of equity. There is an endorsement in blank by A. Forbes, under which Mr. Walker claims.

The order of court under which the master assigned the bond to A. Forbes, is in these words: "Archibald Jamieson, assignee of Roderick Young, and joint assignee of John Young: Ordered that the cash and bonds of the purchasers of lots on Harleston's Green, made at sales by the master as directed by the court, after discharging the costs, be by him paid over to Alexander Forbes, the attorney of said A. Jamieson, and D. Kinment, joint assignees of John Young, paying to the representatives of each estate the share to which such estate is entitled, to be by them applied according to law."

The master was examined by the defendant Walker, to prove what he had said and

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done respecting this tran*saction. He stated that he had made the assignment to A. Forbes which appears on the back of the bond, & Forbes gave him a receipt on the 28th April, 1808, for the bond, and signed himself as attorney for the assignee of Young. Some time after Mr. Walker applied to him for information relative to the same. He did not recollect exactly what passed, but thinks he told him that Forbes had control over the bond.

Mr. King, for complainant. The decree being taken pro confesso against Mr. Forbes, is an admission on his part that he had no power of attorney, and still less any power to sell. He was indeed not the attorney of Roderick Young. Forbes had the custody of the bond, but no power of assigning or transfering. There was enough on the face of the bond to put Mr. Walker on his guard. If the attorney should assign a bond, he must do it in his character as attorney. But he does not assign it as attorney. He assigns it in his own name; assignment not made for the benefit of the estate he represented, but assigned or pledged for payment of his own debt. Complainant is assignee under the court of common pleas for the benefit of creditors: 1 Com. on contracts, 237. An agent or factor cannot pledge or assign the property of his principal to secure his own debt: 2 vol. decrees of this court, p. 14.

Walker should have called for the power of attorney, under which A. Forbes acted: 1 Campbell. Agent acting under general powers must conform to the usage. It is agreed that the master said to Walker that Forbes had a right to do what he pleased with the bond.

Mr. Gibbes, the master, was called upon to prove the declaration he made to Walker. He said he did not remember exactly the language he held to Walker; but thinks that he told him that Forbes had the control of the bond.

Forbes gave receipt on the 28th April, 1808, for the very bond in question, and signed as attorney for the assignees. Receipt was produced.

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*Mr. Hayne, for defendant. The defendant has acted honestly. He made enquiry of the master, whether Forbes had authority to assign the bond, and the evidentia rei is with him. The claim is not for the whole of the debt. It was given as a security for a debt, and there is a balance coming to the complainant. Relying on this bond, Walker has not pursued his legal remedy against his debtor, and he has become insolvent. Commercial principles apply to this case; the case of innocent indorsees. The case of bonds, as decided in our own country, is similar: See the cases in Bay's reports, Kennedy's case, Bay and Fraser, 1 Bay, 63.

The assignment made by the master is to Forbes as attorney of Roderick Young and assignee, and his assignment is in blank; he therefore assigned in his character of attorney, and he had the right to assign.

Walker had a right to receive it to secure himself: Montague on set off, p. 31; the doctrine of sale of personal property.

Admit that Walker taking this bond as a security is not so strong as if he had sold him goods, or taken it as a payment; but still he had a right to do either. The principal suffers by the act of his agent, Forbes; and he who trusts most, should suffer most.

Where the equity is equal, melior est conditio defendentis. The case of commissioners of public accounts v. Moultrie and Tunno. differs from the one before the court, in four particulars:

1. The bond was not negotiated in that case; it was not used for commercial purposes.

2. Tunno knew that Moultrie had no right to settle the debt as he did. (See words of decree.)

3. That was a debt due to the public, and not a subject of assignment.

4. It was the case of an attorney at law, which differs from the case of a general attorney, who generally has power to compromise and discharge the debtor. And the decree decides that Rose should sustain the loss, because of the misconduct of his agent.

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*Mr. King, for complainant. The master's testimony is not very strong; merely that (possibly he said,) Mr. Forbes, as attorney of Mr. Jamieson, had power over the bond. But the power had been revoked. There is no positive proof of this. But Walker's silence, his not answering the allegations of the bill, admits his power at an end. 4 Dallas, 234. A party making a promise under mistake of law or fact, is not bound.

It is conclusive from the pleadings, &c. that Walker knew Forbes held the bond as an attorney.

Factor sells goods for his principal, and fails, his assignees are not at liberty to recover the money due. It did not belong to him, but to his principal.

Walker was the person who trusted most; he should have enquired the extent of Forbes's powers. If he had he would have found he had no authority to transfer it on his own account. If he did not enquire, it was his own fault. He trusted that he had greater powers than he had. The transaction originated in this court, and the complainant is entitled to the protection of this court.

Decree.

There does not appear to me to be much difficulty in this case. The attorney of an assignee, and joint attorney of another assignee, gets possession of a bond, under the order of this court, directing the application of the money to the payment of a debt partly to the estate of R. Young, and partly to the estate of A. Young. Instead of applying the bond in this way, he makes a blank assignment of the bond to Mr. Walker, as a pledge for the payment of a private debt of his own to Mr. Walker. This conduct is utterly unjustifiable and unwarranted. It does not appear whether this power of attorney was revoked at the time he made the assignment; but this makes no difference in the case. Suppose the power of attorney to have been in full force? It must be taken to have been an ordinary power, which authorises him to receive the money for the use of his principal, and that principal himself was only an assignee for the benefit of oth-

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ers. It was a gross depar*ture from such a power to assign it in payment, or as a pledge for his own private debt. He did what he had no authority to do, and what was not implied in any power. The defendant, Mr. Walker, in accepting the assignment to himself, saw on the face of the transfer by the master to Forbes that it was an assignment to him as an attorney to others, and not in his own right. He therefore took the assignment with a knowledge that Forbes had no interest in it, and could not apply it to his own purposes; but that it was applicable to other purposes. It is relied on for defendant, Walker, that he consulted the master who told him that Forbes had control over the bond. Admit this to the extent, it could only mean that Forbes had control over it, as expressed on the face of the assignment, to wit, as attorney for the assignee, and for particular uses. If however it had been much stronger, and the master had actually informed Walker that Forbes was owner of the bond, and could apply it to his own purposes, it would not have altered the rights of the parties. It would have been a misinformation, not binding on the party whose interests were affected by it. The defendant, Walker, was bound when he saw on the face of the assignment, that the master had assigned the bond to Forbes, as an attorney for the benefit of others, to have required the production of the power of attorney, and to have seen whether Forbes had any authority to apply the bond to his own purposes, before he accepted it as a pledge from Forbes, in payment of his own debt. The cases cited from Bay's reports have no application to this case. The doctrine has been well settled, and the principles both of law and justice are entirely against the defendant.† I must therefore decide against him. It is ordered and decreed that the defendant do deliver up the bond to the com-

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plai*nant, and that the defendants, the obligors in the bond, be restrained from paying the money due on the bond to any other person than the complainant, or some person legally authorised by him to receive the same.

HENRY WILLIAM DESAUSSURE.

† This case comes within the principle of the decision of this court in the case of the commissioners of public accounts v. Rose, Tunno and Moultrie. [1 Desaus. 461;] for the doctrine laid down in that case is as applicable to cases between individuals, as between the public and individuals; and to the conduct of attornies in fact as well as of attornies at law.

3 Desaus. 535

Case LIX.

Mr. LEQUEUX, Executor of James Addison, Deceased, v. PETER OLIVER.

[Tried before Chancellor Desaussure, Charleston, February, 1813.]

[*Bonds* ⊂⊃45; *Lost Instruments* ⊂⊃8, 11.]

Bill to set up a bond and mortgage, which it is alleged were lost by the obligee in his lifetime. The defendant, the obligor, admitted the execution of the deeds, but insisted that they were not given for any valuable consideration, but merely to cover his property for a time from his creditors. And he relied upon a memorandum in writing of the obligee, acknowledging that the deed was given for that purpose alone. That memorandum has been lost pending this suit; but it had been seen and examined by many witnesses; some doubted if it was the signature of the obligee, but the weight of testimony seemed to be in favor of it. And several witnesses stated that the obligee had repeatedly declared that the bond and mortgage were not given for valuable consideration, but to cover the obligor's property. It was decreed that the bond and mortgage should not be set up, and the bill was dismissed. Costs to be divided.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 40; Dec. Dig. ⊂⊃45; Lost Instruments, Cent. Dig. §§ 17, 20, 63; Dec. Dig. ⊂⊃8, 11.]

This is a bill filed to set up a bond and mortgage alledged to have been given by the defendant, Oliver, to the deceased Mr. Addison, and lost by him in his lifetime. The bond is stated to have been dated on the 1st of May, 1805, and conditioned to pay the sum of $3400. The mortgage of the same date for nine negroes, to secure the debt.

The answer of Mr. Oliver admits that the bond and mortgage mentioned in the bill, were made and executed by him; but denies that he was indebted to the deceased Mr. Addison in that or any other sum; and avers that the bond was given without any consideration; but that being indebted to others, and fearful of being pressed by a hard creditor, he had given this bond and mortgage to Mr. Addison, in order to cover his property until he could collect funds, to pay his debts, without any view to ultimate fraud or imposition. And that Mr. Addison being intimate with the defendant, he agreed to accept and hold the said bond and mortgage in special confidence merely to shelter defendant's property for a time. And also that Mr. Addison shortly after the execution of the said bond and mortgage, to wit, on the 12th of May, 1805, gave this defendant a receipt or memorandum, explaining the transaction, acknowledging that he had no claim

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on the defendant on account of *said bond and mortgage, and that he held the same merely as a shelter to defendant's property against his creditors; and that he would deliver up the bond and mortgage when required.

The defendant states that he has no doubt, if Mr. Addison had lived, he would have delivered up the bond and mortgage. On the trial of the cause much testimony was given, the material part of which will be hereafter noticed.

The first question and indeed the principal one in the cause was, whether the bond and mortgage were given to secure a just debt, or were fabricated without any consideration for the special purpose of covering Mr. Oliver's property from his creditors.

The executor of Mr. Addison, knowing nothing of the transaction relied on the bond and mortgage themselves, as evidencing a real debt. The defendant, Oliver, relied on the receipt or memorandum in writing, alledged to have been given by Mr. Addison to Mr. Oliver, soon after the date of the bond, acknowledging the bond and mortgage to have been executed without any consideration; and accepted by him for the special purpose of sheltering Mr. Oliver's property. And the defendant further relied on the verbal declarations of Mr. Addison to the same effect.

The testimony as to the genuineness of the receipt or memorandum, was very contradictory. It is due however to the witnesses to say that they all gave their testimony with great candor and caution, and that the difference of opinion which prevailed between them might well exist on such a question. Mrs. Sergeant who was very clear in all her testimony, was very sure that the signature of Mr. Addison (who was her father) to the receipt, was not in his hand writing, but that it was in the hand writing of Mr. Williams, who was a relation and friend of her father, and who was often employed to write for him, and sometimes wrote letters, and signed his name to them; but she did not know that he had ever signed receipts or

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bonds. Mr. Darrell stated that *he knew the hand writing of Mr. Addison very well for the last two years of his life; that he had carefully examined the signature in question, and though there was a strong similitude to Mr. Addison's hand writing he did not believe it was in Mr. Addison's hand writing; that in fact, it was better than he had ever seen him write. On the other hand Mr. Norwood who had a slight knowledge of Mr. Addison's hand writing, swears that he examined the receipt carefully, and he was of opinion that the signature in question was in Mr. Addison's own hand writing, and that he and Mr. Davis agreed that when Mr. Oliver produced the receipt to Mr. Lequeux, the executor of Mr. Addison, at the time he caused Mr. Oliver to be arrested on the ne exeat issued in this case, Mr. Lequeux appeared to be satisfied that it was Mr. Addison's signature; and in that persuasion actually discharged Mr. Oliver from the arrest, though he declared that as he was acting for an estate, he must go on with the suit. In the perplexity arising from these different opinions, we are obliged to resort to the circumstances.

Mrs. Sergeant, whose testimony was the strongest on this point against the defendant, states that she thought the signature of her father's name was in the hand writing of Mr. Williams, that friend and relation of her father, who was originally employed to write for him, and even signed his letters. And Mr. Williams's signature as a subscribing witness to the receipt, is admitted on all hands to be genuine. Now as there is no imputation on the character or conduct of Mr. Williams, this furnishes a presumption that the signature of Mr. Addison's name, if not made by himself, was made by his direction by Williams. Another consideration of weight is the evidentia rei, furnished by other circumstances of the case. The testimony as to Mr. Addison's verbal declarations is (as we shall presently see) very strong to establish the fact that the bond and mortgage were not given for any consideration, but merely to shelter Oliver's property. This furnishes a strong presumption that Oliver

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would require and Ad*dison would give a private memorandum explanatory of the real nature of the transaction, such as the receipt in question purports to be; as well to guard against death, as to prevent an improper use of the bond and mortgage. Men acting such an immoral part as Oliver was doing, are apt to be suspicious, and to guard against others acting a similar part by them. It is however a great consolation that we are not obliged to decide this case on the testimony alone which relates to the receipt, which must after all be allowed to leave doubts on the mind.

In considering the second ground of defence, the verbal declarations of Mr. Addison as to the nature of this transaction, we have very clear and decisive testimony. Mrs. Sergeant (who was swearing directly against her interest) and Mr. Doyle and Mr. Shackleford all agree that Mr. Addison did repeatedly and deliberately on various occasions declare to each of them that the bond and mortgage in question, were not given to him for any valuable consideration; but were executed by Oliver and received by him for the special and sole purpose of covering the property of Oliver from his creditors. Some circumstances were ingeniously urged by the counsel to weaken the effect of this testimony; but they were by no means of such weight as to affect in any degree the plain and positive testimony of three irreproachable witnesses. Nor is there a conceivable reason why Mr. Addison should have made such repeated and solemn declarations, as they impute to him, against his own interest, unless it had been the very truth of the case. This would appear to put an end to the executor's claim to set up this bond and mortgage as evidences of a real debt, which he has a right to claim from the defendant. But it was contended by the complainant's counsel, that at all events, this was a voluntary bond obligatory on the defendant; and which he could not get rid of, though his creditors might have set them aside. A good deal of learning was gone into on this point; but it does not appear to me to have any ap-

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plication to the case. This *was not a voluntary bond, in the proper sense of those words. It was not intended to create any obligation on Oliver to Addison. It was expressly made and accepted for the particular purpose of covering Oliver's property from his creditors, by the shew of a prior lien. And it would have been as immoral in Addison, to have set up the bond and mortgage, to establish a debt due to himself, as it was in Oliver to fabricate such a bond and mortgage to cover his property from his creditors; and if I could possibly sanction such a demand, the maxim applies that in such transactions, potior est conditio defendentis.

It is therefore ordered and decreed that the bill be dismissed.

In such a case I cannot decree costs to be paid by the complainant to the defendant. But as Mr. Addison was not quite clear of blame in lending his name to sanction such a transaction, I think his estate ought to bear its costs. Let each party therefore pay his own costs.

HENRY W. DESAUSSURE.

February 22, 1813.

Mr. Geddes, for complainant.
Mr. Heath, for defendant.

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Case LX.

JOSEPH BROWN, executor of M'Kearny v. WILLIAM H. GILLILAND.

[Tried before Chancellor Desaussure, Charleston, February, 1813.]

[*Execution* ⇐111.]

The defendant became the purchaser of certain slaves at a public auction: but finding there were executions which he supposed bound the slaves, he refused to comply with the purchase. A bill was filed to compel him. The Circuit Court (on the coming in of the Commissioners report, on the question whether the purchaser could be made secure) decreed, that the contract should be carried into specific execution, as the executions in question were functus officio, and had lost their binding efficacy. The Court of Appeals reversed the decree, on the ground, that the executions bound the property, and that a good title could not be made to the purchaser.

[Ed. Note.—Cited in Greenwood v. Naylor, 1 McCord, 418; Adair v. McDaniel, 1 Bailey, 161, 19 Am. Dec. 664; Dargan & Bradford v. Richardson, Dud. 66; Haynesworth v. Frierson, 11 Rich. 478; Rutledge's Adm'rs v. Hazlehurst, 1 McCord, Eq. 471; Warren, Wallace & Co. v. Jones, 9 S. C. 292; Carrier v. Thompson, 11 S. C. 83, 85; Baxter v. Baxter, 23 S. C. 118.

For other cases, see Execution, Cent. Dig. § 218; Dec. Dig. ⇐111.]

The bill charges that the complainant Joseph Brown, made a sale at public auction of three negroes belonging to the estate of his testator, on the 19th day of January, 1813, by leave of the ordinary, and that the defendant Gilliland being the highest bidder, became the purchaser at five hundred dollars; and the said negroes were put down to

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the debit of the said Gilliland, accord*ing to the custom of auctions. That the complainant offered to deliver the said negroes to the defendant and give him a bill of sale for them, and requested him to perform his part of the contract relative to said negroes, by paying the purchase money, which he has refused to do. The bill prays for a specific performance of the agreement.

The defendant admits the sale of the three negroes as stated by the complainant, and the purchase by him at public auction for the sum of $500; but he denies that he has refused to comply with the terms of the sale, and declares his readiness to receive the negroes, and a bill of sale for them, and to pay the purchase money, provided he is made safe in doing so. But he insists that there are two executions amounting to $494.64, against the estate of the said M'Kearny, which were lodged in the sheriff's office, and bind the said property; and defendant submits that he would not be safe in paying his money unless the same were applied to the satisfaction of those executions, and that he is not bound to pay his money till he is secured in this respect; and that he is willing to comply with the contract as soon as he can be made safe therein.

This case was submitted to the Court without argument. From which I conclude that the parties are satisfied under the authority of the decided cases, that at the sale of a personal chattel at public auction, the auctioneer, after knocking down the hammer is to be considered as agent for the buyer, and that his setting down the name and price, &c. is sufficient to satisfy the Statute of frauds. And there is no doubt that this is so settled by decisions as to personal chattel, that it would be very dangerous to shake that construction of the statute.

I am also left to conclude that the defendant will be well satisfied to accept the negroes and to comply with the terms of the sale, provided he can be made safe, without raising any question as to the authority and practice of the Court to enforce the specific performance of agreements, respecting per-

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sonal chattel. It is the *common course of the Court to decree the specific execution of contracts respecting real estates; and it is equally the settled course of the Court to refuse to decree the specific execution of contracts, as to some kinds of personal chattels, particularly stock. Some exceptions have been made as to some special kinds of personal chattel, under peculiar circumstances; and I am inclined to think that there are good reasons for including negro slaves, (which in some of the states are considered as real estate, or partaking of the realty,) among those chattels relative to which this Court might decree a specific execution of contracts. I shall not therefore hesitate in this cause, especially where the defendant makes no objection on that ground; but declares his readiness to comply with the contract.

The only objection made by the defendant to the complete execution of the contract in question, is as to the security of the title which the complainant can make him for the negroes purchased. He apprehends them to be bound by certain executions which are alleged to have a lien on them; and that unless the purchase money be applied to the satisfaction of those executions, he will not be safe. The defendant undoubtedly has a right to a secure title before he is obliged to pay his money, as in cases of contracts for real estate, where it is usual to refer it to the master to enquire and report upon the title of the seller. It is therefore ordered and decreed that it be referred to the master to enquire into and report as to the title of the seller of the negroes, and whether it be proper for the purchase money to be applied to the satisfaction of the executions which are supposed to bind the negroes, or to be paid to the executor for the general purposes of the estate. And that upon the coming in of the report stating the manner in which the defendant can be made secure, as to the title to the negroes, the contract shall be carried into effect in such way as by the order of the Court shall make the defendant safe.

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*The Commissioner to whom the case was referred, made the following report:

It having been referred to the master to enquire into and report as to the title of the seller of the negroes, and whether it be proper for the purchase money to be applied to the satisfaction of the executions which are supposed to bind the negroes or to be paid to the executors for the general purposes of the estate; and this case having been brought before me by consent of parties, and having been ably argued by counsel, I do in obedience to the above order report, that from the principles of the common law and a reasonable construction of the act of assembly of 1789, as well as the statute of frauds, it appears obvious that the property of the testator acquired subsequent to the lodging of the execution in this case is bound, because judgments and executions bind the estate or property of the defendant from the time in which judgment shall be signed or execution lodged. The judgment being signed or execution lodged, they respectively remain as liens upon the estate or property of the defendant until satisfied. This point being dismissed, it only remains to enquire what is

the duty of the purchaser on the present occasion, and whether he would be safe in taking the title of the executor before the execution on judgment is satisfied? This question I believe has never been expressly decided in our Courts; but I feel less difficulty in forming an opinion upon it than on the first point, because from all the law which was cited in argument or to which I have been able to refer, it seems clear that although a purchaser be not bound to see the application of the funds to the payment of the general debts of an estate, yet that it is his duty to see them applied to the payment of specific debts, such as debts referred to in a schedule, &c. 2 Fonblanque 148, 9. If then a purchaser be bound to notice debts which are not of record and which have no specific lien on the estate or property, a fortiori would he be bound to notice judgments and executions which are debts of record, and by which the estate or property is specifically bound as in the pres-

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ent case. I am therefore of opinion that it would be unsafe and imprudent on the part of the purchaser on the present occasion to receive the title of the executor without first seeing the judgments and executions paid and satisfied.

(Signed,) Thomas Hunt, comm. in equity.

Charleston, March 8, 1814.

To this report the following exceptions were filed:

Exception 1. The executor having authority both by the common law and by an act of assembly of 1789, to dispose of the personal estate of the testator for the payment of debts, a purchaser from him can have no better title; the purchaser is not obliged to see that the executor applies the purchase money to the satisfaction of the debts. The executor's duty is marked out, and if he violates it he is responsible to creditors and any persons interested.

2. By the said act of 1789, executions are enumerated among the debts which the executor is directed to pay off and settle. How can the executors pay off the said executions if the purchaser from him will not pay him the purchase money? The act necessarily supposes that he is to receive the money in his hands when he makes a sale of the personal property, for the payment of debts.

3. In this case the negroes which were sold by the complainant as executor, cannot be considered as bound by the executions lodged against the testator in his life time, because as it is admitted that the said executions were returned to May Court, 1811, nulla bona; and that they were never renewed, the negroes purchased by the testator subsequent to the return of the said executions nulla bona, † could not be subject to their binding efficacy. That cannot be bound which is not in existence. No injury is done here in this view to the creditors who lodged those executions, because the executor will do his duty, but does not wish to be watched

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in *it and compelled to it by a purchaser from him, more particularly as by renewing those executions in the life time of the deceased, they might have seized and sold those negroes. William Lance, comp. sol.

The cause came to a hearing before Judge Thompson, in March, 1814, who made the following decree:

The only point in this case is whether an execution after it has been returned nulla bona, and dead to all intents and purposes, can have such a lien, on after acquired property, as to make it liable for the payment of the debt, for the recovery of which the execution issued. I consider such an execution precisely as if it never had existed, inasmuch as there were no effects on which it could have attached, and of course could have no binding efficacy. It differs widely from the case in Bay's reports. There the binding quality was created from the time the execution was entered in the sheriff's office, there being effects on which it attached. But in this case the execution was defunct, previous to the acquisition of the property; and it would be in vain to say that a non-existing thing can possess existing powers. The exception to the master's report must therefore be sustained; and the defendant is ordered to pay over the amount of the purchase money to the executor, and the executor is ordered to make him title to the negroes.

(Signed,) W. THOMPSON.

From this decree there was an appeal.

In this case it was admitted that William Gilliland, this defendant, purchased at public auction a negro woman and two children for $500; which negroes were sold as the property of M'Kearny, deceased, by his executor the compl't Brown. This defendant to save himself harmless previous to proffering the purchase money examined the sheriff's office in which he found executions had been lodged against M'Kearny for $494, on which executions the returns of the sheriff were

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nulla *bona. It was also admitted that these negroes had become the property of M'Kearny subsequent to the return of these executions. This defendant offered to pay the purchase money to the executor, provided the negroes were released from this lien; which, however, was refused. He then offered to pay the money into the hands of the sheriff or any other person who might be selected by the complainant and defendant, there to abide the order of the honorable court of equity. This was however considered unnecessary. The suit in equity was instituted for the

† That is to say, the said executions were returned to May Court, 1811, and never renewed; and the said negroes were purchased by the complainant's testator in August, 1811.

guidance and safety of the parties, and was considered amicable. The defendant was mulcted with costs. In this case notice of an appeal was given on two grounds:

1. That agreeable to the law and the decisions that have taken place, ([Fotheringham v. Price's Ex'rs] 1 Bay, 292, [1 Am. Dec. 618,]) a writ of fi. fa. lodged in the sheriff's office, binds property of the defendant in such case, beyond the period for which it is made returnable, even though the return of such execution should be nulla bona. And also that the lien of such execution extends to personal property obtained by such defendant subsequent to the return of such execution.

2. That as the complainant refused to apply the purchase money which was tendered him, to the satisfaction of executions in the sheriff's office, or to have such money paid into the sheriff's hands, this defendant ought not to be subject to the payment of costs consequent upon the payment of the complainant's bill.

Ben A. Markley, def. sol.

Decree of the Court of Appeals.

The defendant purchased certain negroes at public auction, which were sold by the complainant as the property of his testator, M'Kearny. There were at the time executions in the sheriff's office against M' Kearny which were unsatisfied, and on which there had been returns of nulla bona. The defendant insists that the purchase money for the negroes ought to be applied to the discharge of these executions, and the complainant contends that the negroes are not bound

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by the execu*tions, because they had been acquired by his testator after the returns aforesaid were made by the sheriff. The question then arising out of this case is whether the lien of an execution is confined to such goods only as belong to the debtor at the time when the writ is lodged, or whether it extends to goods acquired by him afterwards. This question has never been settled by our Courts, †† nor is there any light on the subject to be derived from precedents; it must therefore be decided upon general principles. Two cases were quoted on the part of the complainant, but neither of them determine the point before us. In the case from 10th Vin. tit. Ex. it is said, "If one recovers in debt he shall not have execution but of those goods which the defendant had at the day of the execution made." This only means (as is evident from the whole case) that an execution shall not have a retrospective lien, on any goods which the debtor may have disposed of before the execution was lodged. In 2 N. York T. R. 243, it was held that an execution could not be levied on property acquired by the debtor after the return day, because its operation was then at an end. But the Court proceeds to say that such property may be come at, by procuring a return of the execution and issuing an alias. This is saying nothing more than that the active quality only of the execution ceased at the return day, and that a renewal of it was necessary to give it operation as an authority to sell; the binding quality of an execution is not there determined on; but whatever may be the construction of that or any other Court upon this point is immaterial here; for the construction of the Constitutional Court upon it in the case of Snipes v. Sheriff, 1 Bay, 295 (which has become a rule of property on the subject) ought to govern in the present case. In that case it was determined that the binding effect of an execution continued, notwithstanding its active

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power was *not kept alive by renewals. The lien therefore of an execution on goods is under the authority of that decision of the same nature as that of a judgment with respect to lands. What then is the lien of a judgment? It is a continuing charge which operates until it is satisfied upon all the lands of the debtor, whether belonging to him at the time of the judgment being entered up or acquired afterwards. This effect of a judgment has not heretofore been questioned, and is supported by the construction of the English law as far as it is applicable to the subject. Under a recognizance on the statute merchant, or in the nature of the statute staple, "If the conusor purchase lands after he has bound himself, such lands are subject to execution." 2 Bac. 698. This remedy against lands, which is more full than any other permitted by the law of England, is most analogous in principle to the remedy under our lien. The statute staple and the writ of extent (the execution proceeding from it) were originally devised for the security of merchants. So also a judgment and fi. fa. here against lands which are derived from the stat. 5 Geo. 2, were given (as the preamble states) for the advancement of trade.

Upon principle then, a judgment, like a statute staple, should bind lands acquired by the debtor after the judgment has been entered up, and if so an execution will have the same effect as to goods. But it was argued, how can the execution in the present case bind negroes which belonged to a stranger when the execution was lodged? This would be a good objection if the lien of an execution was only a specific charge on the goods of a debtor. But if it is a general charge (which appears to me to be its true nature) then it may not only bind the existing property of the debtor, but may in con-

†† It was made before the Constitutional Court about nine years ago, in the case of Parker v. Administrator of Levacher, but the Judges (all being present) were equally divided upon it. No opinions however were publicly delivered, as the case went off on another ground.

struction of law, subject to its operation any other property which he may have afterwards. Every debt as soon as it is contracted, vests in the creditor a right to be paid out of any part of the debtor's estate; and while only a chose in action, it has an inchoate lien on all his property, whether ac-

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quired before or after the *contract. When sued therefore, and the right is consummated by a judgment and execution, the general lien of both becomes perfect, and should continue to charge not only the existing property of the debtor, but also to attach on all his future acquisitions. If indeed an execution becomes dormant it must be revived by a scire facias before it can have an active operation; but its binding quality, like that of the judgment, continues until it is satisfied, or until length of time furnishes sufficient ground for presuming satisfaction. This principle is expressly recognized by the 26th clause of the executor's act, which although it forbids any preference to creditors in an equal degree, yet declares that the executions which have been first lodged in the sheriff's office shall be first paid, without requiring any renewals, and without any regard to the time when the property of the debtor was acquired. The rule prescribed by this act is in conformity with the legal maxim "qui prior est tempore potior est jure," and ought to be the general rule on the subject. I am of opinion therefore that the decree of the Circuit Court in this case must be reversed.

(Signed.) THOMAS WATIES.

We concur in the above decree for the reasons given therein.

(Signed.) HENRY WM. DESAUSSURE,
THEODORE GAILLARD,
WILLIAM DOBEIN JAMES.

The costs in the case are to be divided.

Mr. Grimke, for appellants.
Mr. Lance, for respondents.

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3 Desaus. *549

*Case LXI.

Ex parte PERKINS.

[Tried before Chancellor Desaussure, Charleston, March, 1813.]

[*Contempt* ⇐82.]

A person imprisoned by the Court of Equity for noncompliance with its decree for the payment of money, may be discharged by the Court of Equity, under the insolvent debtors' act.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 277; Dec. Dig. ⇐82.]

Captain Perkins was in custody under the process of this Court, for not complying with a decree of the Court and paying over a sum of money due to the complainants in a suit therein depending. He applies to the Court to be discharged under the insolvent debtors' law. No opposition was made by any creditors. They merely submitted the question whether he could take the benefit of that act in this Court. The attorney-general, Mr. Richardson, argued the question very fully on the behalf of Mr. Perkins. He contended that no decision has been actually made, that the Court of Equity has not the jurisdiction to give the benefit of the insolvent debtor's law. The title and the preamble are entirely general, and are not confined to any Court. The enacting clause indeed directs the application of the petition to a court of law, from whence such process issued; but all the other clauses say, courts generally. The spirit of the law is to give relief to the unfortunate debtors, not regarding by what court the commitment is made. That the Court of Equity is a court of law; it has a law side; a common law jurisdiction: Co. Litt. 58. "Court," is where justice is judicially administered. Commissions of idiocy, lunacy, &c. are issued out of the Court of Chancery, on the common law side. Then the Court of Chancery being a court of law, the difficulty is at an end; but there is no real difficulty on principle: Est boni judicis ampliare jurisdictionem, is the advice of Lord Coke. And surely it is proper to interfere when an imprisonment for life would be the effect of not interfering. The act of insolvency must mean and did mean that all Courts having the right to attach the person, should have the right to give benefit of the acts. It would be monstrous that the Court should imprison the debtor without the power of re-

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leasing under the insol*vent law. The City Court recently instituted, having legal and equity jurisdiction, may and does exercise their power of giving benefit of insolvent debtors' law. The prison bound's law, 6th section, expressly says, "the justices of the court from which the process issues."

The Chancellor delivered the following decree:

Upon the whole of this argument I have doubts remaining whether this Court has a right to grant the benefit of the insolvent debtor's law in any case. But as the weight of the argument appears to be in favor of the exercise of this authority; and as by the decision in Lowe's case, it appears that the party confined under the process of this Court, cannot be absolutely released by a discharge made by any other court under the insolvent debtor's law, it would follow that Mr. Perkins would be imprisoned for life, unless this Court should interfere and give relief under the insolvent law, I will venture to exercise the authority in favorem libertatis of the citizen. Should this opinion not be satisfactory to the parties interested, I

should be glad that the question, which is novel, should be carried up to the Court of Appeals.

HENRY WM. DESAUSSURE.

There was no appeal from this decree.

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3 Desaus. 550

Case LXII.

FREDERICK and GASPAR NASAR v. PETER SMITH, executor of Philip Nasar.

[Tried before Chancellor Desaussure, Charleston, March, 1813.]

[*Wills* ⇐733.]

A testator directs his estate to be divided among his two grandsons (children of a deceased son,) and the children, born or to be born of his daughter B. The real estate to be sold when the youngest of Mrs. B's children should attain the age of 18. Any dying under 21, the share of such one to go to the survivors, who may attain 21 or marry. As any attain 21 to draw off his share. B. had two children at the death of her father, and has had one more since. The two grandsons (by his son) claim a moiety of the estate. Decreed that they are entitled to no more than two fifths. Those attaining 21 years entitled to their portions of the personal estate, as the family stands at that time. The real estate not to be divided yet.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1825; Dec. Dig. ⇐733.]

The late Philip Nasar made and duly executed his last will and testament on the —— day of December, 1805, wherein and whereby he made the following devises and bequests. He authorised and empowered his executors to rent out his lot of land in King street, No.

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*84, till the youngest of his grand-children, as well those by his late son Frederick Nasar as those by his daughter Mary M. Brockway, whether already born, or which his said daughter may hereafter have, shall attain the age of eighteen years. And when the youngest of his said grand-children shall attain said age, he desires his executor to sell the said lot and buildings on such terms as he shall think fit, and execute to purchasers good titles in fee simple or otherwise. He desires that as long as the lot shall be rented out, the rents may be applied first to pay all taxes, charges and assessments for it, and for keeping buildings in repair. The surplus of the rents to be applied to the maintenance and education of his grand-children Frederick and Gaspar Nasar, children of his late son Frederick Nasar, and all the children of Mary M. Brockway, his daughter, now born or to be born, till the youngest of them shall attain the age of eighteen years. And when the lot shall be sold he devises the monies thence arising equally to all his said grand-children who may then be living, forever. But in case either of his grand-children should die unmarried and under the age of twenty-one years, the share of the one so dying he gives equally among the survivors of his grand-children who shall live to marry or to attain twenty-one years, forever. He directs his executors to sell the remainder of his estate upon such terms as they shall think proper, and the monies thence arising, with all monies and securities for monies which may be due at his death on any account, he directs to be applied to pay, first his debts and also his funeral expenses, and to place the remainder at interest in bonds, or vest the same in the purchase of stock of the United States or of this state, or any bank of this city, and the interest or dividends shall be appropriated to the maintenance and education of all his grand-children to whom he has given the rents of his real estate, as before directed, till the youngest shall attain eighteen years; and then he devises the principal to his said grand-children, as before directed, as to the

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monies arising from the sale of *the lot, &c. But as his eldest grand-children will attain twenty-one before the youngest will attain eighteen, it may be proper to advance the eldest as they shall severally attain twenty-one: He therefore authorised his executors in their discretion to advance the eldest as they respectively attain twenty-one their full shares of the monies arising from his personal estates, and appoints Peter Smith and John Rodolph Suitzer, his executors. He soon after died, leaving his will in full force and virtue, and Peter Smith alone qualified as executor of the said will. The complainants are the two grand-children of the testator, by his son, who are named in the will. The testator's daughter, Mrs. Brockway, had two children alive at the time of the testator's death, and has had one child born since. The complainants contend that by the true construction of their grand-father's will, they are entitled to one half of the said property between them, or one fourth each; as their grand-father did not intend to depart, in the distribution of his property, from the statute which, would have given one half the said property to the said complainants as representing their father, and the other half among the children of Mrs. B. however numerous they may be.

Decree.

I have looked carefully into the will of the testator, and I do not find any difficulty in it on this point. It appears clearly to have been his intention to divide the amount sales of the real estate, so devised and bequeathed, equally among all his grand-children. No reasoning can make the intent clearer than is apparent on the face of the will. I shall not therefore attempt any reasoning to elucidate so clear an intent; but express my decided opinion, that the two complainants and all the grand-children born and to be born of Mrs.

Brockway, the daughter, will be entitled to equal portions of the real estate devised and bequeathed in their grand-father's will, under the limitations there stated. The only difficulty in the will arises from the testator's directing that on his grand-children respectively attaining twenty-one years of age, they

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shall draw off their *proportion of the personal estate. It seems to me that this qualifies the general intent to divide the property equally among all his grand-children to this extent, that the two grand-children, the complainants, who have attained twenty-one years of age, are now entitled to draw off their respective portions of the personal estate, and that these portions are one-fifth for each of them. The remaining three-fifths will then remain to be divided among the three other grand-children, and such other children as Mrs. Brockway may have; each of them when attaining the age of twenty-one years to be entitled to draw off their respective proportions in the then situation of the personal estate and of the family. The defendant having stated in his answer that he has paid over to the complainants their two-fifths of the personal estate, nothing now remains to be decided as to that portion of the estate. As to the real estate the testator having directed it to be kept together, till a certain time, and no good reason being assigned for departing from this direction, the Court will make no change in that respect. It is therefore ordered and decreed that the bill be dismissed.

There was no appeal.

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3 Desaus. 553

Case LXIII.

KENDALL DYRE v. JOSIAS STURGES.

[Tried before Chancellor Desaussure, Charleston, March, 1813.]

[*Equity* ⇐339.]

A defendant denying the only charge in the bill, and there being no evidence to contradict him, is entitled to have bill dismissed.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 710; Dec. Dig. ⇐339.]

[*Discovery* ⇐22.]

A defendant charged with being accountable, for money, and admitting that fact, may go on and discharge himself, by shewing that he has settled or paid it away.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 31; Dec. Dig. ⇐22.]

This is a bill of recovery, to ascertain by the oath of the defendant, whether a note which the complainant Dyre drew in December, 1800, for $407, in favor of E. Coffin, was not a loan or accommodation note to the defendant, Josias Sturges, and which the said complainant alledges the said Josias Sturges agreed and promised to take up and satisfy when it became due; but which he did not take up, and complainant was obliged to pay,

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*and has the same in his possession. The complainant states that he has brought suit at law for the recovery of the said money; but not being able to prove the same, his demand was rejected by the jury.

The defendant in his answer admits that the complainant brought suit at law for the recovery of the money in question; but he was non-suited because his demand was not founded in justice. The defendant admits that the complainant did give such a note as he mentions; but not on account of this defendant, who had no interest in that transaction; but it was a loan for the use of Mr. E. Coffin, and it was paid out of the funds of this defendant; that it may be true that the complainant took up the said note when lodged for collection at the bank, but that this defendant paid to complainant $200 in cash, and gave a due-bill for the balance.

The defendant has thus positively denied the allegation of the bill, that the note was an accommodation to defendant on his own account; and this directly negatives the only claim made by the bill. But he admits, however, that it was a loan at his instance for the use of E. Coffin; and he adds that he himself has paid and settled the note. There was no engagement in writing to bind defendant to pay the debt of Mr. Coffin. It depends therefore wholly on the defendant's confession and statement of the transaction; and by that statement he has paid off the demand and is not liable. And this he is at liberty to do; for if an executor or other person admits in his answer that he has received certain sums of money, which sums he has paid away or settled, and thus discharging himself, he is at liberty to do so, and it will avail him, provided it be stated relative to the same transaction. The lapse of time too, which would have been a bar at law under the statute of limitations, is unfavorable to the claim, even if it rested on a stronger equitable ground. It is ordered and decreed that the bill be dismissed.

There was no appeal.

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3 Desaus. *555

*Case LXIV.

JOHN BOYLE v. ROBERT ROWAND.

[Tried before Chancellor Desaussure, Charleston, March, 1813.]

[*Dower* ⇐75; *Vendor and Purchaser* ⇐172.]

A certain portion of the purchase money was reserved in the hands of the purchaser, to meet an expected claim of dower; no claim has been made, and the purchaser took and has held possession of the land for 19 years. Decreed that as lapse of time will bar all claims the defendant should pay complainant (the vender,) the amount of the reserved fund, with interest

thereon. The complainant to give a bond of indemnity for five years.

[Ed. Note.—Cited in Rutledge's Adm'rs v. Smith's Ex'rs, 1 McCord, Eq. 405.

For other cases, see Dower, Cent. Dig. § 264; Dec. Dig. ⟸75; Vendor and Purchaser, Cent. Dig. § 349; Dec. Dig. ⟸172.]

This is a bill filed for the recovery of a sum of money due for the purchase of a small tract of thirty-five acres of land, at a stipulated price. At the time of the purchase of this tract, another and a larger tract was purchased. It was then believed a claim of dower would be made, and an agreement was entered into in writing in January, 1794, between Mr. Boyle and Mr. Rowand, that the price of the small tract should be reserved; and that in case Mrs. Sanders, (formerly Mrs. Ferguson,) or any other person should establish a right in the lands sold, then the said Robert Rowand should satisfy the claim of dower, out of the price of the said thirty-five acres, and pay the balance of the price to the said John Boyle, his executors, &c. and if no claim should be established by Mrs. Sanders, or any other person claiming under Charles Ferguson, then that the said Robert Rowand should pay to the said John Boyle the agreed consideration for the said thirty-five acres.

The answer of the defendant admits that he took possession of the said lands including the thirty-five acres, and has held and enjoyed the same undisturbed; and that no claim has ever been made or established for dower in the said lands, and that he has never paid any part of the consideration money.

Two questions were made:

1. Whether as the claim of dower might still be made and established, Mr. Rowand is bound to pay the money till he should be secured against such claim?

2. Whether he ought to be obliged to pay interest on the debt?

On the first point, I am of opinion that as no claim of dower has been made for nineteen years, which lapse of time would be a legal bar to the claim, (for time will be

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*a bar to that as well as other claims,) the debt ought not to be withheld any longer.†

It cannot be presumed that the parties intended that the debt should remain unpaid, forever, waiting for the possibility of the claim of dower. Time enough has been allowed, and the claim not being made, the debt must be paid. But as the complainant has offered in his bill, to indemnify the defendant against the claim, it is ordered and directed that on the payment of the debt, the complainant should deliver to the defendant Mrs. Sander's renunciation of dower to the land in question, or enter into a bond with good security to indemnify the defendant against that claim for five years.

On the second point, I think that interest should be paid from the time Mr. Rowand took possession of the land. (See Fludyer v. Cocker, 12 Vesey 25.) It is therefore ordered and decreed that the defendant pay over the amount of the purchase money for the thirty-five acres of land, with the interest and costs of suit.

There was no appeal from this decree.

† This is a very distinct question from the right of the widow, to have an assignment of dower, and an account of the arrears, from the heir. In that case, there is no limitation in equity or at law, without some special ground shewn. In Curtis and Curtis, 2 Bro. C. C. 620, Lord Alvanly says the Court universally gives the widow an account from the death of her husband. So too in Munday v. Munday, 2 Vesey, jun. 122; and the account has been carried back twelve years, though no reason assigned for the delay; and though it was insisted that the account could not be carried back further than six years, a period adopted by analogy to the statute of limitations. See Oliver v. Richardson, 9 Ves. 222. See the note (a) in 6 vol. of Ves. 215, and Pettiward v. Prescott, 7 Ves. 541. If the account were barred at law, it might be made a question whether the account should be carried back to the time when the title accrued. 2 Atk. 287, 3 Atk. 124, 130.

3 Desaus. *557

*Case LXV.

WILLIAM LOUGHTON SMITH, JOHN F. GRIMKE and THOMAS M. BACOT, in Behalf of Themselves and Others, Officers of the Grand Lodge of South-Carolina v. WILLIAM SMITH, CHARLES J. COLCOCK, B. BAILY, SAMUEL NOBBS, and Others, Styling Themselves Officers of the Grand Lodge of Ancient York Masons.

[Tried before Chancellor Desaussure, Charleston, February, 1813.]

[*Corporations* ⟸296, 600.]

The Grand Lodge of Free Masons cannot make new regulations subversive of fundamental principles and land marks, without the clear consent of the subordinate lodges; nor can the officers of a corporation composed of several integral parts, dissolve the corporation, without the full assent of the great body of the society. The dereliction of the charter by the heads of a corporation does not dissolve the corporate body, especially if the remaining members have the power of renovating the head.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1273, 2391; Dec. Dig. ⟸296, 600.]

[*Associations* ⟸15; *Corporations* ⟸586.]

The seceding members of a chartered society, forming a new voluntary association, cannot sustain a suit for the recovery of debts due to the corporation.

[Ed. Note.—For other cases, see Associations, Cent. Dig. § 22; Dec. Dig. ⟸15; Corporations, Cent. Dig. § 2348; Dec. Dig. ⟸586.]

[*Corporations* ⟸173.]

[The right to remove a member for improper conduct is incident to every corporation.]

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 641; Dec. Dig. ⟸173.]

[*Corporations* ⟸198.]

[A proxy given by a member of a corporation, for voting in the ordinary concerns of the corporation, is no authority to vote for a fundamental change in or surrender of the charter of the corporation.]

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 772; Dec. Dig. ⟸198.]

The bill stated that in the month of December, 1807, Lewis Cameron was indebted to the Grand Lodge of South-Carolina Ancient York Masons, in the sum of $1541, by bond payable to Paul Hamilton, grand master of the said Grand Lodge and his successors in office; which bond was delivered over to W. L. Smith, one of the complainants, who was the successor of the former grand master, with instructions to put the same in suit, and to pay the money, when recovered to the grand secretary. That at the same time there existed another Grand Lodge called the Grand Lodge of South-Carolina Free and Accepted Masons, which held its meetings separate from the former, though the distinction was nominal. That the grand officers of both lodges, lamenting in common with the fraternity the schism which had split them, endeavored to promote a re-union. That on a proposition to unite them, committees of both Grand Lodges were appointed by the unanimous vote of both Grand Lodges, for the purpose of adjusting a plan for the restoration of harmony, and for consolidating the two Grand Lodges into one; and after a friendly discussion, which demonstrated that there did not exist any material difference of system or principle between the two societies, a convention was signed re-uniting and incorporating the two societies into one masonic society, by the name of the Grand Lodge of South-Carolina. And the convention was, after due deliberation,

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*unanimously ratified by both Grand Lodges. That when the Grand Lodge of Ancient York Masons unanimously assented to this act, it consisted of the representatives and proxies of a large proportion of the lodges under its jurisdiction, and several of the present defendants were present and made no objections. That the two societies had been previously severally incorporated by different acts of the legislature; and it was agreed that an application should be made to the legislature to repeal those acts, and to pass another general act incorporating the Grand Lodge of South-Carolina. The application was made, but the legislature did not then pass the desired act. That some time after certain individuals, who had concurred in the re-union, became dissatisfied therewith; and induced some of the country lodges to join and form with them a masonic society by the title of Grand Lodge of South-Carolina Ancient York Masons, contrary to the constitution of regular masons. That the new Grand Lodge of South-Carolina endeavored to satisfy the scruples of the seceders by repealing the obnoxious regulations; notwithstanding which the seceders proceeded to pursue hostile measures. That the attornies of the Grand Lodge had obtained judgment against L. Cameron and his sureties, and were about to recover the debt due by him, when an order was privately obtained from one of the Judges of the Court of Common Pleas, for changing the attornies and substituting another who was subservient to the views of the present defendants; and was about to procure payment of the money, for the benefit of the seceders, though the funds belong of right to the complainants, as grand officers of the Grand Lodge of South-Carolina, the said funds having arisen from contributions of the subordinate lodges, a majority of which constitute and compose the Grand Lodge of South-Carolina. That being apprehensive of the payment of said debt to the defendants, the complainants pray for an injunction, and for a decree establishing their right to the funds in question.

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*The defendants in their answer admitted the complainants' statement of the debt due by Lewis Cameron, and the various steps taken relative thereto; and they admit the existence of two separate Grand Lodges as stated; but they deny that the distinctions between them are nominal, or that they were governed altogether by the same rules and principles; that on the contrary the forms of admission, and the modes of carrying on work in the two Grand Lodges are essentially different; and that members of the Lodges of Free and Accepted Masons, could not be admitted in to the Lodges of the Ancient York Masons, except in the manner practised on the admission of other candidates. That to do otherwise would be to violate the obligations and remove the land marks of the Ancient York Masons.

The defendants admit the steps taken to effect an union of the two Grand Lodges; but they deny that the convention which was agreed upon by the committees of the two Grand Lodges was ratified regularly; that some of the defendants made objections, but were told that the modern or Free and Accepted Masons would be regularly made Ancient York Masons in the customary forms; with which answer they were satisfied. But afterwards finding that was not the effect of the convention they opposed it. And the St. John's Lodge No. 31, a portion of the Ancient York Masons, were unanimously of opinion that the same could not be legally carried into effect, and instructed their representatives to get the same repealed; particularly the seventh article of the convention. And they accordingly attempted to obtain a repeal in the Grand Lodge; but without effect. That although it ap-

pears that the convention was ratified by the representatives and proxies then present; yet in fact a majority of the proxies voted in opposition to the wishes of their constituents, who had not been previously notified of a measure of such importance to the Grand Lodge of South-Carolina Ancient York Masons, and which required their special instructions and approbation before its adoption.

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*The defendants admitted that the two old Grand Lodges were attempted to be united, as alleged by complainants; and they admit the measures taken to procure a new act of incorporation, which was not obtained from the legislature, because it was informed that a majority of the Lodges constituting the Grand Lodge of South-Carolina Ancient York Masons disapproved of the measure, on account chiefly of the 7th article of the convention. That a majority of the said Lodges called a convention in May, A. D. 1809, (of masonry 5809,) at which a majority of the Lodges were represented; and the complainants and their confederates were expelled from the Grand Lodge of Ancient York Masons, and they were declared to have forfeited the rights and advantages resulting to them by the act of incorporation; and that the defendants and their associates were entitled to all the benefits and advantages of said incorporation.

The defendants deny that they have formed a new Grand Lodge, and aver that they have only re-organised and perpetuated the Grand Lodge of South-Carolina Ancient York Masons, agreeably to the established rules and conformable to their charter.

Defendants admit that they took measures to secure the said debt due by L. Cameron to prevent its getting into the hands of the complainants, who were seceders, and having formed a new Grand Lodge under a new title, not known in the charter, were not entitled to the same.

At the hearing of the cause, the act of incorporation was produced in evidence by which it was enacted, that the grand master and others, the officers and members of 18 Lodges of Ancient York Masons, represented in the Grand Lodge of Charleston, (who had petitioned to be incorporated) should be and become a body politic and corporate, by the name and style of the Grand Lodge of the state of South-Carolina Ancient York Masons, and its masonic jurisdiction; and that the said society and the lodges constitut-

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ing the same, should have power *to receive, purchase and retain property; to make bye-laws, to constitute subordinate lodges, and to do all other things concerning the government, estate, monies and revenues of the said Grand Lodge and subordinate lodges.

The proceedings of the different lodges were then produced to shew the steps which had been taken towards an union. By the fourth of the articles drawn up for the union of the two societies, it was agreed that the oath and form of initiation, together with the form of working should be hereafter the same in all the lodges, under the direction of a committee of inspectors to be appointed as soon as convenient, after the passing the new act of incorporation; until when, all the lodges should initiate according to their respective usages. By the fifth article it was agreed that as soon as the new act of incorporation should be passed, the grand masters of the present Grand Lodges should summon their respective bodies to assemble in convention to elect grand officers and organise the Grand Lodge of S. Carolina; and by the sixth, the grand officers of the present and past masters of the subordinate lodges, should, at the first meeting of the Grand Lodge of South-Carolina, after the act of incorporation should be obtained, appear in the said Grand Lodge and take the customary oath of secrecy; and the masters of the subordinate lodges should afterwards administer the same to their officers and members. By the seventh article, brethren from foreign lodges taking the customary test and entering into an obligation not to reveal any part of the mysteries, should be admitted without regard to their being Ancient or Modern, which names of distinction should thereafter cease.

This agreement of the committees of the two Grand Lodges, appears to have been accepted and confirmed at a meeting of the Grand Lodge of Ancient York Masons on the 24th September, 1808, (5808,) and a committee was directed, in conjunction with the committee of the Grand Lodge of Free and

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Accepted Masons, to *petition the legislature for a new charter, and to carry the agreement into effect, and to transmit to the masters of the lodges under their jurisdiction copies of the convention. Application was accordingly made to the legislature for a new act of incorporation; but the prayer of the petition was not then granted, and no act was then passed. Nevertheless the two Grand Lodges assembled in Dec. 1808, (5808,) and deliberately proceeded to carry the convention into effect, by electing grand officers of the Grand Lodge of South-Carolina, and by appointing committees to give effect to the system. The committee reported a test oath which was adopted, by which every member was required to swear not to reveal the secrets of Free Masonry, and to observe and obey all the orders and decrees of the Grand Lodge of South-Carolina.

The rules and regulations of the Grand Lodge of Ancient York Masons and the several lodges under its jurisdiction were produced in evidence, as well as the Ahiman Rezon of Dermot, and the Ahiman Rezon of

Dr. Dalcho, both which were admitted to be books of authority. In Dermot's Ahiman Rezon it is stated that "there is a great difference between Ancient and Modern Masons." In Dr. Dalcho's Ahiman Rezon the supremacy of the Grand Lodge and its power to ordain and establish such rules as it thought proper is repeatedly asserted, with proviso that the new rules did not tend to remove the ancient land marks of the craft, to abolish useful ceremonies, or to introduce any that are new or improper.

Other documents were produced to prove the dissatisfaction of several of the members of the Grand Lodge, and of eighteen of the subordinate Lodges, who concurred in disapproving the conduct of the Grand Lodge of Ancient York Masons, as unmasonic, as an abandonment of the principles of the craft, and as removing land marks. Letters were produced from the Lodges of Ancient York Masons in Georgia, North-Carolina, Virginia, Maryland, Pennsylvania, Tennessee and Ken-

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*tucky disapproving the conduct of the Grand Lodge of South Carolina Ancient York Masons declaring that they had departed from the ancient rules and land marks of masonry.

The proceedings of the Grand Lodge of Ancient York Masons at Columbia were produced, by which it appeared that sixteen lodges were represented, who dissented from and censured the conduct of the Grand Lodge, and expelled the members of it; and that a re-election of grand officers of the Grand Lodge of the Ancient York Masons took place; so that the same was re-organised, according to the ancient constitution, and they are the defendants in this suit.

The complainants produced the abstract of the books of the Grand Lodge to shew that the funds were produced chiefly by the Lodges who concurred in the new arrangements, and who adhered to the new Grand Lodge.

The complainants also produced an address of the grand convention of the Grand Lodge at Baltimore, approving the conduct of the Grand Lodge in S. Carolina.

The defendants called a number of respectable witnesses, entitled to full credit, who deposed that they had been Ancient York Masons, and that in their opinions Modern Masons could not be admitted nor initiated without going through the ancient ceremonies. That to admit them merely on taking a test oath, was a departure from rules and principles, and removed land marks. And that the differences between the Ancient York Masons and Modern Masons were material; and that the Moderns did not know the secrets of the Ancients.

On the other hand the complainants called a number of respectable witnesses, fully entitled to credit, who deposed that they were well acquainted with masonry, and that some of them had taken high degrees in the craft. That the Ancient York Masons could visit the Moderns, but not vice versa; that they considered the differences as formal, trifling and

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unessential: that *there was nothing in the constitution of the Ancient Yorks which forbade such an union as took place on modifying the rules of the society; and that admitting the Moderns merely on taking the test oath, was dispensing with some ceremonials; but there was no dereliction of principle or removal of land marks; and that the mode of working is essentially the same among both; that the test oath was intended to secure secrecy and was binding on Ancients and Moderns; that the words and signs are the land marks of masonry; that the supreme power was in the Grand Lodge, and that the subordinate lodges were bound to obey the orders and decrees of the Grand Lodge; but that the Grand Lodge itself could not alter the land marks. They did not think land marks were altered by the terms of the union.

The Court in delivering its decree, stated, that it was under the peculiar disadvantage in this case, of being obliged to take opinions instead of facts, as the witnesses on both sides declared they could not disclose facts, consistently with their obligations as masons. To weigh opinions is one of the most difficult tasks which can be undertaken. In the relation of facts, discerning and honest men often disagree, yet the Judge or the Jury have some land marks to guide them. But in the conflict of opinions, how difficult is it to ascertain how much is the sober result of impartial examination, made with a sound judgment, seeking the truth alone, or how much is the result of passions and prejudices acting on a weak judgment, and credulous temper. I am aware of the difficulty of my situation. It has induced me to examine this case with uncommon deliberation and attention: and if I should be mistaken in my judgment, I have the consolation to know that it may be corrected.

Before I proceed to the argument on the questions which arise on the case, it will be proper to take a view of the actual situation of the Lodges under the jurisdiction of the Grand Lodge of Ancient York Masons, at the time of its adoption of the plan which

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has unhappily *produced such discords, as well as at the subsequent period. At the extra meeting on the 9th July, 5808, there were present fourteen Lodges of which ten were represented by their proper officers, and four by proxies. At the stated meeting on the 24th September, 5808, there were present twenty eight Lodges of which fifteen were represented by their proper officers, and thirteen by proxies, of which col. John Mitchell, had eight in his own hands, Mr. Richards four, and Mr. J. H. Stevens, one. At the stated meeting on the 17th December,

5808, there were present twenty-nine Lodges, of which twelve were represented by their proper officers, and seventeen by proxies, of which col. John Mitchell held nine in his hands, Mr. Richards four, Dr. Dalcho two, Mr. Cudworth one, Mr. J. H. Stevens one. At the meeting which took place at Columbia, which declared against the proceedings of the Grand Lodge of Ancient York Masons as unwarranted, and removing land marks, there were present sixteen Lodges, ten of whom had been represented in the Grand Lodge of Ancient York Masons at the time of these proceedings; but who declare, that they had no notice of these intended alterations from their proxies, and gave no instructions, and disapproved of their conduct. And they expelled the officers of the Grand Lodge who had made the alterations which they deemed a removal of land marks. It seems that only two of the country Lodges which were under the jurisdiction of the Grand Lodge of Ancient York Masons, have concurred in and finally adhered to the alterations which were made on the 17th December, 5808; but that ten Lodges resident in the city, have consented to the alterations, and do adhere to the new Grand Lodge of South Carolina, for which they have been expelled by the Lodges who have reorganized the Grand Lodge of South Carolina Ancient York Masons. After this detail of the proceedings in this case, we come now to consider the questions made for judicial decision. The first question which arises is, whether the Grand

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Lodge of Ancient York Masons *has such absolute power by the constitution and principles of masonry, as to warrant the acts which it has done, supposing those acts have removed the land marks of the craft? The second request for consideration is, whether the act done by the Grand Lodge, did amount to a breach of the fundamental rules of the order and removal of the land marks? The third question is, whether, the subordinate Lodges were not so represented, and did not so consent to the act done in the Grand Lodge as to bind them even if the act removed land marks: Fourth, whether any part of the act done by the Grand Lodge of Ancient York Masons, were inconsistent with the chartered rights of the society, and with the law of the land respecting corporation. Fifth, what were the legal effects of the act of the Grand Lodge as to the charter itself? As to the individuals composing the Grand Lodge? And as to the subordinate Lodges which did not finally accord with the Grand Lodge in its measures. Sixth, can the individuals who have formed a new voluntary association, bring suits under their new name, and support claims under the old rights of a chartered body to which they originally belonged.

A good deal of ingenious argument was urged, respecting the absolute rights of the Grand Lodge which form the subject of the first question. Several passages from the Ahiman Rezons were quoted to prove the supreme unqualified power and authority of the Grand Lodge, to make and alter laws and regulations; to abolish them and replace them by others; and all this without controul, or appeal even (as is said by the counsel) to the Courts of Justice. I have examined the books, I mean Dermot's and Dalcho's Ahiman Rezons, from one end to the other, as well as the particular rules of the Grand Lodge of Ancient York Masons, to ascertain this point; and I do indeed find many very strong passages which assert the supremacy of the Grand Lodge over the subordinate Lodges; but after all, it is not easy of belief that any set of reasonable men, and

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least of all *the citizens of a free country, should consent to bind themselves so absolutely and irrevocably under the power of others, but that some reservation must have been intended; and in reality, we perceive plainly by these very books of authority, that there is a limit to this power. In the first place we find the expression of a constitution repeatedly used, which implies some fixed principle independent of ordinary legislation. We also find, that in the Ahiman Rezon of Dalcho, when the master of a lodge is installed, he is called upon to swear implicit obedience to every edict of the Grand Lodge of Ancient York Masons, that is not subversive of the principles and ground work of masonry; thus manifestly referring to, and recognising some principles and ground work, which are sacred and not subject to be altered or effected by the edicts of the Grand Lodge itself. And so in page 191, '2, of the same work, in the preamble to the rules for the government of the Grand Lodge of Ancient York Masons, the right to establish a Grand Lodge in this state, is asserted, with power to ordain and establish such rules for their future government, as suited them; provided they did not tend to remove the ancient land marks of the craft, to abolish useful ceremonies, or to introduce any that are new or improper. Nor was this limitation to the absolute power of the Grand Lodge, a new principle introduced into the regulations in this country, from the tendency which all private societies have to conform their principles to those of the government under which they live; for we find the same laid down as a fundamental principle in the Ahiman Rezon of Dermot, framed under a monarchical government, and actually expressed more fully. In the 27th rule, page 84 of Dermot, it is stated that every Grand Lodge has an inherent power and authority to make new regulations, or to alter these for the benefit of the ancient fraternity, provided always, that the old land marks be carefully preserved; and that such new regulations and alterations be proposed and agreed to by the Grand

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Lodge. And that they *be offered to the perusal of all the brethren in writing, whose approbation and consent, or a majority thereof, is absolutely necessary to make the same binding and obligatory. If it were necessary to add any thing to these authorities or to resort to individual testimony, it may be said that some of the strongest witnesses for the complainants, expressly stated that no Grand Lodge could remove the land marks of the craft, notwithstanding its great powers. Thus we find a perpetual recurrence to certain fundamental principles and land marks which the Grand Lodge itself could not disturb or remove. And this is consistent with the very nature of free masonry, which professing to be founded on the broadest principles of charity and benevolence, and to embrace the whole human race, and to be in connexion with the brethren all over the world, could not maintain that connexion without adhering invariably to certain immutable principles, and practising certain forms and ceremonies common to all and unchangeable by any. The acts of the Grand Lodge of Ancient York Masons now under consideration cannot then be defended upon the mere ground of supreme authority, empowered to alter or add to the system what it pleased, without regard to principle or land marks. The counsel for the complainants therefore, judiciously took another ground, to wit: that the acts done by the Grand Lodge, were not inconsistent with the fundamental principles of masonry, and removed none of the land marks of the craft, which forms the second question for the consideration of the Court. The sources to which we must resort, for light to guide us in forming a judgment on this question are the following, to wit: the Ahiman Rezon or book of authority among masons; the rules and regulations of the society of South-Carolina Ancient York Masons; the parol evidence, or rather the opinions given in the cause; the opinions of the lodges in this state, and the opinions of the Grand Lodges in the other States of America. It is unnecessary to repeat in detail the principles stated, and the provisions contained in the

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Ahi*man Rezon, and the rules of the Ancient York Masons; but it does appear to me, that they treat as fundamental points, and consider as land marks those things which the Grand Lodge have assumed upon themselves to change, by which it seems to me they have violated those principles, and removed those land marks. These acts may be summed up in a few words. The Grand Lodge formed and executed a plan to alter the existing state of things in the society, without special authority from the subordinate lodges to their representatives, to agree thereto; and without their knowledge, their representatives acting only under ordinary powers, which had no view to such alterations. They admitted into the society, without the usual forms and ceremonies, all the members (who would take a new test oath devised for the occasion) of another society of masons who according to the Ahiman Rezon of Dermot, differed in essentials from the Ancient York Masons; and they thus dissolved the old society, and formed a new one, which was an amalgamation of the Ancient York Masons, and the Moderns, under a new name; and they formally abolished the old name of the society. By these acts, the wall of separation which previously existed between the two societies was broken down, without regard to those differences which for a long time subsisted and seemed at least (in whatever they consisted) to have been considered by the two societies as essentials. The imposition too of a new test oath, on the old members of the Ancient York Lodges, which obliged them to a promise of implicit obedience to the future regulations of the Grand Lodge of South-Carolina, and the refusal to admit those of them who refused it, seems to me to have been a strong act, inconsistent with their rights under their constitution and rules. And the oath itself is subject to great objections, as it required obedience not to the principles of masonry, known and established, but to all such future regulations as should be made by the new Grand Lodge; which is the imposition of an obligation, almost without example.

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If we proceed to the parol testimo*ny, or rather the opinions given in the cause as to the materiality of the differences which subsisted between the two sects of masons, and of course to the legality of the acts of the Grand Lodge, we feel rather embarrassed than satisfied. For we find respectable and intelligent men, skilled in the mysteries of masonry, and entirely worthy of credit, differing totally in opinion. The witnesses for the defendants attesting that the differences between the two sects were material, important and affecting land marks; consequently not within the power of the Grand Lodge, to remove by a short hand, or by such proceedings as took place. On the other hand, the witnesses for the complainants attested that these differences were immaterial, trifling, and not worth a pinch of snuff; consequently removable by the Grand Lodge without altering land marks. The scales thus poized by such opposite testimony, or opinions, would have hung in suspense, if we had not other guides to our judgment. But I cannot avoid remarking that where such differences of opinion existed, as to the constitutional or fundamental point, it would have been safest not to act; and the tranquility and harmony of a band of brothers would have been best preserved by respecting the scruples of those who believed that the changes contemplated would affect vital rules

or principles. Such conduct in those who zealously, and I am sure honestly, sought an union of different sects, might have prevented the discords and schisms which have taken place in their own sect. The declarations of many subordinate lodges go to strengthen the opinion I have formed that the measures of the Grand Lodge and the alterations made by them were vital, and did affect the rights, interests and principles of the Ancient York Masons. It is true, they are parties to this controversy, and if the matter rested on their opinions alone, it would not be conclusive. Opposite opinions of other respectable lodges would have equal weight. But we are seeking for information, and we are obliged to resort to opinions for that information; and when we perceive a

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majority of *the lodges in this state, made hostile to the Grand Lodge (which they previously reverenced as their head) on account of an alleged departure from the land marks of the order, it adds strength to the other testimonies on this subject. The immateriality of the differences could not be clear, when so many of the skillful doubted or denied it. Nor is this all. A number of Grand Lodges of Ancient York Masons in other states have been consulted, and a great majority of them have pronounced that the proceedings of the Grand Lodge of Ancient York Masons were a clear departure from the principles of the craft, and a removal of the land marks. This appears to me to be very weighty—skilled in the mysteries of the craft, and unprejudiced as to the parties, their opinions must be entitled to very high consideration. It is said the Grand Lodges are not unanimous in their opinion; this is true, but the majority are of that opinion; and in matters of opinion, the presumption of right is with the majority, at least when it is considerable; and the Court can have no better guide in such a case as this. Against this it has been stated that similar reunions of the Ancient York Masons and Modern Masons have been made in England, and elsewhere; and this is used as presumptive evidence of the regularity and correctness of the proceedings here. But we have not learnt whether these re-unions were effected in the manner this has been done; or whether the Moderns were regularly re-made, and with the full assent of the Ancient Yorks. Upon the whole I feel myself bound to declare that so far as I can form an opinion on this subject, the alterations and arrangements made by the Grand Lodge of Ancient York Masons, did remove what were most generally considered land marks of the craft, and that this exceeding the powers of the Grand Lodge, the subordinate Lodges were not bound by those acts, unless it be found that they regularly and understandingly assented and adhered to the alteration. This leads us to consider the third question, whether the subordinate Lodges were not represented,

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and did not so *consent to the acts of the Grand Lodge as to be bound by them, even if those acts removed land marks? A number of the Lodges were represented undoubtedly by their proxies in the Grand Lodge, at the time that these transactions took place. But I think it is of great importance in this question that there were no special powers given to these proxies, and that one proxy representing a number of Lodges was allowed but one vote. No formal notice was given to the Lodges of any material changes being in contemplation, and there is no evidence that any kind of notice reached the subordinate Lodges in the country, of what was passing, till after the ratification of the convention on the 24th September, 5808. It it not known that even the subsequent letter of the grand secretary of the 4th October, 5808, giving notice of the plan being ratified on the 24th September, ever reached the subordinate Lodges, so as to give them an opportunity to express their dissent, prior to the 17th December, 5808. When the Lodges granted these proxies they gave them for ordinary purposes, and to support, not to destroy, the system of Ancient York Masons; yet a radical change is attempted, and carried into operation, as far as it could be done under that authority, without consulting their constituents. But it is insisted that the Lodges were represented and bound by the assent of their delegates. I confess it does appear to me, that when so fundamental an alteration was under discussion, it was reasonable, and according to the rule in Dermot's Ahiman Rezon, that all the brethren should be consulted on great occasions; that the subordinate Lodges should have been informed distinctly of what was doing, and should have had an opportunity of instructing their representatives what course they preferred on this occasion; and that not having had this opportunity, they were not bound by the acts done by the Grand Lodge, on this vital question, though their proxies acting under ordinary powers, assented to them. But if we admit that notice had reached the subordinate Lodges of the con-

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vention, which had been agreed on *and ratified in time to have enabled them to oppose them before the 17th December, 5808, it is obvious that the terms of that convention were conditional. Every thing was made to depend upon the attainment of a new charter, and they had a right to expect that nothing further would be done, if the new charter was not obtained. Yet on the 17th December, 5808, the Grand Lodge resolved to give effect to the convention without waiting for the new charter which had been agreed to be the basis of the new system. And it proceeded to give full and final effect to the convention, to the entire abandonment

of the old system, even to the very name of the society. It does strike me that the subordinate Lodges were not so represented for this special and extraordinary purpose, as to bind their assent to the acts done. And that if entitled to be consulted at all, as I think they were in all vital changes, there ought to have been a special notice of the contemplated alterations, being fundamental, that they might have sent a special representation, with proper instructions, to speak their sentiments. This was not done, and I do not hold them bound. They were at liberty to dissent, and a majority of the Lodges have dissented; and only two country Lodges adhere. We come now to the consideration of the fourth question, in this case, whether any part of the acts done by the Grand Lodge were inconsistent with the chartered rights of the society, and with the law of the land respecting corporations? We have heretofore considered the question as if it had related to a mere voluntary association, which was governed solely by its own rules and bye-laws, which formed a code for its own government, independent of any charter and the laws of the land. We must now look at it as a corporate society, and examine the act of incorporation, and test its conduct by that charter. By that act it appears that upon the grand master and others, the officers and members of the eighteen Lodges of Ancient York Masons, represented in the Grand Lodge, and then forming a voluntary society, petitioning the legislature

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to be incor*porated as a body politic, "it was enacted that the society above mentioned, and the subordinate Lodges composing the same," and their successors were declared to be a body politic and corporate, by the name of the Grand Lodge of the State of South-Carolina Ancient York Masons and its masonic jurisdiction, and that "the said society and the Lodges constituting the same," were made capable in the law to purchase and hold property; and to sue, or to be sued, in any court of law or equity in this state, and to make such rules, orders, and bye-laws (not repugnant to the laws of the land) as might be necessary for the order, rule and good government thereof; and it was made lawful for the said society to constitute Lodges and to do all other things concerning the government and estates of the said Grand Lodge and subordinate Lodges. By this act it appears that the subordinate Lodges were a constituent part of the society so incorporated. We must now look to the laws of the land for the rules which are to govern the conduct of this incorporated body. One of the fundamental rules of corporate bodies is, that the members are not to do any act which may destroy its existence, or, injure its privileges. If any members do any such acts as are detrimental to the corporation itself, or to some of its liberties, privileges or franchises, such as burning or erasing the records, attempts to destroy the charter, &c. they are subject to be removed for such acts. 11 Co. 99; 1 Bun. 399; and that whatever is done, shall, according to the English law, be by the consent of the majority of the corporate body, though the civil law required the assent of two thirds of the corporate body. By recurring to the convention agreed to by the Grand Lodge, on the 24th September, 5808, it appears that the very object of the convention was to dissolve the then existing corporation, and to form a new one, partly with the old, and partly with new materials; for which, a new charter was to be obtained; and that though the new charter was not obtained, the Grand Lodge proceeded to carry into

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effect the convention as far as they *could, and to declare the old system abolished, and the new one established, and they never after met as a Grand Lodge of Ancient York Masons. We have already examined the question, whether the subordinate Lodges, who formed a constituent part of the corporation, were so represented in the Grand Lodge, as to be parties to this deliberate attempt to dissolve the old corporation, and we have expressed our opinion that they were not so represented. Could the individuals then, who composed the Grand Lodge, give up the charter which covered the whole body of Ancient York Masons by their act? This subject has been much discussed. In the time of Charles the II. when a profligate and tyrannical government found it necessary to vacate the corporations in England in order to mould them to its purposes, bold and cunning attempts were made on the corporate officers of London, and most of the corporations in England; many of them were surrendered by the pusillanimity of the officers, and that of London was declared to be forfeited, with some others, who would not voluntarily surrender the charters. The arguments against the validity of the voluntary surrender by the officers appear to be very powerful; it was said that those who were in the government of corporations, and had their charters and seals in keeping, were not the masters or proprietors of those rights; they could not extinguish those corporations nor part with any of their privileges; the charters were sacred trusts which could not be given up at the will of the officers, who only had a temporary administration, not a property in the charters; nay that crimes committed by corporation officers, were mere personal things which were only chargeable on those who committed them, but could not affect the whole body. These arguments had no effect at the time when a wicked government and dependent judiciary decided arbitrarily; for at that time the judges held their commissions at the pleasure of the crown, and were miserably submissive to

its dictates, as the least resistance produced a dismission; but afterwards at the revolu-

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tion, *parliament and the court acknowledged these principles and reasonings to be valid; declared the surrender and the judgments of forfeiture to be void, and the charters were all restored and new sanctions enacted to guard them from future surrenders. See Burn. His. of his own time, and Bac. 31, 2. To apply this to the present case. The officers and members of the great Society of Ancient York Masons assembled in Grand Lodge, agreed to surrender or abandon the charter, under which the subordinate Lodges were incorporated, as well as the Grand Lodge, and to accept a new charter; and upon that not being obtained, they formed themselves into a new voluntary association with a new name, and actually carried their plan into effect, as far as in them lay, and declared the ancient system and name abolished and extinguished; but without any regular assent on the part of the subordinate Lodges, except that which was said to be implied by the vote of their proxies, which we have decided not to be binding in such an extraordinary case. Upon the best consideration I have been able to give this question, it does seem to me, that these acts done by the Grand Lodge, were inconsistent with the chartered rights of the society, and with the law of the land respecting corporations. My great respect for the intelligent and excellent persons concerned in these acts, made me long hesitate before I came to this conclusion, but I find myself irresistibly driven to it. This leads to the inquiry under the fifth question: What are the legal effects of the acts of the Grand Lodge? 1st. As to the charter itself. 2d. As to the subordinate Lodges, which did not accord with the Grand Lodge in its measures. 3d. As to the individuals composing the Grand Lodge. 1st. As to the charter itself. Among the methods by which corporations may be dissolved, that of a surrender is enumerated in the law books, and doubtless when the whole body of a corporation chooses to surrender its rights, it is at liberty to do so, and it will be valid; but a majority must concur who have an interest or a right. The

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officers of a cor*poration, or an integral portion of it, as we have before stated are not the corporation, they have no right to make the surrender, and if they make the attempt, by an act, or declarations, it is an inefficient act, it is not obligatory on the corporation, which retains its full rights, existence, and legal character. In the present case, the Grand Lodge, which by charter, is only one of the component parts of the corporation, intended, as has been repeatedly stated, to surrender, and actually declared their dereliction of the charter, and pronounced the society extinct, and a new one formed by a new name; and the individual members who then composed the Grand Lodge, have never assembled again under the charter. But the subordinate Lodges being also component parts of the corporation by the very terms of the charter, and a majority of those Lodges having never regularly assented to the act of dereliction or surrender, in their distinct Lodges, either by themselves or by their representatives, properly authorised for such a purpose, in my opinion, the surrender or dereliction of the charter by the officers composing the Grand Lodge, was not such a surrender as extinguished the corporation; their act was invalid; and the corporation remains in full force, life and vigor, in possession of all its rights. The charter not being forfeited, in my opinion, it might seem to be unnecessary to notice the argument, that if the acts of the Grand Lodge amounted to a forfeiture, it was fatal to all the claimants. But I will make a few remarks thereon. In the first place—if this were true in the extent stated, then it is obvious that the complainants even if they had used the old corporate name, could not have sustained this suit, and their bill must have been dismissed, whether the defendants had any right or not. Again: The law indeed seems to be settled as a rule, that where a corporation consists of several integral parts, if one of these become extinct, (2d Bacon, 31,) whether by the death of the persons of whom it is composed, or by any other means, the whole corporation is dissolved. For

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though *this was doubted in the case of Colchester v. Seaber, (3 Burr. 1866,) yet in the later case of the King v. Passmore, 3 Term Rep. 199, it was decided that when an integral part of a corporation is gone, and the corporation hath no power of restoring it, or of doing any corporate act, the corporation is so far dissolved that the king may grant a new charter to a different set of men. The qualification in this judgment is very important. Where the corporation has no power of restoring the integral part which is gone, then the corporation is so far dissolved that the king may grant a new charter to a different set of men; but if the corporation has the power of restoring that portion of it which is gone, then the corporation is not dissolved. And I do apprehend even if it be admitted, for the sake of argument, that the dereliction of the Grand Lodge put an end to that branch of the corporate body, that the remaining part of the corporation, to wit, the subordinate Lodges, had the power of restoring the integral part, which by this argument is supposed to be gone. In most cases it would be presumable that corporations have the power of supplying defective members, to prevent the death of the whole body. It is the genius of our law to preserve rather than destroy, to lend its aid to maintain rights rather

than suffer them to perish. But there is in this case a renovating power, apparently inherent in the very organization of the masonic system. The Grand Lodge however powerful when formed, grows out of the subordinate Lodges. It is composed of past-masters and other officers of the subordinate Lodges; they must have subsisted before a Grand Lodge could be formed, though when formed, the Grand Lodge erects new subordinate Lodges. Who formed the Grand Lodge of Ancient York Masons originally in this state after the war? A certain number of Lodges then existing, who agreed to unite together and to form a Grand Lodge. The right of individual Lodges not less than five in number, to form a Grand Lodge in any state or community, where none is in legal

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existence, is asserted from Dermot down *to Dr. Dalcho's Ahiman Rezon, and if the Lodges could create a Grand Lodge, as they did after the war, they surely could renew one, which the officers and members had left vacant by dereliction. I think therefore the Lodges could lawfully restore or renovate the Grand Lodge on the abandonment of the officers who composed it, though we should admit that the act of abandonment had amounted to a temporary extinction of an integral part of the corporation. But I should have very great reluctance to decide that the dereliction of station or abdication of any officers of a corporation, or even a distinct branch of an extensive corporation, amounted to such an extinction of an integral part of the corporation, as would jeopardise the body corporate. It would be very mischievous to do so. The charters of all our towns, and of all our societies, might be jeopardised by any leaning of the Court to construe the acts of portions of corporate bodies as extinctions of their charters. This is not the policy of our country. We have nothing of the jealousy against corporate bodies which Trajan expressed in his celebrated letter to Pliny, when he consulted him as to the formation of an useful one in his province. We know their value, and cherish them as useful engines for great purposes in society. I am disposed therefore to consider the declaration of the officers and members of the Grand Lodge, that the old system and the old name were abolished, and a new one established, as a simple dereliction or abdication or (if it will be more acceptable to the very respectable men concerned) resignation of their stations in the corporation. They intended indeed a great deal more; for meaning well, and believing they possessed absolute power over the object, they meant to extinguish the corporation in order to establish another society, chartered or voluntary, on a broader basis. But they had not the power under the charter to do this, and their act in my judgment may be fairly said to be no more than a resignation; and I think the subordinate Lodges, who originally created the Grand Lodge, and out of

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whose bo*som it grew, had a right to renew the Grand Lodge by sending their past and present masters and the officers or proxies, to form a Grand Lodge, and to choose new grand officers. They have exercised this right, and I think the new Grand Lodge and the subordinate Lodges are re-established in their full force, and in possession of all the legal rights of the corporation. I will not go into a full examination of the question, whether the subordinate Lodges had a right to assemble in convention and expel the members whose conduct they disapproved. The regulations of the Ahiman Rezon on the subject of assembling in convention, were adapted to ordinary occasions. The proceedings of the Grand Lodge, supposing them irregular and untenable, as I have done, left the subordinate Lodges, who disapproved their conduct, and who were desirous to adhere to the charter, no other method of proceeding, in order to preserve themselves and to revive or (as the case Rex v. Passmore expresses it) to restore the integral part of the corporation, which had been left vacant by resignation or dereliction. And I think they might lawfully revive it as they did. Nor do I think it necessary to examine minutely as to the numbers who concurred with the Grand Lodge. In such a question, which went to the existence of the society and charter, no representation or proxies could take away from the Lodges the power of judging for themselves as constituent parts of the corporation; but allow the full system of representation, it had not proper powers for such a purpose, so that a majority of the Lodges never consented to these measures; and if they did momentarily submit, they speedily, and whilst the measure was pending (the condition of the convention, to wit, the attainment of a new charter, never having been obtained,) expressed their disapprobation and disagreement, and no more than twelve Lodges out of thirty-nine adhere to the change attempted by the Grand Lodge. With respect to the individuals composing the Grand Lodge who acted the part complained of by the subordinate Lodges, it

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appears to me that they made so *complete an abandonment of the society, such a resignation of their interest in the charter, that there was no necessity for their removal by any act of expulsion or amotion. But if it were necessary that they should be formally removed, it is well known that every society, every corporate body, has the power of amotion as incident to it. Though Lord Coke and some others formerly thought differently, the later cases have completely established that point. 2 Bac. 21, 2. But this power of amotion must be exercised with great caution and regularity, for the body of the

corporation and the parties have a right to be summoned, and have an opportunity of explaining their conduct and defending themselves. These provisions have not been followed in this case, for the parties had no notice, and if the matter rested here, I should say these individuals still remained members of the corporation; even though I might be satisfied that the attempt to extinguish the corporation and to give up the charter, was a reasonable cause for amotion. But where an officer declares he will serve no longer, and had in other respects misdemeaned himself, and was removed without notice; the Court of King's Bench refused a mandamus to restore him, the causes of removal appearing so sufficient. See Rex v. Mayor and Burgesses of Axbridge, Cow. 532. I think the acts of the members composing the Grand Lodge, in declaring the Grand Lodge dissolved, (which they have produced in evidence) do amount to an express declaration that they would serve no longer, and is a voluntary and avowed abandonment of the charter and of the society. It was not a loose declaration, but a solemn act, published to the world, and since avowed to the Court; and they are bound by it. Their very suit in a different character proves this.

It will be perceived from the foregoing, that I am of opinion against the complainants on the merits of the cause. But if my judgment should have been misled in that respect, there is another ground on which it appears to me impossible that the complai-

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*nants can sustain this suit. They have brought the action in the name of William Loughton Smith, John F. Grimke and others, officers and past masters of the Grand Lodge of South-Carolina, to recover a debt, contracted with and due to the Grand Lodge of South-Carolina Ancient York Masons. In their individual capacity they are clearly not entitled to the money nor can they maintain the suit. The Grand Lodge of South-Carolina is not a corporate body known to the law. In neither character can they recover. It was insisted that here is only a slight alteration of the corporate name, and that in some cases it has been decided that such slight variations shall not vitiate the claim or the suit. The rule is that suits shall be in the corporate name which is the bond which binds the society together; but there have been some instances in which the corporation has not been held to the strictness of a letter. Slight variations have not been allowed to defeat just demands, and I approve of that liberality which aids justice. But here the variation in the name is not a slight one, it omits the words which form the distinction and discriminating character of the corporation, "Ancient York Masons;" nor is this omission accidental, which the Court might remedy by allowing an amendment. It is done by design, on a settled plan fully executed and avowed even now, to abandon the use of the name given by the charter, and to abolish its use, and to assume a new one, in a distinct society composed of others besides the members originally or regularly members. And this too is a voluntary society, not an incorporated one. It does therefore appear to me that this was a radically designed change of name as well as of character. And that this new voluntary society of masons, forming the Grand Lodge of South-Carolina could not succeed to the rights of the corporation of South-Carolina Ancient York Masons, which they had voluntarily abandoned; and still less that this suit could be maintained in their name as it is brought, even against the debtor, if the other defendants

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made no opposition. I admit *(that I may not be misapprehended) that a debt due to a corporation still remains though their name be changed by a new charter, (2d Bacon, 32, 3; Lev. 238,) but this must be where the change has been regularly agreed to by the constituent parts of the corporation, and the new charter is actually obtained, and where it is obviously the same corporation somewhat new modelled, with their own full consent. It is not easy for a corporation to be connected and succeed to the rights of a voluntary society out of which it grew, as may be perceived in the case of Dance and others v. Girdler and others, in 1 Bos and Puller, page 34; and still less I apprehend can the individuals who belonged to a corporation, and even composed an integral part of it, but who have abandoned the society to form a new voluntary society, connect the rights of the old corporation with the new society. There were some minor points in the case, which I will notice from respect to the counsel who urged them. It has been stated that the fund in controversy was raised chiefly by the contributions of those Lodges which have adhered to the change made by the Grand Lodge in Charleston, and that the Lodges who adhered to the ancient charter had contributed but little to the fund. This may be and I believe is correct, but it cannot have any influence upon this cause, for whenever individuals or portions of a corporation quit the main body, they leave all the rights and funds of the corporation which remain in its perfect character. This is the legal effect and result, not from the decree of this or any other Court. It was also urged that the defendants had obtained the advantage of possessing the fund, by an order of a Judge of the Court of Common Pleas, changing the attorney, which was irregularly obtained. I have but one remark to make on that subject. If that order had been irregularly obtained, it could have been regularly reversed; and I am bound by the respect mutually due by the Courts of Justice to each other, to suppose that the order was properly

obtained. Upon the whole, I am satisfied
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after a most deliberate examin*ation of this case, that the complainants are not entitled to recover on the merits of the cause; and I am also satisfied that the individuals who have left an incorporated society and formed a voluntary one, cannot maintain a suit to recover the corporate funds, more especially as that corporation remains in my judgment, entire, and is in full possession of all its rights. It is therefore ordered and decreed, that the injunction be dissolved, and that the complainants' bill be dismissed, but without costs of suit.

HENRY WILLIAM DESAUSSURE.

There was no appeal from this decree.

Messrs. Bacot, Simons, Huger and Ford, for the complainants.

Messrs. Wilson, Geddes and Pringle for the defendants.

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3 Desaus. 584

Case LXVI.

WILLIAM GIBSON v. WILLIAM BROADFOOT.

[Tried before Chancellor Desaussure, Charleston, March, 1813.]

[*Account* ⟸20; *Arbitration and Award* ⟸39.]

It is not necessary for an umpire to examine the accounts referred, if the two arbitrators agree in their report.

[Ed. Note.—Cited in Rounds & Hagler v. Aiken Mfg. Co., 58 S. C. 323, 36 S. E. 714.

For other cases, see Account, Cent. Dig. § 120; Dec. Dig. ⟸20; Arbitration and Award, Cent. Dig. § 200; Dec. Dig. ⟸39.]

[*Equity* ⟸405, 407, 412.]

Accountants appointed by the Court to aid the master, are more upon the footing of the master, than of arbitrators, and their reports more under the control of the Court. The Court when dissatisfied with the master's report, may refer it back to the master to be reviewed; though the general rule is not to admit exceptions after the report, and no exceptions then made.

[Ed. Note.—Cited in Millam v. Southern R. Co., 58 S. C. 288, 36 S. E. 571.

For other cases, see Equity, Cent. Dig. §§ 882, 897, 924; Dec. Dig. ⟸405, 407, 412.]

[*Equity* ⟸405.]

Formal notice of the accountants' meetings and proceedings not necessary, if the parties are apprised of them.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 882; Dec. Dig. ⟸405.]

This case came on upon a motion made on behalf of Mr. Gibson, to set aside the reports made by the accountants to whom the Court had referred the accounts in the above cases, and to refer the said accounts to the master or to other accountants with certain directions and instructions. It was agreed by the parties under the direction of the Court to confine themselves at present to the sixth ground stated in the notice, to wit, "That there is reason to believe that the said accountants made their reports without proper investigation, as one of them has since acknowledged that he did not investigate the accounts, but signed the report as a mere matter of form." To which it was added verbally, and made the principal ground in
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the argument, that Mr. *Gibson had not had an opportunity of putting in his exceptions to what was called the third report of the arbitrators.

The first objection has been completely removed by the explanations given by Mr. O'Hear, one of the accountants. He states that he had examined with care and attention all the accounts and books of account, except those which related to the Liverpool transactions; and that with respect to these Mr. Tartt and Mr. Duffus had undertaken the minute examination of them, and if they differed, he was then to be called in to decide between them; but they agreeing, there was no necessity for his investigating them. There is nothing improper in this. In most cases the umpire performs this very duty, and examines and decides only when the arbitrators differ in opinion. If Mr. O'Hear had gone over the accounts and had differed from his colleagues, it could not have altered the case. How can his acquiescence and concurrence in the result of their known laborious examination, produce the effect of vitiating their act? I am entirely satisfied on this point.

The other ground, though taken verbally at the argument, was most urged and most relied on. To understand it fully, we must resort to a history of the transactions. The disputes between these parties related to accounts. On a reference of these accounts, it was agreed between the parties that it would be proper to appoint accountants, who should stand in the place of the master, and who should examine and report upon them. The appointment accordingly took place by order of the Court; and on the 16th of February, 1810, all three of the referees who had been named by the parties, joined in a report. To this report both parties put in exceptions; which exceptions were deliberately examined and decided upon, as appears by the report of two of the referees on the 5th of March, 1810. It appears further that on the 10th of March, 1810, the Court did on the motion and with the consent of the solicitors of the respective parties, order and direct that the
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report made *by two of the referees on the exceptions of the parties to their first report should be set aside; and that the parties respectively should be at liberty to renew their exceptions, and state such others as they should see fit; and that the order of reference should be extended to the last day of May then ensuing. On the 22d of

May, 1810, the three referees made a third report, grounded on the exceptions which had been previously before them, and made their final award. The motion now before the Court is to get rid of all the references, reports, exceptions, and reports upon the exceptions, in order to have a new reference to the master himself, or to other accounts; one of those formerly employed having departed the state; and another being very sick and infirm, and the third not acceptable to one of the parties.

It was insisted as a preliminary, that the referees did not stand on the footing of arbitrators, but as substitutes for the master, whose reports are more under the revision and control of the Court. This certainly is correct; and I agree to the law cited from Dickens's Rep. that if the Court sees reason to be dissatisfied with the master's report, it may refer it back to the master to be reviewed; although the general rule is, not to admit of exceptions after the report is made and no exceptions filed to it. If therefore there be substantial ground to be dissatisfied with the report, I shall not hesitate to send it back to be reviewed. In the present case, however, the dissatisfaction cannot be extended to the merits of the report; for this motion, restricted as it is, goes only to the conduct of the referees, in not giving, as is alleged, an opportunity to Mr. Gibson to put in his exceptions. It is not pretended that formal notice was given to either of the parties to put in their exceptions and to attend the referees; and upon examination of the state of the facts, it does not seem to me to have been necessary. For the order of the Court of the 10th of March, 1810, did not set aside the original report of the referees, but merely the report on the exceptions of the parties; and it authorised the parties

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to renew the old exceptions, *and to put in new ones, and directed a report to be made on or before the 31st of May: It was not therefore for the referees to direct the parties when to put in their exceptions. The master after he makes a report, leaves it wholly to the discretion of the parties to put in exceptions, and their non-performance of that act is always understood to be an acquiescence in the report. In this case the Court had enlarged the time from the 10th of March to the 31st of May, to enable the parties to put in exceptions. Down to the 22d of May, no exceptions were put in; the referees had a right to presume that no new ones were intended to be brought forward; and therefore lest the time should elapse, they took into consideration the old exceptions of both parties, considered them, overruled some and sustained others; and no new exceptions were filed within the limited time. I can see nothing incorrect in this conduct, so far as we have gone. But it is alleged that the referees were bound to have given notice to the parties of the time and place of their meetings to consider the exceptions, and that not having done so, their report ought not to be supported. There are two answers which I think are satisfactory to this objection. The referees were not framing an original report; but were examining the old exceptions, which had been antecedently before them, and doubtless much discussed; and a formal notice does not seem to have been necessary, more especially when it is in proof from the affidavits, that if the parties had not formal notice, they had knowledge that the referees were meeting frequently on the subject; and Mr. Gibson was even present at some of those meetings. He indeed alleges that he was there accidentally, and on other business; but whatever was the cause of his going to the place of meeting, it is positively affirmed on the oath of a disinterested witness that Mr. Gibson asked the referees how they were going on with the business, and the referees asked him various questions respecting the subjects under discussion. When we consider this, and reflect that Mr. Gibson never did put in any

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*exceptions under the order of Court after the 10th of March, as he was bound to do without notice, if he intended any; and that Mr. Tartt, one of the referees, was the particular friend of Mr. Gibson, and lodged with him, and was an excellent accountant, and intimately acquainted with the accounts and affairs in question; and that he attended the meetings regularly, and advocated the interests of Mr. Gibson as far as a sense of justice would permit, the impression on the mind is irresistible that Mr. Gibson was fully informed of what was passing, and ought to have attended more directly to his interest, if he had thought it necessary. It is further insisted on the part of Mr. Gibson, that no notice was given him previously to the third report being given in to the Court, which notice he was entitled to, that he might have put in exceptions to the report. This objection seems to be grounded upon the idea that whenever exceptions have been put in, and the master has decided on them, that he is bound to furnish a copy of his report on the exceptions, or give notice to the parties that they may prepare exceptions to it. But this surely is not the course of the Court. Upon the original report, it is the course, and properly so, to give notice, in order to elicit the objections and exceptions of the parties. When these are made, and the master decides on them, it is neither necessary nor proper to give notice to the parties before he lays them before the Court; for it would be useless, not to say idle, to travel in the same circle without end, in the manner proposed. The exceptions being sustained or overruled, become the subject of discussion before the Court, which decides finally on them. This was the case now under consideration. The original report had been made, exceptions had been put in, some

of which were sustained, and some were overruled. The court had by consent of both parties, sent back the report on the exceptions to the referees. They considered them, and made a new report on the old exceptions (no new exceptions being filed,) and this report would carry all the disputed points made

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known before *the Court. It appears to me all this was in the proper course. But it is insisted that Mr. Gibson believed that as he was not formally noticed to attend the meeting of the referees, he could at any time come in and set aside their proceedings; and that if he is prevented from doing so, he will have lost his opportunity, and be much injured. I am sorry for this allegation; because it would surely have been more proper for Mr. G. to have requested the referees to be more formal in their proceedings when he thought he saw them proceeding irregularly, than to have lain by and furnished a ground for the suggestion, (which however I am unwilling to believe,) that he lay by designedly, and with a view to set aside the proceedings and delay the determination of the cause. Be that as it may, I cannot set aside the reports on his allegation of misapprehension, to the lasting delay and deep injury of the other party. If he should be injured, it will be his own fault; for he had access to better advice. But he cannot be injured; for if on the coming on of the cause, it should appear to the Court that the referees have not done justice, and that there ought to be a reference back to the master or accountants to get at the merits of the case, doubtless such a course will be pursued. But I wish to be understood fully. It must be a very strong and even a flagrant case, which will induce the Court, after a lapse of three years and a most laborious examination of accounts, by men eminently competent to the task, and above reproach, to set aside the result of those examinations. More especially when the referee nominated by the complaining party concurred in and signed the first report, and the last decisive report upon the exceptions; and more especially when the absence of that referee, and the infirmities of another might involve the necessity of an entire new reference, and thus open the whole subject of litigation, to travel the same round of investigation and delay. The time prescribed for the duration of causes has nearly elapsed in this case and though by a late law the Court is authorised

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to extend *the time, on good cause shewn, it is a confidence in the discretion of the Court which must be exercised cautiously, so as to give effect to the maxim which considers the public interest, as well as that of individuals best consulted by the speedy decision of causes. Upon the whole I must refuse to grant this motion.

3 Desaus. 590

Case LXVII.

HENRY LAINHART v. the Administrator of CH. REILLY.

[Tried before Chancellor James, Charleston, November, 1813.]

[*Principal and Surety* ⇐62, 152.]

The principal and one of the sureties in a joint deed or covenant becoming insolvent, this is not a bar to the claim of the creditor, against the estate of the solvent surety who is dead. The delay in suing did not amount under the circumstances to such laches as would bar the claim. The complainant is not obliged to sue the other surety who is out of the jurisdiction of the Court and insolvent.

[Ed. Note.—Cited in Susong v. Vaiden, 10 S. C. 255, 30 Am. Rep. 50.

For other cases, see Principal and Surety, Cent. Dig. §§ 106, 418; Dec. Dig. ⇐62, 152.]

[*Equity* ⇐117; *Principal and Surety* ⇐156.]

[A defendant must take advantage of a want of parties by plea, if at all.]

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 288; Dec. Dig. ⇐117; Principal and Surety, Cent. Dig. § 423; Dec. Dig. ⇐156.]

This bill is brought by complainant on a joint deed made at Nassau, the 30th August, 1799, by a certain George Ross, as principal, and the defendant's intestate and a certain Linton Dudley, as securities. The deed was intended to secure a bill of exchange drawn by the said George Ross at Port de Paix, on the 17th December 1798, upon Edward Goittier of Baltimore, for the sum of $800, and protested by him on the 26th of March 1799. Complainant and Ross both lived at Baltimore, and Ross after the protest first arrived there from the West-Indies, in the year 1800, during the time the yellow fever prevailed in Baltimore. In October of that year, complainant sued him on the bill of exchange. On the 16th March 1801, Ross applied to the Court of Chancery, the proper tribunal in Maryland, for the benefit of "An act for the relief of sundry insolvent debtors." In the same year of 1801, he left Baltimore, and on the 20th September 1810, at the date of the evidence taken under commission, he had not returned there. After Ross left Baltimore, judgment on the suit of Lainhart against him was confessed by Ross's attorney on the 4th of February, 1802, and the judgment was entered the same day; but no execution was issued, because as it was said he was insolvent, and was absent in the West-Indies. Goittier says he believes Ross had no property to surrender to

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assignees, under *the act for the relief of insolvent debtors. As to Linton Dudley, the other surety to the deed, a witness, James M'Ilhenny, has deposed, that he lives in North-Carolina, near Wilmington; that he is insolvent, and he believes, he could not pay even a debt of five dollars; so that both the principal and one of the sureties to this deed

being insolvent, the complainant has brought his bill against the representatives of the deceased surety, expecting to recover from him in equity. It has been urged on the part of defendant, that he is not liable, because the deed being joint, on the death of his intestate, the survivors only were chargeable. It is so at law, but the complainant has a lien on the estate of the deceased covenantor, in equity. He has bound himself, his heirs, executors and administrators to be accountable for the bill of exchange; and the bill not being paid, and the other joint covenantors being insolvent, upon the authority of adjudged cases, both here and in England, he is liable in this Court, for the payment of the whole of the money. An objection is made that complainant did not use due diligence in recovering the money on the bill of exchange. Ross was in the West-Indies at the time the bill was protested; he did not return to Baltimore, where he and complainant resided, till the year 1800, during the prevalence of the yellow fever in that place, which was during the summer and fall, and we find that he was sued as early as October. There was therefore no great laches. But I apprehend that all that diligence which is necessary to make an indorser liable, was not necessary here. The intestate was no indorser; he did not assume on the foot of a bill of exchange, but by a separate, independent instrument, and that being under seal, he is sued in due time. But it is also objected that Dudley ought to have been sued. He is without the jurisdiction of this Court, and has been proved to be insolvent. It would therefore have been a nugatory act, to have made him a party; and even if defendant had wished to take advantage of such omission, if it can be so

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termed, he ought to have done it *by plea. To warrant the doctrine I have laid down, "see the case of the executor of Shubrick v. Russell executor of Levingston, [1 Desaus. 315,] eq. March term 1793; Madox v. Jackson, 3 Atk. 405." It is therefore decreed that the defendant as administrator of Reilly, do pay the whole of this debt. Let the master report the amount of the same with interest, and upon the coming in of the report let the defendant pay the principal and interest out of the estate, and account with the master for the assets. Let the deed be assigned by complainant to defendant for the benefit of the estate; and let the costs also be paid out of the same by the administrators.

WILLIAM D. JAMES.

An appeal having been made in the above case from the decree of the Circuit Court, the appeal was argued, and the Court delivered the following decree:

We have considered this case, and we are satisfied with the decree of the Judge who tried the cause in the Circuit Court. The decree is therefore affirmed for the reasons therein given.

HENRY WM. DESAUSSURE,
THEODORE GAILLARD,
THOMAS WATIES,
WILLIAM JAMES.

Mr. Ford, for complainant.
Mr. Pringle, for defendant.

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3 Desaus. 592

Case LXVIII.

BELLA HART and Others, Devisees of Daniel Hart v. NATHAN HART and RACHEL, His Wife.

[Tried before Chancellor James, Charleston, November, 1813.]

[*Frauds, Statute of* ⇐129; *Wills* ⇐480.]

A father gave a house and lot, by parol, to his eldest daughter, on the day of her marriage, as a portion. She and her husband were put in possession of the house, and lived constantly in it, and paid the taxes for it as their own. The father never executed any conveyance to them. He afterwards made his will and directed his estate to be equally divided among his children, except his eldest daughter whom he declares he had already portioned and provided for on the day of her marriage. The daughter is entitled to hold the house and lot absolutely as a gift sustainable under all the circumstances, or by implication under the will.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 303; Dec. Dig. ⇐129; Wills, Cent. Dig. § 1004; Dec. Dig. ⇐480.]

This case comes before me under the following circumstances, which are distinctly admitted to be true by both parties. Daniel Hart in the year 1807, purchased a house and lot in Charleston, which he gave by parol to

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*his daughter Rachel, the defendant, the wife of Nathan Hart, on the day of her marriage, as a marriage portion, and he immediately put her husband and herself in possession. The defendants lived in the said house undisturbed by the father, during his life time; but they never received from their father, conveyances of the property, though he always spoke of it, both to them and to strangers, as being the property of the defendants, who always paid the taxes for it in their own name, and were regarded by the said Daniel and his family as the indisputable owners. That the said Daniel Hart died in 1811, leaving a will by which he bequeathed, inter alia, as follows: "All the residue of my estate, either real or personal, and of every description whatsoever, shall be divided between my said children, or the survivors of them, share and share alike, after bringing into account whatever may have been advanced to any child or children as aforesaid, so that they may all receive their equitable share, and be placed on an equal footing in every respect whatsoever. But my eldest daughter who is married to

Nathan Hart having been already portioned and provided for on the day of her marriage, consequently she has no claim, and is not to be considered a legatee under the present disposition of my property."

The complainants charge that as the house is not expressly devised by the said Daniel to the defendants, it must pass into the residue of the estate, and be transmitted to them under the devise before recited; which is resisted by the defendants who claim it under the marriage contract and under the will itself.

The first and leading principle in the construction of wills, is that the intention of the testator shall govern; and in the present case the intention of the testator inferred from the will itself, evidently is to exclude the portion already given to his daughter Rachel from the residue of his estate, and divide that residue equally between all his children, excluding the said Rachel, who he declares to be already portioned and provided

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for on *the day of her marriage. Now here is an express recognition by the testator of the portion given by him to his daughter on her marriage, and it is sufficient, if not expressly, at least impliedly, to vest such portion in her and her husband. By a will an estate may arise by mere implication, as where a devise is to the heir at law of the devisor, after the death of his wife. No estate is by express terms given to the wife, yet she shall have an estate for life by implication. 1 Fonbl. 450. So in the present case a devise of the whole of his estate to his other children, excluding what his daughter Rachel had received, as a marriage portion, though it does not by express terms give to Rachel the said estate, yet it manifestly does so by implication. Marriage portions are regarded with a very favorable eye by this Court, and will be always upheld if possible, especially when it appears to have been the intention of the father to place all his children on an equal footing, and where the portion allotted to one is equal in value to the shares to be received by the others. This being admitted to be the case here, it would not perhaps be too astute in the Court to say, that the declaration of the testator in his will, that he had already portioned and provided for his daughter on the day of her marriage, is of itself a confirmation of the estate to her and her husband, under the hand and seal of the father, and therefore a sufficient title in fee to them. But further, this clause in the will may be construed as being meant as a performance of the father's promise to portion; and in this light parol evidence is admissible to shew such meaning; for it is not used to contradict, but to explain the will, and to shew one thing to be in satisfaction for the other. Powel on Devises, 529. But parol evidence is unnecessary, where the parties admit the fact, and both parties here agree that the promise to portion, was made by the father to the defendants, and that portion was the house. But another view of this subject, puts the matter out of doubt. Both law and equity would regard the defendants as bona fide purchasers of this house for one

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of the high*est considerations known in the law, namely marriage. Now no principle is better established than this, that a parol contract of sale or purchase admitted by the parties, (when the statute is not also insisted on,) will be specifically decreed. So also when there is part performance, such as payment of the purchase money, or delivery of possession, (3 Atk. 1, 3, Dickens 664, 1 Ves. 312,) the case is taken out of the statute. Now in the present case the consideration has been performed, namely the marriage; and the possession of the house, as a performance of the contract on the father's side, has been delivered. Where then can be the danger of fraud? In a case of this kind were the contract to be declared void, the statute would be converted into an instrument of fraud. Let us ask if the father could have recovered back this gift in this Court, in his life time? The answer must be no; it would be iniquitous if he attempted it; and this Court would shut its doors against a wrong doer. It would be a fraud on the defendants who had married and undertaken the charge of a family in consequence of this portion having been not only promised, but actually given them. Then if the father could not have recovered, it follows that his devisees cannot, as they stand precisely in his shoes. Upon the particular circumstances of this case, I am of opinion, that the defendants, Nathan Hart and Rachel his wife, have a good equitable title, which this Court will not suffer to be disturbed; and I do therefore decree that the bill be dismissed, each party paying their own costs.

WILLIAM D. JAMES.

There was no appeal from this decree.

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*Case LXIX.

COLONEL JAMES BURN v. the Administrators of JOHN POAUG, Deceased.

[Tried before Chancellor James, Charleston, November, 1813.]

[*Stipulations* ⟸16.]

Parties agreeing to have the payment of a sum of money, determined by the declaration of a particular witness, are concluded by it.

[Ed. Note.—For other cases, see Stipulations, Dec. Dig. ⟸16.]

[*Principal and Surety* ⟸88.]

A purchaser of a house and lot, on which an annuity is charged, and who gives his bond for the purchase money, is compellable to pay the amount of the purchase money after the an-

nuity is extinguished, though not done in the first instance by the original vendor of the house, or his representatives.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 135; Dec. Dig. ⇐88.]

[*Equity* ⇐392, 446, 447; *Principal and Surety* ⇐97, 108.]

A petition for a bill of review or rehearing, rejected by the Court. The petition did not make a case which comes within the rules, as to bills of review, for there is no error apparent on the face of the decree; nor is there any allegation of new matter, affecting the justice of the case, which could not be used at the time of the first decree. Nor is the petitioner entitled to a rehearing; the facts existing in the case do not warrant the conclusions drawn from them by the petitioner, but support the decree. And the surety is not entitled, under the circumstances of the case, to be discharged without paying the debt.

[Ed. Note.—Cited in Haskell v. Raoul, 2 Tread. Const. 896; Haskell v. Raoul, 1 McCord, Eq. 29; Jeannerett v. Radford, Rich. Eq. Cas. 472; Hinson v. Pickett, 2 Hill, Eq. 354; Hill v. Watson, 10 S. C. 276; Ex parte Knox, 17 S. C. 209.

For other cases, see Equity, Cent. Dig. §§ 835, 1079, 1091; Dec. Dig. ⇐392, 446, 447; Principal and Surety, Cent. Dig. §§ 160, 213; Dec. Dig. ⇐97, 108.]

[*Equity* ⇐392.]

[Cited in Carr v. Green, Rich. Eq. Cas. 408, to the point that a court of equity cannot order rehearing after final decree.]

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 834–851; Dec. Dig. ⇐392.]

[*Principal and Surety* ⇐104.]

[Cited in Galphin v. McKinney, 1 McCord, Eq. 297, to the point that a surety is released by an extension of time for performance of contract.]

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 186–190, 193–195, 197–200; Dec. Dig. ⇐104.]

[*Principal and Surety* ⇐125.]

[Cited in Pickett v. Land, 2 Bailey, 610, to the point that mere delay of creditor to sue will not release surety.]

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 312–328; Dec. Dig. ⇐125.]

This was a bill filed by the complainant to obtain an injunction to restrain the defendants from proceeding to enforce a judgment at law, which they had obtained against the complainant, on a bond which was executed by William Tunno, together with the complainant as his surety, under the following circumstances. William Tunno had purchased a house and lot in Charleston from John Poaug, who gave Tunno conveyances for the same, with a general warranty, and also a bond of indemnity to protect him from all incumbrances. The principal incumbrance on the house was an annuity of 60*l.* per annum bequeathed by Mrs. C. Poaug, (the mother of Mr. John Poaug, and former owner of the house,) to Miss E. James, and charged on all her real estate. Tunno paid John Poaug 1010*l.* and gave his bond, as above mentioned, on 1st March, 1794, conditioned to pay £1094 by instalments in the year 1797 and '8, which is the bond to which the complainant was surety. The bond was also secured by a mortgage of the house and lot to Mr. Poaug. In January, 1798, Mr. Tunno mortgaged the lands to Francis Bremar, and on the 14th January, 1804, he released the equity of redemption in said mortgage to said F. Bremar; which release he has since endeavored to controvert. In the year 1806, Miss E. James filed her bill in equity against William Tunno and Francis Bremar, to procure a sale of the house, to pay the arrears of the annuity charged on it by its former owner Mrs. C. Poaug, (Mr. John Poaug having paid the annuity down to the 14th September, 1794, and no payment having been made afterwards,) and to raise a fund for its future regular payment. And the Court in May

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1808, decreed, that the *house should be held liable to the annuity, exclusively of the rest of Mrs. C. Poaug's estate. Afterwards the said E. James being about to enforce the decree of the Court for the sale of the house, the said Francis Bremar made two payments to Miss James on the annuity, one for £699 12s. 9d. and the other for £93 6s. 8d. Miss James died on the 7th day of May, 1810, having bequeathed the balance of the arrears of annuity to Mr. James Ferguson. William Tunno had paid £70 in the year 1798, and £100 in the year 1799, for which he claimed credit on his bond; and he also claimed credit for a payment of £50 alleged to have been paid through the hands of W. Robertson, Esq. and which it was agreed should be decided by his statement of the fact. The administrators of John Poaug instituted a suit on the bond against Mr. Tunno, in the year 1801, and the case was put on the issue docket where it remained till May 1804, when it was discontinued, and he took the benefit of the insolvent debtor's law in the year 1805. In the year 1809, the administrators of John Poaug brought a suit on the bond against the present complainant James Burn, the surety; and judgment had been suffered to be taken thereon, upon an agreement entered into between William Crafts, acting for the administrators of Poaug, and T. Parker for the defendant Burn; by which it was stipulated that the judgment should not be enforced for so much of the sum as was due on a certain annuity bequeathed by the late Mrs. C. Poaug to the said Miss James, untill the same be paid or discharged by the representatives of the estate of John Poaug; and it was further stipulated by the said agreement that the payments of £70 and of £100 made by Mr. Tunno, in 1798, and 1799, should be credited on the said bond, and that the sum of £50 should be reserved to be afterwards adjusted according to the evidence which might be given respecting it by Mr. William Robertson, of Beaufort. A bill was filed by Colonel Burn against the representatives of

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John Poaug, and a *motion for an injunction was made on the following grounds.

1. Because the defendants had not proceeded against William Tunno, the principal obligor, for many years, (from 1794 to 1801,) and when a suit was instituted against him, the same was discontinued without enforcing a judgment against the principal, or taking any measures to get payment from him; whereby, it was alleged, the surety was discharged according to the rules and principles of equity.

2. That if the surety was not discharged, he is entitled to avail himself of every defence or discount which the principal obligor was entitled to do; and particularly that he was entitled to claim as a set off against the bond, the amount of the arrears of an annuity charged on the house purchased by Mr. Tunno, the principal obligor, from the said John Poaug, which house was the consideration of the bond, and which it was alleged had been agreed by the defendants to be allowed as a set off against the bond, and actually exceeded the amount due on the bond.

The Chancellor before whom the motion was made for an injunction, granted the same, reserving to the defendants the right of shewing cause for setting it aside, on the first day of the next sitting of the Court of Equity in Charleston.

In November, 1813, the defendants moved to set aside the injunction, and the Chancellor then sitting, ordered a reference to the master to ascertain the amount due on the bond. The master afterwards reported that two sums of £70 and of £100 had been paid on account of the bond, and ought to be allowed in discount. But that the sum of £50 claimed as a discount, had not been paid on the bond, and ought not to be allowed; and that the whole amount due appeared to be £1556 19s. 8d.

To this report the following exceptions were filed:

1. Because as the sums of £70 and £100 had been paid by William Tunno to the attorney of Miss E. James, on account of the

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annuity, (which should have been paid *by Mr. Poaug himself,) it is clear that Tunno ought to have been allowed the same, with interest from the time of payment to the time of the settlement.

2. Because the sum of £50 was agreed by the defendant to be reserved, to be proved or disproved by the testimony of William Robertson, which has not yet been adduced; and therefore it could not properly be rejected by the master. Besides that it was immaterial whether it was paid on the bond or not; as it was indisputably paid by Tunno for Mr. Poaug; and Tunno is entitled to credit for it, with interest from the representatives of Mr. Poaug.

3. Because the amount stated to be due on the bond is erroneous, as the amount of the annuity, (a discount alleged to be admitted by the defendant's assent,) was not enquired into by the master, who considered his enquiry confined to the bond, according to the order of the Court furnished him by the register, and therefore refused to hear any thing on the subject of the annuity.

4. Because if the above sums with interest, and if the amount of the annuity be discounted against the said bond, (as agreed to by the defendants,) nothing would be due on the aforesaid bond by the said William Tunno, and by his surety the complainant.

The cause came to a hearing before Chancellor James at the sitting of the Court in November, 1814.

Mr. Thomas Parker gave evidence in the cause to the following effect. He stated that it was understood by both parties to the agreement above stated, that Mr. Robertson's testimony was to decide whether the sum of 50*l.* claimed to be credited on this bond, had been paid by him; and that Mr. Robertson having stated in his letter of the 5th of March, 1813, that he had not made the payment of the £50 in question on the bond of Tunno and Burn to J. Poaug, not having been instructed to do so by Mr. Tunno, but to another purpose for Tunno, he (Mr. Parker,) who was then counsel for Mr. Burn considered their statement as conclusive.

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That with *respect to the annuity, he had advised Mr. Moncrieffe the agent of Colonel Burn, to take up so much of the debt or annuity as had been paid by Mr. Bremar, the purchaser of the house, (by reimbursing him,) lest the representatives of John Poaug should do so. But this had not been done.

The agent of the estate of John Poaug produced a receipt from F. Bremar, dated in July, 1813, for £699 reimbursed him for the money he had paid on the annuity to prevent the sale of the house; and afterwards another receipt from Mr. James Ferguson, to whom the balance of the arrears of the annuity had been bequeathed, in full for such balance; and it was insisted that the representatives of the estate of John Poaug, having thus paid off the whole of the annuity, and thereby removed the incumbrance on the house, they were entitled to recover the whole debt on the bond of Tunno and Burn, after crediting the acknowledged payments.

Mr. Ogden and Mr. Prioleau, counsel for the complainant, contended that Colonel Burn, the surety in the bond, was discharged by the laches of the holder of it, in not pursuing the demand on the principal, in proper time and with due diligence, and they cited some cases to this point.

It was further insisted that the master's report, to which exceptions were filed, was erroneous in not allowing interest on the

admitted payments or discounts, and in not admitting the discount of 50*l.* which was to be explained by Mr. Robertson; that the letter of Mr. Robertson stating that he had not made the payment on this debt of Tunno's was not conclusive. It ought to have been further examined. It was also contended that the question as to the annuity not having been considered by the master to be within the order of reference, the Court ought now to decide upon it; and that the decision ought to be in favor of the complainant. That the payments made by Bremar extinguished so much of the annuity;

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but this not being done by the re*presentatives of Poaug, they were not entitled to the benefit of it; and if the representatives of Poaug have since paid the amount to Bremar, it is of no importance, and cannot alter the rights of the parties. They were noticed not to make such payments.

Chancellor JAMES delivered the following decree:

This is an injunction case, the history of which may be collected from the bill and answer. The Judge who granted the injunction, has stated "that complainant was entitled to an adjustment of his discounts, and a statement of the amount of his debt in equity," and being of the same opinion, I directed the case to be referred to the master. He has reported the discounts, and the balance which he thinks due; and the whole merits of the case now come before me, in the shape of exceptions to the master's report. Exception 1: On this it appears, that the payments of £70 on the 12th of November, 1798, and that of £100 on the 15th of April, 1799, were made on the bond of William Tunno, long before the decree made for the payment of the annuity, which was not until May, 1808; that therefore the said two sums are to be credited as discounts on the bond, first wiping off the interest, according to the established practice in such cases. Exception 2: The payment of 50*l.* on the above bond was agreed to be proved or disproved by the evidence of William Robertson. This witness believes that William Tunno did not direct him to credit the said 50*l.* on the bond, or he would have done so. That as an attorney he had a demand against Tunno, in behalf of Alexander Inglis, on which he thinks he credited the payment. Now it was Tunno's business to direct on what debt the payment should be made; and as he did not, the witness was at liberty to credit it on any other demand against him; at all events he may call Robertson to an account, and not the defendants. Therefore as the rights of complainant, the security, are in this instance the same as Tunno's, this discount is not established.

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Exception 3: On this the *complainant contends that he is to be allowed a discount for the money paid by Bremar on the annuity. By the decree of the Court, the annuity was the first encumbrance on the house; and this was an encumbrance of which Tunno, the complainant's principal, had full notice. He therefore might have taken it up, and thereby charged the defendant; but he paid nothing, and the complainant stood in his shoes. How then is he to be allowed any thing? Tunno was the first mortgagor, Bremar the second; and to secure himself, he (Bremar) was perfectly right to disencumber the house, which he had purchased, by paying off a prior encumbrance. It makes no difference as to Tunno, whether the said encumbrance was that of the annuitant or that of the defendants who represent the first mortgage, and hold the second encumbrance. This discount therefore, cannot be allowed. Wherefore the report of the master is confirmed, and the injunction must be dismissed at the costs of complainant.

WILLIAM D. JAMES.

From this decree an appeal was made.

The appeal was heard at the sitting of the Court in March, 1814.

It was argued by Mr. Ogden and Mr. Ford for the appellant, Colonel Burn, that the laches in this case had been very great. The bond of Tunno and Burn was dated in March, 1794; it was payable by instalments in 1797 and 1798; no suit was brought on it against Tunno, the principal, till the year 1801, and that was discontinued in 1804. The first demand on Col. Burn, the surety, was in the year 1809, when a suit was instituted against him. The principal was solvent many years; he did not take the benefit of the insolvent debtors' law till 1805. This long responsibility of the surety was produced by the delays and transactions between the debtor Tunno and the creditor Poaug and his representatives. The surety had a right to require that the principal should be sued in a reasonable time. The

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suit *was not brought till three years after the whole bond was due, and then ineffectually, for the suit was discontinued. This laches discharges the surety. It was essentially an extension of the credit of the debtor, at the risk of the surety. Injury might have resulted to the security, and has in fact done so, from the delay; therefore he ought not to be held liable. See the case of Butler and Hamilton, the comptroller-general, decided in this Court. 1 Domat. 399, 400, 8§. Pothier on Oblig. 230, § 370, 235, § 377; 2 Bro. C. C. 578, Nesbet v. Smith; 2 Vesey, 540, Rees v. Barrington; 4 Vesey, 824, Law v. E. I. Company; New-York Cases in Error, p. 1, Ludlow v. Simond; 7 Johnson, 332; 2 Henning and Mumf. 116; 1 Fonbl. 406.

Mr. Wm. Crafts, jun., for the representatives of the John Poaug, contended that they

were entitled to enforce their judgment on the bond; for that all that Tunno and his surety in the bond had a right to require either in justice or under the agreement, was to be indemnified against the operation of the annuity on the house and lot, for which the bond was given. That this had been done; for Bremar the purchaser from Tunno had paid great part of the arrears, and he had been reimbursed by the representatives of Poaug. This as far as the payment went was a satisfaction of the annuity; and it was immaterial to Tunno and his surety how or by whom it was satisfied. Tunno's payment on his bond was suspended only till the annuity was satisfied; that has been done, and he and his surety were now bound to pay the whole bond, the price of the house. And Mr. Parker, the attorney of Colonel Burn, considered the agreement complied with.

As to the laches, there is no ground for the complaint, for no injury has resulted. Tunno was insolvent before the suit against him was discontinued. But this case does not come within the rules for the relief of sureties. Chief Justice Elsworth dismissed all the applications for sureties on the ground

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of laches in pursuing the *principal. He said the indulgence was a favor. The case of Shubrick v. Russell, decided in this Court, has settled this point.

The Judges of the Court of Appeals being divided in their opinions, delivered the following:

This is an appeal from the Circuit Court for having dismissed an injunction which the complainant had obtained, to restrain the defendants from proceeding at law to enforce a judgment on a bond given by William Tunno, with the complainant as security, for the purchase of a house by Tunno from J. Poaug, deceased. The complainant claims relief against the bond upon two grounds. 1. That Mr. Poaug and his administrators, the defendants have not been sufficiently diligent in endeavoring to procure payment from the principal, Mr. Tunno, and that on account of their unreasonable indulgence to him the complainant as surety ought to be discharged. 2. That if he is not entitled to a discharge on the first ground, yet that he is entitled to a discount for the amount of an annuity to Elizabeth James charged exclusively by a decree of the Court of Equity on the house for which the bond was given, the amount of which it is alleged exceeds the sum due on the bond. There is no difference of opinion as to the first ground. A surety will be released where an obligee does some act which varies the terms of the original contract; as by extending the term by some written agreement, or by any other act which is in its nature injurious to the surety. But a mere forbearance to sue is not such an act; it is often a benefit both to the surety and the principal, and if the surety apprehends otherwise, he should apply to a Court of Equity and compel the obligee to sue. On the second ground we do not all agree, and as different conclusions are drawn from the same facts, it is important that these should be distinctly stated. Mrs. Poaug, the mother of the defendant's intestate, bequeathed by her will to Elizabeth James an annuity of sixty pounds per an-

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num, and charged with the payment *of it her whole real estate, which she devised to her son. He soon after sold the whole to different purchasers, none of whom it appears, had notice of the annuity, except Mr. Tunno, who purchased a house and lot, paid down part of the purchase money, gave his bond for the balance, with the complainant as his surety, and took from Mr. Poaug, when he received titles, a bond to indemnify him against the annuity.

It is manifest from these facts that the original contract between Mr. Poaug and Mr. Tunno was, that Tunno should pay the whole purchase money for the house, and that Poaug should indemnify him against the annuity; that is that he should discharge it as it occurred. These then were the terms by which the complainant as the surety of Tunno, was also bound. Let us see now if there are any subsequent acts which alter the original contract. It appears that Tunno afterwards sold the house to Francis Bremar; and that the annuitant, Miss James, having large arrears due to her, brought her bill to subject the house to the payment of her arrears and future annuity. As Bremar also bought with notice of this charge, and the purchasers of other parts of Mrs. Poaug's real estate had not, the Court decreed that the house should be exclusively liable to the payment of the annuity, as it must be obvious that the single object of the bill was to obtain a more efficient security for the regular payment of the annuity, this decree could not have had any other object in view; it could not have had in view the relief of Mr. Tunno or his surety; they have not asked for it. There was indeed no ground on which they could claim it. Mr. Poaug or his administrators had done no act which varied the terms of the original contract; and there was therefore no reason why the decree should make any alteration in it. By that contract Mr. P. was bound to discharge the annuity, and although the decree made the house exclusively liable to Miss James, yet he was still liable to Tunno under his bond of indemnity; and upon his discharging the annuity, Tunno and his surety continued

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still liable *to pay him the whole of their bond. But the decree could not have intended to alter the original contract, for another reason. If it released Mr. Poaug from his

bond of indemnity, it would have impaired the rights of Tunno and the complainant; for if, as is alleged, the amount of the annuity exceeds the balance due on their bond, they would be deprived by the decree of their remedy for this excess under the bond of indemnity, and if Miss James had continued to live they would have been deprived also of all indemnity against her future annuity. I can see nothing in the decree to authorise this construction; on the contrary I can see no other effect in making the house exclusively chargeable with the annuity than to make this charge exclusive with respect to the other lands of Mr. Poaug, which were purchased from him without notice of the annuity. In all other respects it appears to me that the decree intended to leave the parties under the original engagements; for it is not reasonable to presume that the Court would alter these when there was no ground to justify it. This construction is greatly strengthened by the subsequent conduct of the parties. The agreement between them which is made an exhibit, and which was entered into long since the decree, stipulates that the judgment against the complainants shall not be enforced until the defendants shall discharge the annuity. This surely means that the defendants were still bound under Mr. Poaug's bond of indemnity to discharge the annuity, and on this being done that the complainant was bound on his part to pay the full amount of the judgment. Now the defendants have performed the condition; they have discharged the annuity by reimbursing Mr. Bremar, who paid a large proportion of it to the annuitant, and by settling the remainder with her legatee. It is true that Bremar had it in his option to make either Tunno or the defendants account for what he paid; and if he had made Tunno do so, Tunno would have a right to discount pro tanto on his bond to Poaug, and the complainant as his surety would have

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been relieved to the *same amount. But Bremar has chosen to settle with the defendants under their intestate's bond of indemnity, and the complainant has no right to insist on a different mode of settlement. His original undertaking was to pay the whole bond, if his principal, Tunno, was indemnified against the annuity. His subsequent agreement expresses the same thing; and the decree has not said, nor could it intend that without any legal or equitable cause supervening, he should be released from that undertaking. If then the defendants have completely indemnified Tunno by a full discharge of the annuity, they have thus fulfilled the original engagement of their intestate, and the complainant ought to fulfill his. I am of opinion therefore that the decree of the Circuit Court should be affirmed.

THOMAS WATIES.

We concur with our Brother WATIES in the opinion given above for the reasons assigned.

HENRY WM. DESAUSSURE.
WILLIAM DOBEIN JAMES.

Poaug sold the house and lot to Tunno who paid down part of the purchase money and for the balance 1048*l.* gave his bond with Burn as surety. Some time after partial payments were made which were credited on the bond. Poaug's mother who devised the house to him, by her will dated in 1791, gave an annuity of sixty pounds per annum to Miss James, and charged her real estate with it, and Poaug gave to Tunno when he sold the house a bond to indemnify him against the encumbrance. A considerable sum being due on account of the annuity, Miss James filed a bill against Tunno who was in possession of the house, against Bremar who had set up a claim to it against the purchasers of the other parts of Poaug's real estate devised to him by his mother, and against his administrators and administratrix. The purchasers were exonerated from the charge on their purchases and the house sold to Tunno by the decree of the Court given in May, 1808,

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was *made exclusively liable for the annuity. Since the decree, Bremar has paid the annuity and receipts have been produced by which it appears that he has received from the administrators and administratrix of Poaug the sum applied by him for that purpose. Miss James, the complainant, was satisfied with the decree of the Court, because the house was sufficient to pay her her annuity and was appropriated for it, and the administrators and administratrix of Poaug were satisfied because Miss James could hereafter only look to the house for payment. Bremar too was satisfied. He knew of this encumbrance on the house before he took from Tunno his mortgage of it to secure his debt; and in his answer he says that he is willing that it should be sold. The original contract was between Tunno and Bremar on the one part and Poaug on the other, and if the administrators and administratrix of Poaug are entitled to recover, they must do it on the bond. This they cannot do because the decree of the Court making the house exclusively liable for the annuity obliges Miss James to look to it as the fund out of which it was to be paid, and prevented her from resorting afterwards to the estate of Poaug. The three destroyed the relation between the contracting parties, and also the right of acting on the bond, for the amount of the annuity at the date of the decree being credited on the bond, it was discharged and could not by any subsequent transaction between Tunno and the representatives of Poaug's estate, or any other person set up against Burn. The engagements of sureties are definite, and cannot be altered or varied without their privity and

quired of them than they are bound to do by their undertaking and this upon the soundest principles of law and equity. The purpose for which security was required was completely answered by the decree of the Court subjecting the house to the payment of the annuity. The objection that the bond was paid if the house only could be resorted to

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for the an*nuity after the decree is equally fatal to the administrators and administratrix of Poaug as assignees of Bremar; but let us take another view of the subject. The administrators and administratrix of Poaug stand in the place of Bremar; be it so. The complainant Burn, Tunno's surety, if he be liable, can only be liable on the bond. The bond was not given to Bremar nor does he hold it by assignment. The payment of the annuity by Bremar gives to him the rights on the house which belonged to Miss James; it puts him in her place; but it is said again that Tunno is his debtor. Admit that he is. His demand is distinct from and unconnected with the bond. But how does it appear that Tunno is indebted to Bremar? it is true that the Court in their decree took notice of a defeazance from Bremar to Tunno, which was produced by Tunno, but this was only for the purpose of shewing that Tunno understood when he bought the house from Poaug that it was liable for the annuity. By this defeazance the estate of Bremar in the house was to become absolute, if Tunno did not do certain things within a specified time; among others if he did not pay the annuity, taxes, &c. He did not pay them; of course Bremar acquired a greater interest in the mortgage premises than he had before. But whether he entitled himself to a credit with Tunno in this or any other way, or how accounts stand between them, it is not for us in this suit to say. They form the subject of another suit commenced in this Court by Tunno some time ago, in the year 1810, which is now depending and in which the bill has been taken pro-confesso. Tunno's rights in relation to Bremar could not be affected by the decree in the case of Miss James against them and others. The answer of one defendant not being evidence against another, the sole object of that suit being to make the house liable for the annuity. If they are entitled to recover it back from Bremar, they may do so; but I do not think that this Court should interfere in this matter, because Bremar is no party to this suit. A circuitous mode has been pursued to make

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Burn, the *surety, liable, which has involved this case in some intricacy. I am of opinion that Burn should be relieved, and therefore that the decree should be reversed.

THEODORE GAILLARD.

opinion.

Mr. Crafts for repre
Messrs. Prioleau and

At the sitting of the
March, 1816, the coun
presented the following

Petition states that
1794, James Burn as su
no, gave his bond wit
John Poaug, conditione
terest, payable in two i
which on the 1st of M
principal obligor had
Poaug, devisee of Cha
and lot in Charleston, s
and gave this bond to
remainder. That the
charged under the wil
in common with the re
with the payment of
Elizabeth James, and i
nanted between the obl
principal obligor, that
should be free from the
tice of suit of Elizabeth
obligor paid her £70
1799, having also on t
1795, paid on his bond
other sums intended b
the bond, but which we
on. In May, 1808, Eliz
a decree of the Court
the house and lot, exc
parts of Charlotte Po
payment of the annuity
contended the obligati
came annulled, and the
titled to be relieved alt
chase, or at any rate to

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his bond the whole amo
the annuity. By this de
ed that the administrato
of John Poaug were dis
mand of Elizabeth Ja
And they were afterwa
volunteer any payment
On the 13th of June, 18
and administratrix of J
judgment at law against
aforesaid. Proceedings i
ed by James Burn to enj
the equitable merits coul
decided upon; and in M
was brought up by app
that no enquiry had be
amount of the sums
paid on said annuity, al
been duly urged, and th
sel had insisted before
a certain receipt produ
Bremar for £[illegible]., was n
so much money paid;
afterwards produced in

viz. of James Ferguson for 400*l.* was subject to the like exception and inconclusive. And the decision of this honourable Court of Appeals, so far as it embraced this part of the case, was manifestly upon their receiving these two receipts as conclusive evidence. That the petitioner hath reason to believe that none or a very small part was truly paid, but merely stipulated to be paid after being collected, upon the judgment aforesaid. That the said appeal was brought up upon the further ground that the complainant under the circumstances of his case, as set forth in his bill, was entitled in equity to be discharged altogether from his bond. Wherefore petitioner prays that the said case and all the proceedings had thereon may be opened and that the same may be returned to the Circuit Court for the district of Charleston, in order that a reference may be had to the master for the purpose of ascertaining whether any and what sums were truly paid, to the said Francis Bremar and James Ferguson, on account of the said annuity; and that the case after being reported

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*upon by the master, may be reheard upon the bill and answer, and such decree therein given as may be agreeable to justice and equity.

Mr. Prioleau, for petitioner.

Mr. T. Ford, Mr. B. Smith and Mr. R. Ogden, of counsel.

Messrs. Prioleau, Ogden, and Smith and Ford, in support of the petition, contended, that there is an inherent right in the Court to review its own decrees. That there is no principle in the Constitution or in the law creating the Court, which prevents the Court of Appeals from re-examining its own decrees. That the Court of Appeals may be misled by misstatements, or surprised into error by a misapprehension of facts, or by the imperfect manner in which the case is brought up; and it would be grievous if the Court could not open the case, to remedy injustice. That it is in the discretion of the Court to grant rehearings. 3 P. Wms. 8; 13 Vesey, 483. See as to bills of review, 1 Vern. 90, 416; 3 Atk. 35; 1 Bro. P. C. 93; 7 Bro. P. C. 175, 204, 208, 303, 318; Coop. 92. That the case was imperfectly brought up to the Court of Appeals, and the whole case was not properly before the Court; which arose from an imperfect reference to the master, and of course an imperfect report, and exceptions to that report, which exceptions alone were brought to the view of the Court of Appeals. That the decree was erroneous in three particulars:

1. In admitting the letter of Mr. Robertson, as evidence to prove that the sum of fifty pounds had not been paid by him on account of Tunno, on the bond in question; such letter not being evidence; and the agreement by Mr. Parker to receive the statement of Mr. Robertson as evidence, was not binding.

2. In not allowing interest on the payments made.

3. In making the surety liable under the circumstances of the case.

That the Circuit Court was in error in deciding, that the receipts for money given by Mr. Bremar to Mr. Crafts, the agent of

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the administratrix of Poaug, *as reimbursement for money he (Bremar,) had paid on the annuity, were conclusive; and in refusing to receive evidence to explain or contradict the receipts,† and the Court of Appeals has confirmed this error. And the Court of Appeals also committed an error in affirming the decree of the Circuit Court, which decided that the surety was not released from the bond. For the decree of the Court in 1806, on Miss James' bill, to recover her annuity, had made the house and land exclusively liable; and Bremar having become the owner of the house and lot, became liable to the annuity. So that the house in his hands became the security, and the surety to the bond was released. Bremar acquiesced in this decree, and made payments on the annuity, and he thus extinguished the same, as far as the payments went. These were his payments, and not those of the representatives of Poaug, who were bound to have paid the annuity, and protected Tunno and his surety against the annuity. That Crafts' repayment to Bremar, of the sums actually paid by him on the annuity, and which had relieved the house and lot from so much of the annuity, came too late. He had no right to do it; for he had notice from Burn, the surety, not to repay Bremar. But in fact the receipts of Bremar, do not prove conclusively, that Crafts has actually paid the money. There is ground to believe he only promised to do so.

Mr. William Crafts, jun., against the petition, contended that the Court of Appeals having delivered its solemn judgment on the case, it is not open for the party dissatisfied therewith, at any subsequent period to bring the subject again under discussion. That if this were admitted, a party against whom a decree had been given, has only to wait till some of the Judges are removed by death or otherwise from the bench, and new Judges are placed on it, to apply for a bill of review, and have a new discussion and decision. This

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would be an *intolerable evil, and there would be no end of litigation. That the petitioner had not made out a case to entitle him to relief, even if the Court were at liberty to grant it. They had not shewn any error appearing in the decree itself; or that they had

† Judge James, who tried the case in the Circuit Court, said that he had no recollection that any such evidence had been offered, or rejected by him.

discovered new matter, which had arisen after the decree, or new proofs which could not be used at the time when the decree was delivered. That the statement of Mr. Robertson was properly received as to the question of the payment of fifty pounds, alleged to have been made by him for Tunno. It had been agreed to be received, and his statement was decisive against the allegation. That the master had made the calculations on the bond, and allowed the acknowledged payments correctly, according to the course of the Court. That the Circuit Court and afterwards the Court of Appeals had done right, in decreeing that the receipts given by Bremar to the agent of Poaug's estate, were sufficient evidence of his having reimbursed Bremar for the sums which he had paid on the annuity; and that such payments were a fulfilment of the agreement to protect Tunno and his surety against the annuity. Tunno bought the house at a certain price, and gave his bond for a certain sum. But as the house was bound by an annuity or rent charge, payment of part of the purchase money was suspended until the rent charge should be paid off and extinguished. This has been done, and Tunno is in no danger from that demand. Then his pretext for non-payment is destroyed.

The Court of Appeals having taken time to consider the subject, made up its judgment on the following grounds: The petition must be considered as an application either for a bill of review or for a rehearing. If it be for a bill of review, it does not make a case which comes within the rules which would regulate the conduct of the Court on that subject, even if it were conceded that the Court of Appeals, organized as it is by law, could grant bills of review. Lord Bacon, when chancellor, established the rules respecting bills of review; and Lord Hard-

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wicke says these rules have never *been departed from. See 3 Atk. 34, 5. By these rules and the established practice of the Court under them, "there are two sorts of bills of review, one founded on supposed error appearing in the decree itself; the other on new matter which must arise after the decree, or upon new proofs which could not have been used at the time when the decree passed." If the application be founded on the first ground, supposed error appearing in the decree, the Court is of opinion that there is not such error apparent, as ought to induce it to grant a bill of review. If the application be made on the ground of new matter arising after the decree, or new proofs, the petition does not allege the existence of the one or the other. But the petition professes to be for a rehearing, and prays that the case and all the proceedings had thereon may be opened, and that the same may be returned to the Circuit Court, in order that a reference may be had to the master to ascertain whether any and what sums of money were truly paid (by the representatives of J. Poaug) to F. Bremar and J. Ferguson, on account of the said annuity; and that the case after being reported upon by the master, may be reheard on the bill and answer, and such decree made thereon as may be agreeable to justice and equity; and the petition alleges as the principal ground for this application, that the Circuit Court, (and afterwards the Court of Appeals,) considered the receipts from Bremar and Ferguson to the representatives of Poaug, of certain payments on the annuity to Miss E. James, as conclusive evidence that such sums had been actually paid, whereas it is alleged that none or but a small part of the money was truly paid, but merely stipulated to be paid at a future day, after the money should be collected on the judgment against the surety; and that such payments by Bremar (the purchaser from Tunno) to the annuitant, did not fulfil the obligation of J. Poaug and his representatives, to save Tunno harmless from the annuity; for the payments were Bremar's, not Crafts'. And also

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that the *surety ought under the circumstances to be discharged altogether from his bond.

The Court has had occasion to consider these applications for rehearing, and it has formed an opinion that it is not at liberty, under its present organization, after a full and final decree, to open cases for rehearing; though it has in a few instances corrected palpable errors arising from misstatements, oversight or misapprehension, upon simple suggestions of such misapprehension. But this application is to open a case entirely, which has been maturely considered and solemnly decided, in which the Court does not perceive any error. For if the fact alleged to exist, that the representatives of Poaug did not actually pay the money to Bremar and Ferguson, was fully proved, it does not appear to the Court that it would make any difference in the case. The parties entitled to the annuity which bound the house and lot, have declared themselves satisfied, and the annuity is extinguished, and the house is no longer bound. This is precisely what J. Poaug stipulated to perform, and his representatives agreed to do. In what way it was done is immaterial. As soon as it was done the representatives of Poaug were entitled to the payment of the debt due on the bond from the principal and his surety, who were no longer in danger from the annuity. It would therefore be of no avail to the party to open the case to receive proofs, which when made, would not change the merits of the case, or the judgment of the Court. Nor has the Court been able to discern any circumstances in the case which

ought to discharge the surety from the liability which he voluntarily incurred, by joining in the bond, on which a judgment at law has been obtained. The case does not come within the reason of those cases, in which this Court under a peculiar equity, has released the surety from his liability. The petition must therefore be dismissed.

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